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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO / OAKLAND DIVISION

Meredith R. BROWN; Jorge RODRIGUEZ-CHOI; Lizz CANNON; Kelly RYAN; Jeri FLYNN; Arturo DOMINGUEZ COBOS; Isidro de Jesus RODRIGUEZ SANCHEZ; Nelida ORNELAS RENTERIA; Manuel CRUZ RENDON; Orlanda URBINA; Juan de DIOS CRUZ ROJAS; Maria de Jesus CALDERON RUIZ; Cristina Lucero RAMIREZ; Carolina CASTOR-LAURA; Efren ESCOBEDO; Delmy GONZALEZ-ORDENEZ; Artemio Alejandro PICHARDO-DELGADO; and Farook ASRALI

Plaintiffs,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION; and DEPARTMENT OF HOMELAND SECURITY,

Defendants.

Case No.: 3:15-cv-01181-JD

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM IN SUPPORT OF MOTION

Date: July 8, 2015
Time: 10:00 a.m.
Place: Courtroom 11, 19th Floor
Judge: Hon. James Donato

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

Statutes

NOTICE OF MOTION

PLEASE TAKE NOTICE that on July 8, 2015, at 10:00 a.m. in the United States Courthouse at San Francisco, California, Defendants United States Customs and Border Protection ("CBP") and United States Department of Homeland Security ("DHS"), by and through undersigned counsel, will bring for hearing a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and Civil L.R. 7 in this Freedom of Information Act ("FOIA") action. The hearing will take place before the Honorable James Donato in Courtroom 11, on the 19th floor of 450 Golden Gate Avenue, San Francisco, CA 94102. The motion is based on this notice, the memorandum of points and authorities that follows, all pleadings and papers filed in this action, and such oral argument and evidence as may be presented at the hearing on the motion.

MOTION TO DISMISS

Defendants respectfully request that the Court grant their Motion to Dismiss Plaintiffs' First Amended Complaint because, as explained in the accompanying Memorandum of Points and Authorities, the Complaint fails to allege any actionable claim under FOIA, Plaintiffs do not have standing to bring a FOIA pattern and practice claim under FOIA, and Plaintiffs have failed to state a cognizable pattern and practice claim under FOIA.

MEMORANDUM OF POINTS AND AUTHORITIES

This is not a typical Freedom of Information Act ("FOIA") case. Plaintiffs do not allege that any documents have been withheld by United States Customs and Border Protection ("CBP"). CBP has not denied Plaintiffs' FOIA requests. Nor have any exemptions been claimed with respect to those requests that Plaintiffs challenge here. Rather, Plaintiffs seek to certify a class[1]

[1] To Defendants' knowledge, no court has granted certification of any FOIA class, much less where (as here), putative named plaintiffs do not claim that any particular information was wrongfully withheld. As will be detailed in Defendants' forthcoming response to Plaintiffs' Motion for Class Certification, this case does not meet the requirements for class certification.

based on the sweeping claim that the FOIA requires federal agencies to respond to all FOIA requests within 20-30 days of receipt. *See, e.g.*, First Amended Compl. ("Compl.") ¶ 41. Building on this premise, Plaintiffs further claim that CBP has a "nationwide pattern and practice of failing to respond to FOIA requests within the statutory time period," *id.* ¶ 99, and ask this Court to "[i]ssue a nationwide injunction requiring Defendant to respond to CBP FOIA requests that have been pending for more than 20 business days, within 60 business days of the Court's order." *Id.* at 22 (Prayer for Relief). The relief Plaintiffs seek would impose an impractical obligation on CBP, which received nearly 50,000 FOIA requests in year 2014 alone, and would fail to recognize that these requests vary dramatically in breadth and substance. Plaintiffs' claims must fail as a matter of law.

First, the FOIA timeline on which Plaintiffs rely does not create an independent cause of action. As the D.C. Circuit has held, the only result of an agency's failure to meet the FOIA's timeline is that "the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Citizens for Responsibility & Ethics in Wash.("CREW") v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013). In other words, if the FOIA timelines are not met, a requestor's remedy is to file a lawsuit, and seek the court's supervision with respect to the specific requests at issue. This remedial structure is sensible and necessary, since "it would be 'a practical impossibility for agencies to process all [FOIA] requests completely within twenty days,'" and any application of the FOIA must "recognize[] and accommodate[] that reality." *Id.* (citation omitted).

Second, Plaintiffs' attempt to style their case as a "pattern and practice" claim also must fail. As a threshold matter, Plaintiffs lack standing to bring that claim. To maintain a pattern and practice claim under FOIA, a requestor must show that his access to information will be impaired in the future. The Complaint does not allege that any of Plaintiffs are likely to file FOIA requests with CBP in the future, much less that they will suffer a future impairment.

Finally, even assuming that the FOIA timeline on which Plaintiffs rely could create an independent cause of action (which it does not), and even if Plaintiffs had standing (which they do not), Plaintiffs' "pattern and practice" claim also fails the merits. Any such claim requires a showing that the defendant agency has withheld documents pursuant to a discrete, and identifiable, policy or practice. Plaintiffs' generalized attack on CBP's FOIA backlog cannot meet this standard. Accordingly, the Court should dismiss the Complaint with prejudice.[2]

LEGAL STANDARD

A facial challenge to subject matter jurisdiction pursuant to Rule 12(b)(1) and a motion brought under Rule 12(b)(6) are reviewed under the same standard. *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012). Dismissal is proper under either rule where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990). To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations in the complaint "must be enough to raise a right of relief above the speculative level." *Id.* at 555. "[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

ARGUMENT

I. This Case Must be Dismissed Because the FOIA's Timeline Does Not Provide an Independent Right of Action

This entire lawsuit is predicated on the theory that the FOIA's 20-day timeline creates an independent, judicially-enforceable cause of action. There is no such cause of action under the

[2] The U.S. Department of Homeland Security ("DHS") is included as a defendant in this case based on its role as CBP's parent organization. Compl. ¶ 31. The Complaint does not include any independent claims against DHS.

FOIA. Rather, the FOIA empowers district courts only to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155 (1980) (holding that the withholding of documents is an "indispensable prerequisite" to FOIA jurisdiction).[3] Since Plaintiffs fail to allege any actionable claims under the FOIA (*i.e.*, any withholding of documents), and assert only that CBP has taken too long to respond to their requests, this case must be dismissed.

FOIA directs that, if an agency fails to make a determination within 20 days, a requestor "shall be deemed to have exhausted his administrative remedies with respect to such request." 5 U.S.C. § 552(a)(6)(C)(i). And, "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review" with respect to that particular request. *Id.* The statute does not so much as hint at any other consequences for an agency's failure to make a determination within 20 days. The provision is clear that the 20-day timeline – and an agency's failure to meet that timeline – simply sets forth a condition that must be met before a court may exercise or retain jurisdiction over the underlying FOIA claim.

The D.C. Circuit recently reached this same conclusion. Since venue in FOIA cases is, by statute, established "in the District of Columbia," 5 U.S.C. § 552(a)(4)(B), a significant portion of FOIA cases are heard in D.C. federal courts – this means that FOIA decisions in the D.C. Circuit

[3] This rule is no different where, as here, Plaintiffs have styled their case as a "pattern and practice" claim. Since the withholding of documents is an "indispensible prerequisite" to FOIA jurisdiction, any alleged pattern and practice must (among other things) claim a systemic "withholding." *See infra* Part II.

generally are afforded considerable deference.[4] In *CREW*, the D.C. Circuit summarized the FOIA timelines and process as follows:

> An agency usually has 20 working days to make a "determination" with adequate specificity, such that any withholding can be appealed administratively. 5 U.S.C. § 552(a)(6)(A)(i). An agency can extend that 20-working-day timeline to 30 working days if unusual circumstances delay the agency's ability to search for, collect, examine, and consult about the responsive documents. *Id.* § 552(a)(6)(B). Beyond those 30 working days, an agency may still need more time to respond to a particularly burdensome request. If so, the administrative exhaustion requirement will not apply. But in such exceptional circumstances, the agency may continue to process the request, and the court (if suit has been filed) will supervise the agency's ongoing progress, ensuring that the agency continues to exercise due diligence in processing the request. *Id.* § 552(a)(6)(C).

711 F.3d at 189. The Court then further explained that "the 20-working-day period (actually 30 working days with the unusual circumstances provision) is the relevant timeline that the agency must adhere to if it wants to trigger the exhaustion requirement before suit can be filed." *Id.* (emphasis added). However, "[t]he unusual circumstances and exceptional circumstances provisions allow agencies to deal with broad, time-consuming requests (or justifiable agency backlogs) and to take longer than 20 days to do so." *Id.* (emphasis added).[5] "[I]f the agency does

[4] *See e.g.*, *Matlack, Inc. v. U.S. EPA*, 868 F. Supp. 627, 630 & n.3 (D. Del. 1994) (noting that federal courts in the District of Columbia have "long been on the leading edge" of interpreting the FOIA); *Gaylor v. United States*, No. 05-414, 2006 WL 1644681, at *1 (D.N.H. Jun. 14, 2006) (transferring suit to the District of Columbia because of its "special expertise in FOIA matters").

[5] "[E]xceptional circumstances exist when the agency is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of [FOIA], and when the agency can show that it is exercising due diligence in processing the requests." *Elec. Priv. Info. Ctr. ("EPIC") v. DOJ*, 15 F. Supp. 3d 32, 41 n.3 (D.D.C. 2014) (quoting *Open America v. Watergate Spec. Pros. Force*, 547 F.2d 605, 611 (D.C. Cir. 1997)). Citing no supporting facts, Plaintiffs conclude that "[n]o exceptional circumstances exist warranting a delay in processing CBP FOIA requests." Compl. ¶ ¶ 40 & 100. These "bare assertions" of legal conclusions, without supporting factual allegations, are insufficient to state a claim. *Iqbal*, 556 U.S. at 680. In fact, the Complaint supports a finding of exceptional circumstances here. For example, Plaintiffs concede

not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Id.* at 189 (emphasis added); *see also EPIC*, 15 F. Supp.3d at 41 ("CREW makes clear that the impact of blowing the 20-day deadline relates only to the requestor's ability to get into court.") (emphasis in original).[6] Once a lawsuit is filed, the agency "may continue to process the request," but will do so under the court's supervision. *CREW*, 711 F.3d at 189.

This interpretation reflects practical realities. The FOIA sets up "a comprehensive scheme that encourages prompt request-processing and agency accountability," while recognizing that adherence to the 20-day timetable is not always possible. *Id.* "It would be a practical impossibility for agencies to process all [FOIA] requests completely within twenty days," and the purpose of FOIA's unusual and exceptional circumstances provisions is to recognize and accommodate that reality. *Id.*; *see also EPIC*, 15 F. Supp.3d at 42 ("*CREW* also clearly recognizes that the 20-day

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that CBP received 47,261 FOIA requests in FY 2014 alone – a 50% increase from just three years earlier. *See* Compl. ¶¶ 35-36. And, CBP reduced its backlog in 2014 by nearly 10%. *See id*.

[6] Some Northern District of California decisions have recognized claims for delay in responding to FOIA requests, but these decisions were issued prior to *CREW*. *See, e.g., Hajro v. USCIS*, 832 F. Supp. 2d 1095 (N.D. Cal. 2012); *Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184 (N.D. Cal. 1998). Additionally, in *Our Children's Earth Foundation v. Nat'l Marine Servs.* ("*OCEF*"), --- F.Supp. 3d ---, 2015 WL 1458156 (N.D. Cal. 2015), "[t]he Court concur[ed] with the *CREW* court's persuasive interpretation of the statute" that an agency's forfeiture of the exhaustion of administrative remedies defense is "the only legal consequence that flows directly from [the non-adherence to FOIA's timelines]." *Id.* at *9. Nonetheless, the *OCEF* Court relied on its equitable powers to "issue a judgment declaring that the agency has, in fact, violated the statutory timeline." *Id.* The equitable relief granted in *OCEF* is inconsistent both with *CREW* and with the FOIA's clear statutory language. *See Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) ("Unless each of the[] criteria [for a FOIA claim] is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with FOIA's disclosure requirements."). In any event, *OCEF* recognized that "a declaratory judgment should [not] always issue when the agency violates [FOIA's] time limits," *id.* at *10, and did not address whether an injunction would be available or proper. Moreover, *OCEF* is distinguishable on its facts. Unlike *OCEF*, Plaintiffs here seek a broad judgment about CBP's handling of FOIA requests generally, going far beyond the specific legal relations at issue, and Plaintiffs have not alleged that the alleged violations will recur with respect to any of the same requestors in the future.

determination deadline is not always practicable, and it explains what happens when that deadline is not met: in such circumstance, the FOIA requestor is deemed to have exhausted his administrative remedies and can proceed immediately to federal court.").

By contrast, Plaintiffs' interpretation would make hash of the FOIA's remedial structure and contradict the statute's clear intent. It would leave no room for any district court proceedings under the statute's "exceptional circumstances" provision, which expressly allows the agency "additional time to complete its review of the records" after suit is filed. 5 U.S.C. §552(a)(6)(C)(i). It would ignore the diverse facts and circumstances of individual cases, and deprive future courts of an opportunity to examine CBP's practices in concrete factual situations that pertain to specific FOIA requests. And, it would place federal agencies in an impossible situation – mandating adherence to timelines that they do not have the resources to meet, while requiring the judiciary to second-guess agencies' use of limited resources to manage competing priorities. *Cf. Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1100–01 (D.C. Cir. 2003) (noting "importance of 'competing priorities' in assessing the reasonableness of an administrative delay"). Moreover, if Plaintiffs' proposed "nationwide injunction" were justified, any failure to timely respond to any "requestor" could form the basis of a contempt action – regardless of the circumstances of the request. That plainly is outside the scope of what FOIA provides in 5 U.S.C. § 552(a)(6)(C)(i). The prospect of such contempt actions would add a whole new set of potential "penalties" and incentives far different than those Congress contemplated in crafting FOIA's statutory scheme.

Finally, Plaintiffs' claims are inconsistent with the well-settled principle that equitable relief only is appropriate in the absence of an adequate remedy at law. *See Cohen v. United States*, 650 F.3d 717, 738 n.2 (D.C. Cir. 2011) ("[A] bedrock principle of the American legal system [is that] [e]quitable relief is not available when there is an adequate remedy at law."); *Richards v.*

Delta Air Lines, Inc., 453 F.3d 525, 531 n.6 (D.C. Cir. 2006) ("The general rule is that injunctive relief will not issue when an adequate remedy at law exists."). Here, an adequate remedy does exist: Ordinary FOIA litigation is fully capable of resolving Plaintiffs' disputes in individual cases involving their FOIA requests to CBP.[7] Accordingly, if CBP failed to meet the 20-day timeline with respect to Plaintiffs' FOIA requests, the appropriate remedy for Plaintiffs is targeted lawsuits in a federal district court, seeking judicial supervision over their specific requests.

This lawsuit, by contrast, has nothing to do with the substance of Plaintiffs' FOIA requests to CBP. Indeed, Plaintiffs have not even attached copies of their FOIA requests to the Complaint. Accordingly, the case should be dismissed.

II. Plaintiffs' Pattern and Practice Claim Should be Dismissed

As a threshold issue (and for the reasons stated above), since there is no cause of action for "failure to respond to FOIA requests within the statutory time period" – and Plaintiffs have not alleged any other underlying FOIA "violation" – there cannot be any illegal "pattern" or "practice" of "violating" that timeframe. This case should be dismissed in its entirety for that reason alone.

But, Plaintiffs' "pattern and practice" claim also fails on its face for several additional, and independent, reasons. "Pattern and practice" claims are a narrow exception to the principle that FOIA lawsuits must be litigated based on individual FOIA claims (and that such claims are moot once the requested documents are provided). *See Payne Enter., Inc. v. United States*, 837 F.2d 486,

[7] Indeed, FOIA has several provisions that facilitate individual lawsuits. It gives federal agencies only 30 days to respond to a complaint (rather than the 60 days otherwise permitted under the Federal Rules). *See* 5 U.S.C. §552(a)(4)(C). It applies the "catalyst" doctrine to attorneys' fee eligibility, for the benefit of plaintiffs. *See* 5 U.S.C. §552(a)(4)(E)(i). And, FOIA attorneys' fees awards no longer are paid from the Judgment Fund, and instead must be paid by the agency directly. *See* 2007 Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 § 4. Thus, the remedy for failure to comply with FOIA time periods may include both an expedited lawsuit, and a greatly enhanced possibility of fees payable from the agency's own budget.

494 (D.C. Cir. 1988); *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982).[8] A pattern and practice claim may go forward only where a requestor can show that the agency has engaged in a discrete and egregious pattern and practice of violating FOIA, and that such a practice "will impair the party's lawful access to information in the future." *Payne*, 837 F.2d at 491 (emphasis added). Plaintiffs' alleged experience with FOIA delays simply does not fall within this narrow exception.

Thus, even if Plaintiffs could identify an actionable FOIA "violation" – which they cannot – their pattern and practice claim should be dismissed for at least two independent reasons: (1) Plaintiffs lack standing because they have not alleged that their access to CBP information will be impaired in the future; and (2) Plaintiffs have, in fact, not challenged any discrete CBP policy or practice.

A. Plaintiffs Lack Standing to Bring a FOIA Pattern and Practice Claim

Individual standing is a prerequisite to any class action. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Each named plaintiff must have individual standing in order to bring claims on behalf of others. *See id.* Since none of the named plaintiffs in this case have standing to bring a FOIA pattern and practice claim, the claim should be dismissed.

To establish standing to bring a FOIA pattern and practice claim, a plaintiff must demonstrate: (1) a withholding of documents in the first instance; and (2) that "an agency policy or practice [of withholding] will impair the party's lawful access to information in the future." *Payne*, 837 F.2d at 491 (emphasis added). Requiring each plaintiff to show that he or she individually is threatened with such violations in the future reflects the general rule that standing to seek an injunction is limited by the scope of the threatened injury. *See Lewis v. Casey*, 518 U.S. 343, 357-360 (1996). As the Supreme Court stated in *Schlesinger v. Reservists Comm. to Stop the War*, the

[8] The terms "pattern and practice claims" and "policy and practice claims" are used variously in the case law, and the terms are interchangeable.

requirement of injury in fact "insures the framing of relief no broader than required by the precise facts." 418 U.S. 208, 222 (1974).

As detailed *supra* in Part I, Plaintiffs have not alleged any withholding under the FOIA. But even assuming *arguendo* that failure to respond to a FOIA request within 20 days could be deemed a "violation" or "withholding" (which it cannot), Plaintiffs fail to allege any facts that satisfy the second essential element of standing – *i.e.*, that they are likely to file FOIA requests with CBP in the future (and thus, that they are poised to suffer any future injury as a result of CBP's alleged pattern and practice). There are two categories of Plaintiffs in this case: (1) attorneys who have brought FOIA requests on behalf of their clients (the "Attorney-Plaintiffs"); and (2) non-citizen individuals who seek information related to their eligibility for lawful permanent residence (the "Non-Citizen-Plaintiffs"). *See* Compl. ¶ 1. Neither group has alleged that they will suffer any future injury as a result of any purported CBP policy or practice.

1. Non-Citizen Plaintiffs Have Not Claimed Any Need for Future Access

The Complaint does not allege that any Non-Citizen Plaintiffs will file FOIA requests with CBP in the future, much less that they are likely to do so. Compl. ¶¶ 62-85. The absence of any allegations of future harm, in and of itself, requires dismissal of the Non-Citizen Plaintiffs' claims for lack of standing.

Notably, the Complaint actually highlights the unlikelihood that Non-Citizen Plaintiffs will file additional FOIA requests with CBP in the future. The Complaint alleges that each Non-Citizen Plaintiff has filed only one FOIA request with CBP to date, for the purpose of "determining their eligibility . . . for lawful permanent residence or other immigration relief." Compl. ¶¶ 1, 62-85. Non-Citizen Plaintiffs' requests – which have not been denied – are broad enough to cover any non-exempt information that is relevant to their legal status. For example, Plaintiff Urbina "filed a request with CBP . . . seeking information regarding any interactions she may have had with CBP

officers from 1999 to present." *Id.* at ¶ 70 (emphasis added). Plaintiff Cruz Rojas sought information "about any encounters he may have had with CBP agents." *Id.* at 72 (emphasis added). Plaintiff Gonzalez-Ordonez sought "information about any entries into the United States she may have had." *Id.* at ¶ 80 (emphasis added); Plaintiff Asrali sought information about "any entries he made into the United States and copies of any CBP forms documenting those entries." *Id.* at 84 (emphasis added). The sheer breadth of these requests, which are designed to capture any information at CBP that is relevant to Non-Citizen Plaintiffs' legal status, should obviate any future need for information from CBP.

2. Attorney-Plaintiffs Lack Standing Because they Have Not Alleged a Need for Future Access

The Attorney-Plaintiffs also fail to allege if, when, and for whom, they intend to file FOIA requests with CBP in the future. At best, their alleged future injuries rest entirely on the bare allegation that they "regularly file[] FOIA requests "on behalf of and at the request of [their] clients." Compl. ¶¶ 47-61. These barebones allegations are insufficient to establish standing for several reasons.

First, Attorney-Plaintiffs fail to allege any specific plans to file FOIA requests with CBP in the future. Their generic allegations do not satisfy the requirement that a plaintiff allege "a real and immediate – as opposed to merely conjectural or hypothetical – threat of future injury." *CREW*, 587 F.Supp.2d at 59; *see also Walsh v. U.S. Dep't of Veterans Affairs*, 400 F.3d 535, 537 (7th Cir. 2005) ("The theoretical possibility that Walsh might again have to wait for requested records is not enough to keep his claim alive."); *Quick v. Dep't of Commerce, Nat'l Inst. of Standards and Tech.*, 775 F. Supp. 2d 174, 187 (D.D.C. 2011) ("[T]o the extent Quick seeks to establish his standing to pursue his 'pattern or practice' claim by his passing allegation that he 'plans to file additional FOIA requests to the NIST in the future,' the Supreme Court has foreclosed that route: '[s]uch

"some day" intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the [requisite] 'actual or imminent' injury.'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

Second, Attorney-Plaintiffs' attempt to gain standing based on the needs of future clients is barred as a matter of law. The Supreme Court has made clear that there is a controlling distinction between an attorney suing on behalf of existing clients and one suing on behalf of prospective clients.[9] In *Kowalski v. Tesmer*, 543 U.S. 125, 130-34 (2004), the Court assumed (without deciding) that attorneys had standing to represent the rights of existing clients, but held attorneys did not have standing to represent the rights of future clients. As the Court stated, "it would be a short step from the . . . grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients." *Id*. at 134.[10] Put differently, possible FOIA claims of Attorney-Plaintiffs' potential future clients are not ripe for adjudication. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 580-81 (1985)).

B. Plaintiffs Fail to Challenge a Discrete Policy or Practice of CBP

Plaintiffs' lack of standing (like their failure to allege an underlying cause of action under the FOIA, *see supra* Part I), by itself warrants dismissal of this lawsuit. But Plaintiffs' pattern and

[9] Defendants do not concede that Attorney-Plaintiffs have standing on behalf of their existing clients in this case, and hereby reserve all rights to argue that they do not.

[10] Nor have Attorney-Plaintiffs alleged that their future clients will be unable to challenge or otherwise be "hindered" in seeking relief as to any FOIA requests or CBP policy. *See Kowalski*, 543 U.S. at 131-32 (stating that, in order to have standing, attorneys must show that the third-parties would suffer a "hindrance" in protecting their own rights). If and when such documents are withheld, those clients could bring a lawsuit, and at least then the court would have the benefit of a concrete factual situation, rather than the purely hypothetical situations presented by the Attorney-Plaintiffs' potential future clients in this case.

practice claims also must be dismissed for yet another independent reason – because they fail to challenge any discrete policy or practice of CBP. An essential predicate to a pattern and practice claim is a showing that the defendant agency has acted pursuant to a discrete, and identifiable, policy or practice, which threatens to cause the plaintiff continuing injury. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). In this regard, judicial remedies in a FOIA pattern and practice case are subject to the same limits as suits under the APA. *See Del Monte Fresh Produce N.A., Inc. v. United States*, 706 F.Supp.2d 116, 120 (D.D.C. 2010). Since Plaintiffs allege only that CBP frequently fails to respond to FOIA requests within the statutory timeline – not that CBP has a specific policy or practice that led to that result, nor that CBP has failed to properly provide information once it does respond – their claims should be dismissed.

In *Norton*, the Supreme Court held that "a [failure to act] claim under [5 U.S.C.] §706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." 542 U.S. at 64 (emphasis in original). The Court explained that "[t]he limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)." *Id.*[11] While *Norton* addressed APA claims, the limits on judicial power recognized in *Norton* also apply to limit the scope of judicial remedies available for a "pattern and practice" suit under FOIA. *See, e.g.*, *Del Monte*, 706 F. Supp. 2d at 120. Specifically, after *Norton*, pattern and practice claims under *Payne* and *Long* should be confined to cases involving "repeated denial of Freedom of Information Act requests based on the

[11] In *Lujan*, the Supreme Court considered a challenge to the U.S. Bureau of Land Management's ("BLM") land withdrawal review program, which was couched as unlawful agency "action" that the plaintiffs wished to have "set aside" under the APA. *See Lujan*, 497 U.S. at 879. The Court held that the program was not an agency "action," and that respondent could not attack the agency program "wholesale" under the APA, but rather "must direct its attack against some particular 'agency action' that causes it harm." *Id.* at 891.

invocation of inapplicable statutory exemptions rather than delay of an action over which the agency had discretion." *Id.*

The Complaint here fails to identify or challenge any discrete policy or practice of CBP, relying instead on the general conclusion that CBP "has a nationwide pattern or practice of failing to respond to FOIA requests within the statutory time period." Compl. ¶ 99. While CBP does have a backlog of FOIA requests, Plaintiffs have not pointed to any discrete action that CBP has, or should have, taken to address this reality. *See* Compl. ¶¶ 32-42. Nor do Plaintiffs claim that CBP fails to fully respond to those requests once processed. Under *Norton*, being routinely late responding to FOIA requests is not a "discrete" policy and practice, since that outcome could be due to a host of causes, including simply the lack of resources to deal with the sheer number of FOIA requests pending at any given point in time.

The distinguishable facts of *Payne* and *Long* are instructive on this point. In *Payne*, the Air Force initially withheld specific documents based on "perfunctor[]y" exemptions. 837 F.2d at 487. The FOIA appeal authority (the Secretary of the Air Force) then ordered their disclosure, finding that the exemptions did not apply. But the FOIA processers in the Air Force refused to comply with Secretary's rulings, and offered no justification for their actions. 837 F.2d at 494. In light of the Secretary's "inability to deal with [the] noncompliance" and the agency's "persistent refusal to end an [unjustified] practice," the D.C. Circuit ordered declaratory relief." *Id.*

In *Long*, the parties spent "nearly a decade" in litigation over documents that the IRS conceded were not exempt from disclosure under the FOIA. 693 F.2d at 908. But even though the IRS conceded that the documents were not exempt, it deliberately and systematically refused to produce the documents until after lawsuits were filed. *Id.* at 910. Then, as soon as suit was filed, the IRS would voluntarily release the documents in order to "retain[] the right to claim that similar documents were exempt in the future." *Id.* The Court found that the IRS was "us[ing] the FOIA

offensively to hinder the release of nonexempt documents," and enjoined that practice going forward only with respect to the narrow and specific type of documents at issue. *Id.*

Plaintiffs do not allege any such discrete, egregious, or deliberate conduct by CBP in this case. Quite the opposite, the Complaint demonstrates that CBP is faced with a deluge of FOIA requests so large that responding to all requests within 20 days would be impractical. The number of FOIA requests to CBP has increased substantially in recent years, climbing each year in turn. *See* Compl. ¶ 35. CBP received 47,261 FOIA requests in FY 2014 alone – 50% more than it received in FY 2011 (just three years earlier). *See Id*. And, CBP does not have a "policy" or "practice" of deliberately failing to respond to these requests in a timely fashion. Rather, Plaintiffs concede that CBP reduced its backlog in 2014 by nearly 10%. Compl. ¶ 5.

In light of these undisputed facts, any order requiring CBP to respond to all FOIA requests within 20 days would be unworkable. The overriding principle at stake in *Norton* and *Lujan* is that courts should not take it upon themselves to oversee agency allocation of resources or pick and choose among competing agency priorities. *See Norton*, 542 U.S. at 66-67 ("If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered . . . to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out . . . day-to-day agency management."); *Lujan*, 497 U.S. at 891 ("[R]espondent cannot seek wholesale improvement of [a] program by court decree, rather than in the office of the Department or the halls of Congress, where programmatic improvements are normally made."). Plaintiffs' claims cannot be reconciled with these principles and should be dismissed.

CONCLUSION

Accordingly, for all the aforementioned reasons, the Court should grant Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint.

DATED: May 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2015, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

Executed on May 18, 2015, in Washington, D.C.

/s/ *Emily B. Nestler*
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