Ahilan Arulanantham (*pro hac vice)*
aarulanantham@aclusocal.org
Mohammad Tajsar (*pro hac vice*)
mtajsar@aclusocal.org
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-9500
Facsimile: (213) 977-5297

Counsel for Plaintiffs
(Additional counsel listed on next page)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Ana Adlerstein; Jeff Valenzuela, and Alex Mensing;

Plaintiffs,

v.

United States Customs and Border Protection; Mark Morgan; United States Immigrations and Customs Enforcement; Matthew Albence; Federal Bureau of Investigation; and Christopher Wray;

Defendants

CASE NO: 19-cv-00500-CKJ

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE CLAIM AND, IN THE ALTERNATIVE, PARTIAL MOTION FOR SUMMARY JUDGMENT

Oral argument requested

[Filed concurrently with Declaration of Mohammad Tajsar]

Christine K. Wee (SBN 028535)
ACLU Foundation of Arizona
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854
Facsimile: (602) 650-1376

R. Alexander Pilmer (*pro hac vice*)
Alexander.pilmer@kirkland.com
Kirkland & Ellis LLP
555 S. Flower Street, Suite 3700
Los Angeles, CA 90071
Telephone: (213) 680-8405
Facsimile: (213) 680-8500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Ana Adlerstein, Jeff Valenzuela, and Alex Mensing are humanitarian activists and United States citizens whose government detained, arrested, interrogated, and secretly surveilled them for no other reason than their compassion. Border officers jailed Ms. Adlerstein for four hours in a small concrete cell when she tried to observe an asylum seeker presenting an asylum claim. Mr. Valenzuela was repeatedly handcuffed and physically restrained when attempting to cross into the United States, including once being left shackled by his feet to a steel bench in a border control office for four hours. Despite engaging in no criminal activity, border officers referred Mr. Mensing for detention at the border twenty-six out of a total of twenty-eight times during a fifteen-month period. Together, they brought this action against Defendants U.S. Customs and Border Protection ("CBP"), U.S. Immigration and Customs Enforcement ("ICE"), Federal Bureau of Investigation ("FBI"), and the agencies' directors (collectively "the Government") challenging the Government's actions.

The Government now moves to dismiss all of Plaintiffs' claims, arguing that the Constitution permits it near limitless authority to arrest, interrogate, and investigate anyone for any reason it wants—even a retaliatory one. The Government also contends that Plaintiffs have no basis either to seek a court order to end this misconduct, or to seek destruction of ill-gotten records held by the Government. Contrary to the arguments laid out in the Motion, the First and Fourth Amendments are not so permissive.

First, the Fourth Amendment prevents the Government from conducting intrusive, invasive, and coercive arrests and interrogations at the border in the absence of any suspicion of wrongdoing. Second, the First Amendment prohibits the Government from unnecessarily collecting information about Plaintiffs' protected activities, and from targeting Plaintiffs for particular scrutiny on account of their associations and political expression. Third, Plaintiffs may remedy these plausibly plead constitutional violations by seeking destruction of records maintained about them by the Government, and by seeking an order preventing any future unlawful surveillance and seizures. Finally, the

Government's failure to respond to Plaintiffs' Privacy Act claims precludes their dismissal here, even though Plaintiffs have not plead actual damages as a result of the Government's failure to adhere to its Privacy Act obligations.

BACKGROUND

I. SUMMARY OF RELEVANT ALLEGATIONS

A. The Government operates a covert program to unlawfully surveil and seize Plaintiffs at the border.

Plaintiffs are United States citizens who volunteer with organizations that provide humanitarian assistance to migrants and asylum seekers in Mexico. Compl. ¶ 24. As a result of their volunteer work, the Government targeted Plaintiffs for surveillance and intrusive seizures (defined in the Complaint as detentions, often accompanied by physical restraint, and interrogations). *Id.* at ¶ 25. The Government's secret program operating under the auspices of Operation Secure Line specifically names Mr. Valenzuela and Mr. Mensing as targets for such surveillance and seizures. *Id.* at ¶¶ 30, 65–67.

B. The Government's unconstitutional treatment of Plaintiffs resulted in First and Fourth Amendment violations.

1. Ana Adlerstein[1]

Plaintiff Ana Adlerstein is a longtime human rights volunteer and activist with a background in journalism and storytelling living in Ajo, Arizona during the relevant time periods. Compl. ¶¶ 11, 33; Pltfs.' Statement of Fact ("PSOF"), ¶ 9.

On May 5, 2019, Ms. Adlerstein planned to accompany an asylum seeker to the Lukeville Port of Entry. Compl. ¶ 38; PSOF ¶ 18. Ms. Adlerstein and the asylum seeker arranged a time for the asylum seeker to arrive at the Port to lawfully present, and ensured that the individual's immigration lawyer contacted Port officials to notify them of the asylum seeker's impending arrival. Compl. ¶ 38.; PSOF ¶ 19. When the asylum seeker arrived at the Port at 3 p.m., CBP officials instructed the individual (and later Ms. Adlerstein) that they should return in two hours because border officers were busy

[1] This section concerning Ms. Adlerstein contains citations to the Complaint and, where appropriate, to Plaintiffs' Separate Statement.

processing another family for asylum. Compl. at ¶ 39; PSOF ¶¶ 22–23.

Despite coordinating with border officials on a new time, Ms. Adlerstein arrived only to be arrested for alleged "smuggling." Compl. ¶¶ 40–43; PSOF ¶¶ 24–42. When she protested her arrest and showed a letter from her counsel stating that Ms. Adlerstein had an unqualified right to return to the United States as a citizen, CBP officers responded by threatening to arrest her lawyer too. Compl. ¶¶ 44–45; PSOF ¶ 41–42.

Ms. Adlerstein spent approximately four hours in a small concrete cell, complaining intermittently about her arrest. Compl. ¶¶ 46–55; PSOF ¶ 43, 54. A CBP officer dismissed her protests and stated, "The Fourth Amendment doesn't apply here." Compl. ¶ 54; PSOF ¶ 58. Before releasing her, CBP officials informed Ms. Adlerstein that they detained her for an ICE Homeland Security Investigations interview, which never materialized. *Id.* at ¶¶ 55–56; PSOF ¶ 61.

2. Jeff Valenzuela

The Government also subjected Mr. Valenzuela to multiple lengthy and unjustified detentions at the border. On December 26, 2018, CBP officers referred Mr. Valenzuela to secondary inspection at the San Ysidro Port of Entry and made him wait for two hours in a waiting room before plain clothed ICE Homeland Security Investigations agents interrogated him. *Id.* at ¶¶ 71–72. Their questions concerned Mr. Valenzuela's personal life, his work, what associations and groups he was a part of, whom he volunteered with, and what conditions existed in Mexico among asylum seekers and migrants whom Mr. Valenzuela volunteered for. *Id.* at ¶¶ 72–76. The entire detention and interrogation lasted approximately two and a half hours. *Id.* at ¶ 79.

Two days later, on December 28, 2018, the Government once again referred Mr. Valenzuela for secondary inspection, but this time shackled and arrested him for more than four hours. Compl. ¶¶ 80–103. After being pulled from his automobile upon arrival at San Ysidro, CBP officers handcuffed him and walked him to a nearby office, shackled his ankles to a steel bench, and left him there for four hours. *Id.* at ¶¶ 81–83. Thereafter, two plainclothes officers coercively interrogated him about his personal life, how he earns

money, and his personal political beliefs. *Id.* at ¶¶ 87–89. They eventually released him after searching his telephone, five hours after he was first detained. *Id.* at ¶¶ 91–93. The Government subsequently detained Mr. Valenzuela four additional times within a period of one month upon entering the United States. Compl. ¶¶ 94–107. These detentions were again accompanied by handcuffing and ankle shackling as well as interrogations on matters unrelated to contraband and his admissibility. *Id.*

3. Alexander Mensing

Between June 10, 2018 and October 15, 2019, Mr. Mensing entered the United States twenty-eight times. *Id.* at ¶ 114. On twenty-six occasions, the Government subjected him to secondary inspection, during which time they often detained him for lengthy periods and on some occasions interrogated him about First Amendment-protected activity. *Id.* at ¶¶ 114–16. In one instance, on November 11, 2018, CBP officers at Los Angeles international airport referred him to secondary inspection, then interrogated him about his job, his work with asylum seekers, his volunteerism in Mexico, and how he associated with asylum workers. *Id.* at ¶¶ 117–21. On December 3, 2018, Mr. Mensing was again detained, this time for two- and one-half hours during which he was asked about his background, his education, and why he volunteered with refugees in Mexico. *Id.* at ¶¶ 123–26. Fearing continued detention and interrogation, Mr. Mensing stopped traveling between the United States and Mexico for eight months. Compl. ¶ 147. In September 2019, Mr. Mensing resumed traveling back to the United States, but was again detained every time he did so. *Id.* at ¶ 148.

II. PROCEDURAL HISTORY

On October 16, 2019, Plaintiffs filed this action against the Government alleging that its actions violate their Fourth Amendment rights to be free from unreasonable search and seizure at the border, their First Amendment rights to freedom of association and speech, and violate the Privacy Act by failing to disclose, amend, or expunge records kept about them pursuant to 5 U.S.C. §552a. Compl. ¶¶ 157–75.

ARGUMENT

I. THE GOVERNMENT'S INTRUSIVE SEIZURES OF PLAINTIFFS AT THE BORDER VIOLATED THE FOURTH AMENDMENT.

The Fourth Amendment prohibits Defendants' unlawful intrusive seizures without probable cause or reasonable suspicion.[2] In its defense, the Government raises arguments rejected in a federal court ruling yesterday concerning a challenge to the same program at issue in this case. *See Phillips v. U.S. Customs and Border Protection*, No. 2:19-cv-6338-SVM-JEM (C.D. Cal. Mar. 10, 2020), ECF 23 (concerning six-hour detention and subsequent interrogation of another targeted individual on the Government's secret list). For the reasons set forth below, this Court should follow suit.

A. The Fourth Amendment requires reasonable suspicion or probable cause to perform non-routine searches and seizures at the border.

"The authority to search at the border has always been justified as necessary to prevent smuggling and to prevent prohibited articles from entry, and to determine whether the individual presenting himself at the border is entitled to come in." *United States v. Tsai*, 282 F.3d 690, 699 (9th Cir. 2002) (Berzon, J., concurring) (internal citations omitted); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (citing statutes passed by the First, Second, and Fourth Congresses permitting a warrantless border search of a traveler to "identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.").

Border searches tethered to these two purposes are considered "routine" and do not require any suspicion of wrongdoing. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *see United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (Congress "granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.").

---

[2] Plaintiffs specifically challenge Ana Adlerstein's arrest on May 5, 2019; Jeff Valenzuela's arrests between December 2018 and January 2019; and all of Alex Mensing's detentions and interrogations between June 10, 2018, and October 15, 2019.

Conversely, "[a] search which happens to be at the border but is not motivated by either of these two national self protection interests may not be 'routine' in the sense that term is used in the border search cases, as it is not within the rationale for declaring such searches reasonable without a warrant or probable cause." *Tsai*, 282 F.3d at 699 (Berzon, J., concurring) (internal citations omitted).

What constitutes a non-routine border search depends on the totality of the circumstances surrounding it, "including the scope and duration of the deprivation," *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) and the search's psychologically intrusiveness, *United States v. Bravo*, 295 F.3d 1002, 1006–07 (9th Cir. 2002). To perform non-routine searches and seizures at the border, the Fourth Amendment requires at least reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 541. In some instances, like with Ms. Adlerstein's May 5, 2019 arrest and Mr. Valenzuela's December 28, 2018 arrest, a prolonged border detention constitutes an arrest requiring probable cause when "a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." *United States v. Price*, 921 F.3d 777, 790 (9th Cir. 2019) (quoting *Bravo*, 295 F.3d at 1009) (italics omitted).

B. Plaintiffs' detentions and interrogations at the border were non-routine and therefore violated the Fourth Amendment.

Three reasons explain why Plaintiffs' detentions at the border were non-routine. First, ordinary border control purposes did not motivate the Government's secret surveillance and seizure program. Second, the intrusive and coercive nature of the Government's actions far exceeded what routinely occurs at the border. Third, the detentions of Plaintiffs lasted far longer than what the Ninth Circuit allows without suspicion and, in Mr. Mensing's case, were repeated so frequently as to render them non-routine.

1. Plaintiffs plausibly allege that ordinary border control purposes did not motivate the Government's intrusive seizure program.

The Government's intrusive seizures required probable cause or reasonable suspicion because a retaliatory (or, at best, a criminal) investigatory purpose motivated them. Contrary to the Government's assertion, the programmatic purpose behind Plaintiffs' intrusive seizures determines whether the Fourth Amendment permitted them absent suspicion. "Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion" may be invalid if the scheme as a whole "pursue[s] primarily general crime control purposes." *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–46, 47 (2000); *see, e.g.*, *United States v. Johnson*, 889 F.3d 1120, 1127–28 (9th Cir. 2018) (suppressing evidence gathered from a search of an individual's car during an inventory search because the police officers who conducted the search admitted that they searched the vehicle to find evidence of a crime, rather than to safeguard the arrestee's property). Since Plaintiffs plausibly allege that the Government conducted its surveillance and detention program for a retaliatory purpose, *see, e.g.*, Compl. ¶¶ 3, 6, 25–29, 164–65, the resulting suspicionless detentions violated the Fourth Amendment.

Even if the Court ignored the retaliatory motivations alleged by Plaintiffs and credits the Government's actions as motivated by ordinary criminal investigatory purposes, the seizures still violated the Fourth Amendment. "A border search must be conducted to enforce importation laws, and not for general law enforcement purposes." *United States v. Cano*, 934 F.3d 1002, 1013 (9th Cir. 2019) (internal citations omitted); *id* at 1017 ("[I]f U.S. officials reasonably suspect that a person who has presented himself at the border may be engaged in price fixing, *see* 15 U.S.C. § 1, they may not conduct a forensic search of his phone or laptop. Evidence of price fixing—texts or emails, for example—is not itself contraband whose importation is prohibited by law."). Even if the Court credits CBP's post hoc justification for its surveillance and seizure program, based on a need to collect evidence of criminality "to detect, deter, and mitigate threats to our homeland," the program will have done precisely what the Ninth Circuit prohibits:

investigate *criminal events* by collecting *evidence* of suspected illegality, not contraband itself. Compl. ¶ 31; *Cano*, 934 F.3d at 1017 ("[B]order officials have no general authority to search for crime."); *see United States v. Aigbekaen*, 943 F.3d 713, 724 (4th Cir. 2019) ("If the border search exception is to retain any distinction from the Government's generalized interest in law enforcement and combatting crime, it cannot be invoked to sanction invasive and nonroutine warrantless searches of all suspected domestic 'criminals,' nor the suspected 'instrumentalities' of their domestic crimes.") (internal citations omitted).

Plaintiffs' allegations about the FBI Defendants' role here further reveals the unlawful purpose of the program, and demonstrates why they should not be dismissed. *See* Compl. ¶ 26 (FBI surveilling border activist groups); ¶ 28 (FBI officers also surveil and detain activists); ¶ 30 (FBI jointly manages and accesses surveillance list); ¶ 32 (FBI provides analysis and support to other agencies in this scheme).

The Government mischaracterizes the importance of the programmatic purpose inquiry in its Motion, in two ways. First, it erroneously claims that Plaintiffs' Fourth Amendment claim relies on the *detaining officers'* subjective motivations. To the contrary, while Plaintiffs allege that the officers intended to seize them for non-border related purposes, what makes their suspicionless stops improper were the non-border related purposes of the Government's *program* as a whole. *Cano*, 934 F.3d at 1017–18 ("[C]an border agents conduct a warrantless search for evidence of past or future border-related crimes? We think that the answer must be 'no.'"); *see Whren v. United States*, 517 U.S. 806, 811–12 (1996) ("[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.").

Second, the Government claims Plaintiffs' position would prohibit *all* suspicionless border inspections conducted for criminal investigatory purposes. Not so. As the Ninth Circuit recently made clear, a criminal investigatory purpose alone does not invalidate an

administrative search. *Perez Cruz v. Barr*, 926 F.3d 1128, 1143 (9th Cir. 2019) (interpreting *Tsai*, 282 F.3d at 695). Rather, the inquiry turns on whether an officer would conduct the stop in the absence of the criminal purpose. *Perez Cruz*, 926 F.3d at 1143. Taking Plaintiffs' allegations as true and drawing all inference in their favor, the Government would *not* have conducted the intrusive and repeated seizures of Plaintiffs but for their First Amendment-protected activities, and but for the Government targeting them specifically for adverse action.

2. The intrusive and coercive nature of the detentions and interrogations demanded at least reasonable suspicion.

In addition to the improper programmatic purpose for the searches, the Government's insistence that it properly detained and interrogated Plaintiffs ignores the extraordinary scope and coercive nature of their suspicionless interrogations and arrests.

a. Intrusive interrogations

With respect to the interrogations, the Government subjected both Mr. Mensing and Mr. Valenzuela to intrusive questioning that far exceeded the scope of a non-routine border stop. Absent consent, invasive questioning of an individual when the person is not free to leave ordinarily constitutes a Fourth Amendment search that requires reasonableness. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (brief border-area seizure of individual for questioning is a search that requires reasonable suspicion). The questions border officials asked Mr. Valenzuela and Mr. Mensing concerned "uniquely sensitive" information about their intimate political views, associations, and personal finances. Compl. ¶¶ 74, 118–19, 131 (questions about associational activities), ¶¶ 89, 126 (political views); ¶¶ 88, 132 (financial questions); *see Cotterman*, 709 F.3d at 966 (reasonable suspicion is required when gathering "uniquely sensitive" information at the border). Just as the Government may not search an individual's living quarters at the border without suspicion, *United States v. Alfonso*, 759 F.2d 728, 737–38 (9th Cir. 1985), and may not conduct a forensic examination of the contents of a cell phone without suspicion, *Cano*, 934 F.3d at 1016, so too can it not detain individuals to demand

information about protected expressive and associational activity absent suspicion. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982) ("The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State that is compelling, and then only if there is a substantial relation between the information sought and an overriding and compelling state interest.") (internal quotations removed).

b. Coercive detentions and arrests

The coerciveness of Plaintiffs' detentions and arrests is further evidence of their non-routine nature. In the most egregious example, border officers shackled Mr. Valenzuela by his ankle to a steel bench for four hours, a fact that by itself transforms the detention into a non-routine stop. *United States v. Juvenile (RRA–A)*, 229 F.3d 737, 743 (9th Cir. 2000) ("Given the totality of the circumstances . . . [her four-hour] handcuffing was the clearest indication that she was no longer free to leave and therefore find it to be the point of arrest."); *Price*, 921 F.3d at 790 (two and one-half hour detention in handcuffs at the border was arrest that required probable cause); *see Bravo*, 295 F.3d at 1010 (noting that "handcuffing is a substantial factor in determining whether an individual has been arrested"). His arrest therefore differs from the brief, minutes-long cuffing the Ninth Circuit permitted in *United States v. Nava*, 363 F.3d 942, 946 (9th Cir. 2004).

Border officers similarly restrained Ms. Adlerstein for four hours by jailing her in a small, concrete cell. *United States v. Doe*, 219 F.3d 1009, 1014 (9th Cir. 2000) (arrest occurred when individual placed in a locked detention cell, since "no reasonable person would have believed he was free to leave"). The Government itself concedes that it arrested Ms. Adlerstein, leaving no question as to the non-routine nature of her seizure. Mot. at 19–21; Dkt. 17, Defs.' Statement of Facts ¶ 1. The fact that border officers told her she was under arrest is further evidence that an arrest requiring probable cause occurred. *Bravo*, 295 F.3d at 1011 (officer's statements about an arrest relevant to border search analysis).

Beyond the physical restraints, border officers detained all three Plaintiffs in intimidating environments they could not leave and in which they did not feel free to refuse interrogation in. *See, e.g.*, Compl. ¶¶ 46, 83–84, 125; *United States v. Butler*, 249 F.3d 1094, 1099 (9th Cir. 2001) (coercive nature of environment a factor in determining whether an individual is in custody at border). The accusations that Plaintiffs engaged in criminality exacerbated the coerciveness of Plaintiffs' detentions. *See, e.g.*, Compl. ¶¶ 40, 42, 49 (accusing Ms. Adlerstein of being "an illegal alien smuggler"), ¶ 75 (stating interest in questioning "people like" Mr. Valenzuela), ¶ 119 (repeated aggressive questioning about Mr. Mensing's work with asylum seekers); *Butler*, 249 F.3d at 1099 (considering accusatory questioning as factor in holding that a detention at the border transformed to arrest); *see, e.g.*, *United States v. Chavira*, 614 F.3d 127, 133–34 (5th Cir. 2010) (border detention transformed to arrest in part because of accusatory questioning).

3. Border detentions lasting longer than two hours ordinarily require at least reasonable suspicion.

The retaliatory and coercive circumstances present here did not permit the Government to detain Plaintiffs for more than two hours. The "duration of detention is critically important" in both evaluating the reasonableness of a detention within the border, *United States v. Patterson*, 648 F.2d 625, 632 (9th Cir. 1981), as well as one that occurs at the border, *United States v. Espericueta Reyes*, 631 F.2d 616, 622 (9th Cir. 1980); *see id.* (constitution permits border search "so long as the searches are conducted with reasonable dispatch and the detention involved is reasonably related in duration to the search").

In cases challenging border detentions longer than three hours, courts within the Circuit required either probable cause or reasonable suspicion. *Juvenile (RRA-A)*, 229 F.3d at 743 (border detention of individual handcuffed in a locked security office for four hours constituted arrest that required probable cause); *Alvarado v. United States*, No. CV 14-2066-TUC-LAB, 2015 WL 1279262, at *5 (D. Ariz. Mar. 20, 2015) (border detention for eight hours conducted after a fruitless search for drugs states a Fourth Amendment

claim because probable cause dissipated after the search found no contraband); *see Montoya de Hernandez*, 473 U.S. at 540–41 (requiring reasonable suspicion for non-routine alimentary canal search at the border during eighteen-hour detention).

Even when addressing border detentions shorter than three hours, the Ninth Circuit has at times required either suspicion or probable cause, depending on the circumstances of the detention. *See Price*, 921 F.3d at 790 (officers initiated arrest requiring probable cause when they handcuffed individual for two hours and twenty-two minutes upon deplaning at the border). When it has not required *any* suspicion, the detention lasted no longer than two hours. *Nava*, 363 F.3d at 946 (permitting two-hour suspicionless detention until contraband found in vehicle); *Arjmand v. Dep't of Homeland Sec.*, No. 14-07960 JAK (MANx), 2018 WL 1755428, at *6 (C.D. Cal. Feb. 9, 2018) (suspicionless border stops of one to two hours in length not unreasonable). The Government detained each Plaintiff for longer than two hours, thereby requiring at least reasonable suspicion. *See* Compl. ¶¶ 51, 79, 93, 125, 137.

Particular to Mr. Mensing is the Government's repeated referrals to secondary inspection for intrusive questioning and prolonged detention. Even at the border, reasonableness guides the Fourth Amendment. *See Montoya de Hernandez*, 473 U.S. at 543 (explaining that the Court has "consistently rejected hard-and-fast time limits" in evaluating the reasonableness of border searches and has stressed that "common sense and ordinary human experience must govern over rigid criteria.") (quotations omitted). Common sense compels the conclusion that the cumulative number of times the Government detained Mr. Mensing over a sixteen-month period together constituted a non-routine set of searches that could not have been made on a suspicionless basis. *See* Compl. ¶ 114; *Tabbaa v. Chertoff*, 509 F.3d 89, 99 (2d Cir. 2007) (noting that "in some circumstances the cumulative effect of several routine search methods could render an overall search non-routine"). This is particularly true when the Government asked him the same questions repeatedly during multiple border-crossings, defeating its pretextual criminal investigatory justification. Compl. ¶¶ 116, 147. No case within the Ninth Circuit

justifies the extraordinary rate of seizures and searches that Mr. Mensing experienced.

Border-related searches in analogous contexts further undermine the Government's position. Officers can perform "extended" border searches and seizures some distance away from the physical border. *United States v. Guzman-Padilla*, 573 F.3d 865, 878–79 (9th Cir. 2009). The Fourth Amendment allows such searches when they occur within two hours from the time of a border crossing, but only if justified by reasonable suspicion. *See Espericueta-Reyes*, 631 F.2d at 620–21 (one and one half hour detention after border crossing); *Guzman-Padilla*, 573 F.3d at 875, 881–82 (reasonable suspicion required stop of vehicle and immediate arrest of individual); *United States v. Nelson*, No. CR 11-01364-TUC-JGZ, 2012 WL 827582, at *4–5 (D. Ariz. Mar. 12, 2012) (approximately one hour extended border search).

When considering Fifth and Sixth Amendment challenges to a failure to apply *Miranda* warnings at the border, no Ninth Circuit court has admitted statements made after a four hour or longer detention without *Miranda* warnings. *See Butler*, 249 F.3d at 1098–99 (distinguishing "brief detention at the border" from "custody" required to trigger *Miranda* requirement). To the contrary, even a very brief detention followed by a single question may constitute a custodial interrogation. *See United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007) (question about a package found during a frisk constituted a custodial interrogation when it occurred at a border inspection station immediately after CBP officers ordered the individual out of a car to pat him down); *United States v. Pineda*, No. 09-2542-TUC-FRZ, 2010 WL 3034514, at *4 (D. Ariz. July 19, 2010), *report and rec. adopted by* 2010 WL 3038723 (D. Ariz. Aug. 3, 2010) (one to two hour detention followed by an interrogation of individuals locked in a truck constituted custodial detention). In the lone case involving a lengthy detention, a district court found that a five- and one-half hour stop at a public airport terminal was not custodial, likely because the discovery of contraband two hours into the search demonstrated at least reasonable suspicion to extend its duration. *United States v. Salinas*, No. CR 18-00108 JMS, 2019 WL 4935596, at *1, *5 (D. Haw. Oct. 7, 2019).

The cases the Government cites to defend Plaintiffs' intrusive seizures all undermine its position that lengthy and coercive border delays are permissible absent any suspicion of wrongdoing. The Ninth Circuit's unpublished memorandum in *United States v. Padilla-Noriega*, 81 F. App'x 709, 711 (9th Cir. 2003) permitted a two-hour border detention because the searching agents possessed reasonable suspicion. Likewise, the four-hour detention in *Garcia v. United States*, No. SACV 09-1169 DOC (RNBx), 2011 WL 13224877 (C.D. Cal. Sept. 19, 2011) was also justified on the basis of reasonable suspicion. *Id.* at *8 n.5.

The Government's reliance on *Tabbaa* is equally unpersuasive here. Besides being out-of-circuit authority that does not bind this Court, *Tabbaa* relied on the ordinary nature of the questions the plaintiffs were asked. The Second Circuit described them as "the types of questions border officers typically ask prospective entrants in an effort to determine the places they have visited and the purpose and duration of their trip." 509 F.3d at 99. Here, on the other hand, the interrogations of Mr. Valenzuela and Mr. Mensing concerned intrusive questioning about associations and political views unlike any that the *Tabbaa* plaintiffs faced, and the jailing of Ms. Adlerstein was unlike the treatment of any *Tabbaa* plaintiff. And unlike *Tabbaa*, the Government interrogated them pursuant to a secret criminal investigatory program unconnected to the purposes of the border search exception. Further, *Tabbaa* left "open the possibility that in some circumstances the cumulative effect of several routine search methods could render an overall search non-routine," 509 F.3d at 99, which presents yet another basis to distinguish the case. *See Phillips*, No. 2:19-cv-6338-SVW-JEM (C.D. Cal. Mar. 10, 2020), ECF 23 at 7 (distinguishing *Tabbaa* in analogous Fourth Amendment challenge). For similar reasons, *Bibicheff v. Holder*, 55 F. Supp. 3d 254, 264 (E.D.N.Y. 2014), which relied on *Tabbaa*, lacks any precedential weight over this action, and in any event also did not concern the same constellation of facts that render Plaintiffs' searches and seizures unauthorized. *Id.* (rejecting bare argument that three referrals to secondary inspection of no more than three hours each were non-routine).

C. The Government's request for summary judgment is both inappropriate and premature.

As an alternative to moving to dismiss Ms. Adlerstein's Fourth Amendment claims, the Government seeks judgment on the claim based on selectively-introduced evidence. Awarding judgment on this sparse record prior to the commencement of discovery is both premature and legally unwarranted.

1. Rule 56(d) compels denial of the Government's premature summary judgment motion.

Since the parties have not yet exchanged any discovery, and since such discovery is necessary for an accurate accounting of Ms. Adlerstein's Fourth Amendment claim, Rule 56(d) compels denial of the Government's request. Summary judgment is premature unless the parties have "had a full opportunity to conduct discovery." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). "Where . . . a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56[(d)] motion fairly freely." *Jacobson v. United States Dep't of Homeland Sec*., 882 F.3d 878, 883 (9th Cir. 2018); *see Nyland v. Rooke, LLC*, No. 2:15-CV-01670 JWS, 2016 WL 649072, at *2 (D. Ariz. Feb. 18, 2016) (summary judgment should ordinarily be denied prior to discovery).

Here, discovery has not yet begun, and the parties have not exchanged any discovery. Declaration of Mohammad Tajsar, ¶¶ 5–10. Such discovery is necessary to supplement the declaration of Ana Adlerstein because the parties lack testimony from witnesses to Ms. Adlerstein's arrest. *Id.* at ¶¶ 7–10. Plaintiffs have not cross-examined Ms. Adlerstein's arresting officer on the claims made in his declaration. Nor do Plaintiffs possess any evidence from the Government that border officers knew in advance that Ms. Adlerstein would accompany the individual to lawfully claim asylum. *Id.* at ¶ 7; Pltfs.' Separate Statement, ¶¶ 22–24.

In addition, Plaintiffs require discovery to understand the precise role of the FBI

and ICE in her arrest. *See* Mot. at 20 n.9 (seeking judgment for Defendants FBI, Wray, ICE and Albence). The Government itself stated that Ms. Adlerstein's arrest was conducted in part to facilitate an ICE investigation into her, which suggests that further discovery must be done to understand the relationships between ICE and CBP here. *See* Defs.' Separate Statement ¶ 8. Plaintiffs also allege that Defendants FBI and Wray also secretly surveil and monitor border activists like Ms. Adlerstein, both in Arizona and as part of Operation Secure Line, further justifying discovery into the nature of their role in her arrest. *See* Compl. ¶¶ 26–30. Because "a determination of reasonable suspicion or probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge," *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993), dismissing these Defendants without Ms. Adlerstein enjoying the benefit of discovery violates Rule 59(d).

2. Genuine issues of fact exist to dispute the Government's one-sided portrayal of the factual record.

Even if the Court were to consider the Government's premature summary judgment request on the merits, the argument the Government presents lacks any legal basis and relies on an erroneous standard of review.

As a threshold matter, the Government demands that the Complaint "allege sufficient factual allegations that show the arresting officer could not have had probable cause for Ms. Adlerstein's arrest." Mot. at 20. Yet on a summary judgment motion, the Court must draw all inferences in Plaintiffs' favor. *Anderson*, 477 U.S. at 255. All Plaintiffs must do is raise a genuine dispute as to the existence of probable cause. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1030 (9th Cir. 2018).

On the merits, the Government claims that probable cause existed to arrest Ms. Adlerstein on suspicion of violating 8 U.S.C. § 1324. It relies on subsection (a)(1)(A)(ii), which criminalizes any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of

transportation or otherwise, in furtherance of such violation of law." For three reasons, no reasonably prudent border officer could have applied this provision to her presence at the port on May 5. *See Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1076 (9th Cir. 2011) ("An officer has probable cause to make a warrantless arrest when the facts and circumstances within his knowledge are sufficient for a reasonably prudent person to believe that the suspect has committed a crime.").

First, the asylum seeker did not violate any law when arriving at the Lukeville Port of Entry to present an asylum claim. The Government asks this Court to ignore one critical fact: seeking asylum at a port of entry is not a crime, so Ms. Adlerstein's presence with a migrant acting lawfully could not have served as probable cause of any criminality. Indeed, the asylum seeker followed the guidance of the Immigration and Naturalization Act, 8 U.S.C. § 1158(a)(1), which provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section . . . ."

Second, the statute criminalizes an individual who transports an alien who "has come to, entered, or remains in the United States in violation of law." Not only is seeking asylum itself lawful, "an alien seeking admission has not 'entered' the United States, even if [he] is in fact physically present." *Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015). "Most courts that have construed this term have concluded that 'entry' is not accomplished until physical presence of an alien in this country is accompanied by freedom from official restraint." *United States v. Kavazanjian*, 623 F.2d 730, 736 (1st Cir. 1980) (citing cases). The asylum seeker was never free from official restraint; to the contrary, the asylum seeker in effect surrendered to the officers' restraint. Even when an individual directs aliens to arrive at a port of entry to lie about their status, the aliens did not in fact enter the United States for purposes of § 1324. *United States v. Oscar*, 496 F.2d 492, 493–94 (9th Cir. 1974).

Third, none of the arresting officers could reasonably conclude that Ms. Adlerstein

intended to illicitly transport the asylum seeker *within* the United States. As Ms. Adlerstein alleges, and as her declaration makes clear, Lukeville border officials knew both in advance and in the moment that the asylum seeker arrived at the port to lawfully seek asylum. PSOF ¶ 19–20, 22–23; *see United States v. Zayas-Morales*, 685 F.2d 1272, 1277–78 (11th Cir.1982) (the criminal intent necessary for a § 1324(a)(1) violation was not present where defendants presented aliens to the proper officials specifically so that aliens could seek legal status). The Government's probable cause theory relies on a disputed characterization from Ms. Adlerstein's arresting officer that she was "bring[ing] an undocumented person into the United States." Mot. at 21. As an observer, she did not compel the asylum seeker to seek asylum, and did not act unlawfully in observing the presentation of an asylum claim. PSOF ¶ 21. Nor did she transport or attempt to transport the asylum seeker "within" the United States, as required by subsection (1)(A)(ii). Her arresting officers could not therefore reasonably suspect Ms. Adlerstein transported the asylum seeker unlawfully.

For these reasons, a reasonable jury is entitled to dispute the declaration the Government filed in support of their probable cause argument, and the summary judgment request must be denied as a result.

II. PLAINTIFFS PLAUSIBLY ALLEGE THE GOVERNMENT VIOLATED THEIR FIRST AMENDMENT RIGHTS.

Plaintiffs allege two theories of First Amendment liability: 1) that the Government initiated and continues its secret surveillance and detention program based on Plaintiffs' protected activities and associations; and 2) that the Government unlawfully maintains records about their First Amendment-protected activities without justification.

A. The Government surveilled and investigated Plaintiffs because of their First Amendment-protected activities.

Plaintiffs allege the Government unlawfully targeted them for their humanitarian activities, thereby stating a claim for retaliation under the First Amendment. Retaliation by the government for the exercise of a constitutional right "offends the Constitution

[because] it threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998). The law "is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Even if the government could lawfully take such actions for other reasons, it may not take action against an individual "*because of* [her] constitutionally protected speech," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), or because of her free exercise of religion, *Hamilton v. Hernandez*, 500 F. App'x 592, 595 (9th Cir. 2012).

To succeed on a First Amendment retaliation claim, a plaintiff must show that: (1) she engaged in constitutionally protected conduct; (2) Defendants took adverse action against her; and (3) her speech was a "substantial or motivating" factor in the adverse action. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008). Plaintiffs alleged each of these essential elements.

1. Plaintiffs engage in constitutionally protected speech and association.

First, Plaintiffs engage in constitutionally protected association and speech. "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Their associative conduct with migrants and advocates is "protected by the First Amendment." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). "[T]he First Amendment protects a citizen's right to associate with a political organization" irrespective of whether the organization "includes ties with groups that advocate illegal conduct or engage in illegal acts." *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1063 (9th Cir. 1995). Accordingly, the First Amendment protects Ms. Adlerstein's associations with humanitarian workers in Ajo, Arizona, her membership with the Network on Humanitarian Action, and her associations with asylum seekers themselves whom she accompanied to ports of entry. Compl. ¶¶ 11–12, 34, 36. So too does it protect

Mr. Valenzuela and Mr. Mensing's association with the organization Pueblo Sin Fronteras, of which they are members. *Id.* at ¶¶ 14, 16.

In addition, the actual humanitarian and advocacy work Mr. Valenzuela and Mr. Mensing perform is likewise constitutionally sacrosanct. Their advocacy "involves interactive communication concerning political change," and thus constitutes "core political speech" where "First Amendment protection . . . . is at its zenith." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)); *see, e.g.*, Compl. ¶ 111 (describing Mr. Valenzuela's advocacy through documentary photography), ¶ 16 (describing Mr. Mensing as a "frequent commentator on migration policy issues in North America"). Further, the humanitarian services they perform—including establishing a migrant shelter, Compl. ¶ 69, and coordinating donations of food and clothing to refugees, *id.* at ¶ 16—are themselves protected forms of political speech. *Roberts*, 468 U.S. at 622 (recognizing that "civic, charitable, lobbying, fundraising, and other activities [are] worthy of constitutional protection under the First Amendment").

2. The Government took adverse action against Plaintiffs.

Second, Plaintiffs' allegations demonstrate that the Government took adverse action against them, including undue and unwarranted surveillance, data collection, detention, arrest, and interrogation. In *Duran v. City of Douglas, Arizona*, the Ninth Circuit recognized that a single instance of detention may give rise to a First Amendment claim. 904 F.2d 1372, 1377–78 (9th Cir. 1990). The Government's targeting of Plaintiffs for surveillance and interrogation is also an adverse action. *See White v. Lee*, 227 F.3d 1214, 1228–29 (9th Cir. 2000) (months-long investigation regarding plaintiffs' advocacy in opposition to housing project, which included interrogation of plaintiffs about their protected speech, "would have chilled or silenced a person of ordinary firmness from engaging in future First Amendment activities."). Importantly, "the type of sanction imposed to discourage the exercise of First Amendment rights 'need not be particularly great in order to find that rights have been violated.'" *Hyland v. Wonder*, 972 F.2d 1129,

1135 (9th Cir. 1992) (quoting *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976)).

3. Plaintiffs' protected activities motivated the Government's adverse actions.

Finally, Plaintiffs allege that infringement of their First Amendment Rights was a "substantial or motivating factor" behind the Government's conduct. They allege that the Government targeted them "because of their lawful humanitarian activities," Compl. ¶ 25; collected information about their First Amendment-protected activities without any suspicion of wrongdoing or criminality, *id.* at ¶¶ 3, 67, 165; and did so motivated by the Government's interest in collecting information about Plaintiffs' constitutionally-protected associational activities. *Id.* at ¶¶ 29–30.[3]

For these reasons, Plaintiffs' retaliation cause of action was recognized in *Dousa v. Department of Homeland Security*, No. 19-cv-1255-LAB (KSC), 2020 WL 434314 (S.D. Cal. Jan. 28, 2020), a challenge to this same secret surveillance program brought on behalf of the lone clergy member on the secret fifty-nine-member database. The *Dousa* court denied the Government's motion to dismiss the retaliation claim, finding it was plausibly pled for reasons Plaintiffs raise above. *Id.* at *11.

B. The creation and maintenance of records revealing protected expressive and associative activity violates the First Amendment.

Independent of its retaliatory purpose, the Government violates the First Amendment when it creates and maintains records containing information about an individual's protected activity without justification and untethered to any legitimate investigatory purpose. Investigations into and surveillance of First Amendment-protected activities must have a proper law enforcement purpose. *United States v. Mayer*, 503 F.3d

[3] The Government's reliance on a Homeland Security directive not referenced at all in Plaintiffs' Complaint is inappropriate, *see* Mot. at 12 n.5, both because it falls outside the four corners of the Complaint and is not referred to therein, *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) ("As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion."), and because the existence of an omnibus policy directive does not undermine the plausible inferences drawn in Plaintiffs' favor from the allegations of a surveillance program that specifically targets them and their humanitarianism.

740, 752–53 (9th Cir. 2007); *United States v. Aguilar*, 883 F.2d 662, 705 (9th Cir. 1989). It is an illegitimate purpose for the government to investigate an individual solely based on activities protected by the First Amendment. *Id.*; *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1219–20 (9th Cir. 2019) (explaining First Amendment's good faith limitation on otherwise lawful investigations).

Plaintiffs plausibly allege that the Government created and maintains records revealing information about their protected activity as a result of this illegitimate purpose. Compl. ¶ 6. Mr. Mensing and Mr. Valenzuela are listed in an Operation Secure List as targets for surveillance and intelligence gathering, which resulted in dossiers being formed containing private and First Amendment-protected information about them. *Id.* at ¶¶ 65–67. For Ana Adlerstein, the Government's intelligence-gathering on border rights activists in Arizona likely included her, given that she volunteered with numerous human rights organizations in the state. *Id.* at ¶¶ 11, 26–28. The Government also created records concerning each Plaintiff (and their protected activities) following their detentions, arrests, and interrogations. *See, e.g.*, *id.* at ¶¶ 84 (describing notes taken during interrogations of Mr. Valenzuela, *id.* at ¶¶ 125 (describing notes taken during interrogation of Mr. Mensing); Dkt. 17-1 (arrest record describing Ms. Adlerstein's statement that she is a legal observer and noting her association with an asylum seeker).

The Government raises a red herring in defense, arguing that Plaintiffs' theory would have the effect of impeding the Government's ability to initiate investigations and maintain records in the absence of suspicion. Mot. at 10–11. But the Constitution's rules on expungement do not represent the death knell to law enforcement investigations the Government suggests they do. First, while the Government may initiate a law enforcement investigation without suspicion, it cannot initiate one for *improper* reasons—retaliation being chief among them. *Hartman*, 547 U.S. at 256 ("Some official actions . . . might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution."). Second, a

suspicionless investigation may proceed so long it does not result in the undue collection of First Amendment-protected information in perpetuity. *Cf. Garris v. Federal Bureau of Investigation*, 937 F.3d 1284, 1294–98 (9th Cir. 2019) (holding that records of First Amendment-protected information must be expunged after agency concludes that they do not relate to criminal activity). Third, and as explained above, the Fourth Amendment requires that the Government not deprive an individual of their liberty without suspicion of wrongdoing, including at the border, when such a deprivation is non-routine. *See* Part I, B, *supra*. This case seeks only to enforce these important limitations on the Government's authority to investigate crime, not to eliminate this authority entirely.

C. Plaintiffs correctly place the First Amendment as the site of the Constitutional rights the Government violated.

The Government mistakenly demands that Plaintiffs' speech and association claims be routed only through the Fourth Amendment. *See* Mot. at 9–10. The Ninth Circuit rejected this theory in *Fazaga* when it made clear that the "government's investigation[s] must not be conducted for the purpose of abridging first amendment freedoms." 916 F.3d at 1219 (quoting *Aguilar*, 883 F.2d at 705). The First Amendment, not the Fourth, constrains the Government from investigating individuals for retaliatory purposes. *See, e.g.*, *Fazaga*, 916 F.3d at 1219–20 ("good faith requirement" for use of undercover informants derives from the First, not Fourth, Amendment).

Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) does not compel any other conclusion. The *Zurcher* Court merely required that the Fourth Amendment's warrant requirement be applied with "particular exactitude" where the First Amendment interests of third parties to a criminal investigation may be threatened. *Id.* at 565. Just like in *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008) and *Mayer*, 503 F.3d at 750, *Zurcher* did not address a stand-alone First Amendment retaliation claim. Nor is *United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at *11–12 (D. Or. June 24, 2014) relevant, since the defendant there did not allege an improper and retaliatory purpose motivated the criminal investigation of him.

To the contrary, the Ninth Circuit has long recognized a First Amendment limitation on improperly motivated law enforcement activities, most recently in *Fazaga*. *See also United States v. Wilson*, 639 F.2d 500, 503–04 (9th Cir. 1981) (First Amendment protects against criminal indictments based on exercise of constitutional rights); *United States v. Gering*, 716 F.2d 615, 620 (9th Cir. 1983) (mail cover investigation violates the First Amendment if it is "improperly used and burdened [defendant's] free exercise or associational rights"). Any contrary ruling would effectively bar all retaliation claims arising out of law enforcement activity, a result no court has ever allowed.

The Government's additional citations to *United States v. Black*, 733 F.3d 294, 304 (9th Cir. 2013) and the unpublished opinion at *United States v. Ibarra*, 978 F.2d 1266 (9th Cir. Nov. 10, 1992) are similarly unavailing, as they interpret the established—and, for our purposes here, irrelevant—principle that use of an undercover informant does not constitute a Fourth Amendment search.

III. PLAINTIFFS HAVE STANDING TO SEEK EXPUNGEMENT AND AN ORDER ENDING THE GOVERNMENT'S UNCONSTITUTIONAL ACTIVITIES.

Plaintiffs seek two forms of prospective injunctive relief, expungement of records and an order ending the Government's unconstitutional surveillance and seizures. They enjoy Article III standing to seek both remedies.

A. Plaintiffs have standing to seek expungement of records currently maintained by the Government.

Article III affords standing for Plaintiffs to seek expungement of records the Government maintains as a result of actions that violated their First and Fourth Amendment rights. "[A] determination that records were obtained and retained in violation of the Constitution supports a claim for expungement relief of existing records so obtained." *Fazaga*, 916 F.3d at 1240; *see id.* at 1239 ("We have repeatedly and consistently recognized that federal courts can order expungement of records, criminal and otherwise, to vindicate constitutional rights."). The ongoing retention of such records

"constitute[s] a continuing 'irreparable injury' for purposes of equitable relief." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998); *see, e.g.*, Compl. ¶¶ 26–27 (citing example of records concerning First Amendment-protected activity maintained by Defendants), ¶ 29 (noting that Defendants collect and route information gathered about Plaintiffs to Washington D.C.), ¶¶ 65–67 (alleging ongoing maintenance of records).

Unconstitutional acts which result in the creation of ill-gotten records constitute "extraordinary harms" that make expungement an available remedy. The very case the Government cites in denying this proposition, *United States v. Smith*, 940 F.2d 395 (9th Cir. 1991), explains that expungement is available when the challenged conduct is "unlawful or invalid," or when the "government engaged in any sort of misconduct" that created the ill-gotten records. *Id.* at 396. That is precisely what Plaintiffs allege: the Government's unconstitutional detentions and arrests necessitate expungement. Plaintiffs therefore do not challenge the "natural and intended consequences" of being arrested—they challenge the very legality of their arrests. Should they succeed, the Constitution compels the destruction of records of those illegal arrests.

B. The existence of a policy and program targeting Plaintiffs confers standing to enjoin the Government's unconstitutional acts.

Plaintiffs also have standing to seek prospective injunctive relief to end the written policy and practice that targets them for unlawful surveillance and intrusive seizures. To establish Article III standing, they must show: (1) they suffered concrete, particularized injuries (2) that are fairly traceable to the Government's actions and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because Plaintiffs plausibly allege that the Government "had, at the time of the injury, a written policy, and [Plaintiffs'] injury stems from that policy" or "the harm is part of a pattern of officially sanctioned behavior, violative of the plaintiffs' federal rights," they enjoy standing to seek injunctive relief. *Melendres v. Arpaio*, 695 F.3d 990, 997–98 (9th Cir. 2012) (internal citations omitted); *LaDuke v. Nelson*, 762 F.2d 1318,

1324 (9th Cir. 1985) (distinguishing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) where "defendants engaged in a standard pattern of officially sanctioned officer behavior"); *see* Compl. ¶¶ 26–32 (explaining how Plaintiffs' injuries arise from a coordinated secret surveillance program), ¶¶ 65–67 (explaining how Government's wide-ranging surveillance program operated and targeted Mr. Mensing and Mr. Valenzuela).

The Government's reliance on both *Lyons* and *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) fails to account for the ongoing Government surveillance and seizure program. *Lyons* is inapplicable where the government caused the challenged injuries pursuant to a written policy or a pattern and practice of conduct. *Melendres v. Arpaio*, 695 F.3d at 997–98; *LaDuke*, 762 F.2d at 1324.

Clapper similarly does not shield the Government from the prospect of an injunction. *Clapper* concerned a pre-enforcement challenge brought on behalf of certain plaintiffs who could not demonstrate either that they would be harmed in the future or that they had ever been harmed in the past. 568 U.S. at 411; *see Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017) (distinguishing *Clapper* because "both the challenged conduct and the attendant injury have already occurred"). Here, on the other hand, Plaintiffs plausibly allege both *past* injury (whether in the form of detentions or in the retaliatory creation of investigatory files) as well as the prospect of future injury (given the existence of a Government program which targets all three of them, including specifically naming two). *See Melendres*, 695 F.3d at 998 (defendants' express policy of stopping people based on suspected unlawful presence established a likelihood that plaintiffs—who had been stopped only once in the past—would be stopped again in the future); *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 987 (D. Ariz. 2011) (one prior stop suffices to establish standing where, like here, the stop stems from a written policy or pattern and practice of behavior); *see also Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) ("past" actions alone are "strong evidence" of a "credible threat of adverse state action," even in pre-enforcement cases challenging prospective government action).

Plaintiffs' fear of future injury therefore takes on significant Article III dimensions in light of the past injuries they have suffered. These injuries include the Government's collection of information about their protected activities, Compl. ¶¶ 26–30, 65–67, and their detention and arrest by the Government, *id.* at ¶¶ 41–55, 71–107, 114–53. Plaintiffs consequently suffer and continue to suffer irreparable injuries that confer standing. *Id.* at ¶¶ 58–61 (describing Ms. Adlerstein halting her accompaniment of asylum seekers and scuttling plans to become a program director for a cross-border immigration clinic), ¶ 108 (describing Mr. Valenzuela dramatically reducing his humanitarian work as a result of the Government's conduct), ¶¶ 147, 155 (describing Mr. Mensing's curtailing of travel, and his ongoing fear of future detention and interrogation)[4]; *cf. Cherri v. Mueller*, 951 F. Supp. 2d 918, 931 (E.D. Mich. 2013) (forgoing travel to avoid secondary inspection and questioning about one's religious beliefs is a cognizable injury for standing).

The innocence of Plaintiffs' conduct that resulted in their injuries further supports their claim to standing. *Lyons* does not govern when the "plaintiffs engaged in entirely innocent conduct" and "there is no string of contingencies necessary to produce an injury." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041–42 (9th Cir. 1999); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) ("Where a plaintiff has engaged in entirely innocent conduct, resulting in an alleged injury, allegations of a likelihood of future contact with the defendant are sufficient to satisfy the pleading requirements for standing."). Plaintiffs' blameless conduct—being members of humanitarian aid organizations, and speaking out publicly about their views on North American migration—falls precisely under this exception to *Lyons*.[5]

The Government argues that both Mr. Mensing and Mr. Valenzuela are unlikely to face future Fourth Amendment injury because Congress authorizes border officials to

[4] To the extent the Court finds standing for any one Plaintiff, it "need not consider the standing of the other plaintiffs" who raise the same legal issues. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004).

[5] The Government disputes this as applied to Ms. Adlerstein, relying on its argument that her actions gave border officers probable cause to belief she was unlawfully smuggling her asylum-seeking companion. Plaintiffs addressed this argument in Part I, C, *supra*.

conduct stops and seizures at the border. Mot. at 8 (citing 19 U.S.C. § 1582). But Plaintiffs do not challenge the Government's authority to conduct suspicionless searches at the border generally. They challenge the Government's suspicionless *non-routine* searches of Plaintiffs themselves, two of whom the Government has named individually as targets. That the Government lawfully identifies millions of other travelers for *routine* stops and searches is irrelevant to whether it intends to target Plaintiffs for *non-routine* seizures. *See also* Compl. ¶ 95 (border officers informed Mr. Valenzuela that he should expect referrals to secondary inspection and further detentions should he continue crossing the border).

A ruling finding Article III standing would be consistent with decisions made in *Dousa* and *Phillips*, the only other cases to have addressed the particular Government programs Plaintiffs challenge here. *Dousa*, 2020 WL 434314, at *5–6 (finding plaintiff demonstrated standing to seek injunctive relief on First Amendment claim); *Phillips*, No. 2:19-cv-6338-SVW-JEM (C.D. Cal. Mar. 10, 2020), ECF 23 at 7–8 (rejecting Government's standing objection to Fourth Amendment claim).

IV. THE PRIVACY ACT ENTITLES PLAINTIFFS TO RECORDS AND EXPUNGEMENT.

Plaintiffs bring Privacy Act claims against the Defendant Agencies for failure to provide access to requested records (5 U.S.C. § 552a(d)(1)), failure to maintain relevant and necessary records (§ 552a(e)(1)), failure to maintain accurate records (§ 552a(e)(5), improper maintenance of records of First Amendment activity (§ 552a(e)(7)), and failure to promptly amend records upon request (§ 552a(d)(2)). The Government moves to dismiss the access claim only against Defendant CBP, and to dismiss the remaining claims against the Defendant agencies on the grounds that Plaintiffs failed to allege actual damages.[6] Both arguments lack merit.

[6] The Government correctly asks the Court to dismiss Plaintiffs' Privacy Act claims against the individual defendants. Mot. at 23 n.12. Plaintiffs do not oppose this request.

A. CBP's failure to timely respond to Plaintiffs' Privacy Act requests renders the access claim ripe.

Plaintiffs may bring a Privacy Act access claim against Defendant CBP because the agency failed to timely respond to their Privacy Act requests.[7] The Government argues dismissal is warranted because CBP has not yet denied their Requests. Mot. at 24. Yet no such denial is required when the agency failed even to respond to the Requests. *See* 5 U.S.C. § 552a(g)(1)(B) (authorizing civil action against an agency that "refuses to comply with an individual request under subsection (d)(1) of this section); *see Hodges v. U.S. Atty. Gen.*, No. CIV.A. 07-3076-SAC, 2008 WL 440281, at *1 n.1 (D. Kan. Feb. 13, 2008) ("If an agency fails to comply with the time limits for either the initial response for disclosure or an administrative appeal therefrom, the requester may treat this fact as a constructive denial of the request or appeal and is free to file a complaint in the appropriate United States District Court."); *Thomas v. Dep't of Health & Human Servs., Food & Drug Admin.*, 587 F. Supp. 2d 114, 117–18 (D.D.C. 2008) (failure to respond to Freedom of Information Act request constitutes constructive denial sufficient to authorize enforcement action). The Government's argument has the effect of frustrating the purpose of the civil remedy contained in the Privacy Act. On their theory, an agency that simply refuses to respond to a request for records without ever formally "denying" it reaps the benefit of never being subjected to the civil action that the Privacy Act expressly allows under § 552a(g)(1)(B). Since this argument is both atextual and leads to an absurd bar to judicial review, this Court should reject it here.

B. Plaintiffs' failure to allege actual damages does not compel dismissal of their request for amendment and expungement under the Privacy Act.

The Government demands this Court dismiss Plaintiffs' remaining Privacy Act accuracy, relevancy, expungement, and amendment claims on the mistaken view that Plaintiffs must allege actual damages to pursue them. This is incorrect. Although Plaintiffs sought damages under these various Privacy Act theories of liability, *see* Compl. ¶ 175,

[7] The Government does not move to dismiss Plaintiffs' access claims against Defendants ICE and the FBI.

Plaintiffs also sought injunctive relief in the form of amendment and expungement, *see* Compl. ¶¶ 174–75. The requirement of pleading actual damages only applies when seeking damages under the Privacy Act, not amendment or expungement.

Subsection (g)(1)(D) of the Privacy Act provides the cause of action vehicle to bring Plaintiffs' non-access Privacy Act claims, while § 552a(g)(4) sets a minimum statutory penalty for any such violation when the government acts intentionally or willfully. *Doe v. Chao*, 540 U.S. 614, 620 (2004). *Doe* interpreted § 552a(g)(4), the provision which sets out remedies for claims brought under § 552a(g)(1)(D). It held that when claiming the $1,000 statutory penalty, a plaintiff must allege actual damages. *Id.* The Court did *not*, however, require that *all* claims under the Privacy Act allege actual damages, as the Government appears to argue here. To the contrary, injunctive claims seeking expungement or amendment under the Privacy Act do not require any showing of actual damages. *See, e.g.*, *Garris*, 937 F.3d at 1300–01 (awarding expungement for violation of § 552a(e)(7)). It is only where damages are sought for intentional or willful actions that actual damages must be plead.

Plaintiffs therefore oppose the Government's attempts to dismiss the injunctive component of their Privacy Act claims. Plaintiffs do not oppose dismissal of their Privacy Act prayer for damages, provided it is without prejudice to replead actual damages.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court deny the Government's Motion to Dismiss, and its alternative Motion for Summary Judgment on Ana Adlerstein's Fourth Amendment claim.

DATED: March 11, 2020

Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

ACLU FOUNDATION OF ARIZONA

KIRKLAND & ELLIS LLP

By: s/ *Mohammad Tajsar*
Mohammad Tajsar
Counsel for Plaintiffs