THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSE SANCHEZ, ISMAEL RAMOS CONTRERAS, and ERNEST GRIMES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OFFICE OF BORDER PATROL, UNITED STATES CUSTOMS & BORDER PROTECTION, DEPARTMENT OF HOMELAND SECURITY; JOHN C. BATES, Chief Patrol Agent, Blaine Sector of the United States Border Patrol, in his official capacity; JANET NAPOLITANO, Secretary, Department of Homeland Security, in her official capacity; DAVID AGUILAR, Acting Commissioner, United States Customs & Border Protection, in his official capacity; MICHAEL J. FISHER, Chief of the United States Border Patrol, in his official capacity; and JAY CUMBOW, Agent in Charge for the Port Angeles Office of the Olympic Peninsula of the United States Border Patrol, in his official capacity,

Defendants.

No. 3:12-cv-05378 RJB

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION

NOTED ON MOTION CALENDAR: August 10, 2012

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Border Patrol's unlawful practice of stopping vehicles without reasonable suspicion of violation of laws that it is authorized to enforce has resulted in at least one plaintiff having been stopped on multiple occasions. This fact alone is sufficient to overcome defendants' argument that this action should be dismissed for lack of standing.

Defendants do not cite a single case where a court granted dismissal for lack of standing where a plaintiff was stopped more than once. Defendants instead unpersuasively strain to analogize this case with *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc), and with *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723 (N.D. Ohio 2000), both of which involved plaintiffs who had been stopped once. And they ignore completely *Nicacio v. INS*, 797 F.2d 700, 702 (9th Cir. 1985), in which the Ninth Circuit held that the "possibility of recurring injury ceases to be speculative when actual *repeated* incidents are documented" (emphasis added).[1] This failure to address *Nicacio* is particularly remarkable given that the judgment entered in that case is directed at unlawful vehicle stops in the State of Washington, including those made by Border Patrol agents, and is discussed at considerable length in the Complaint. Complaint ¶¶ 35-42, Dkt. No. 1.

Defendants also ignore the additional facts alleged in the Complaint that go to the issue of whether Border Patrol's vehicle stops of the plaintiffs are "one-off" incidents, as defendants argue, or evidence of Border Patrol's pattern and practice of regularly stopping vehicles without reasonable suspicion. *See* Motion at 13, Dkt. No. 15. Plaintiffs have alleged that Border Patrol agents base their decisions to stop certain vehicles solely on hunch or intuition—affected by the

[1] In *Hodgers-Durgin*, the Ninth Circuit overruled *Nicacio* on the issue of whether evidence about non-named plaintiff class members could be considered in determining standing. 199 F.3d at 1045. Plaintiffs, however, do not rely on vehicle stops of such class members at this stage of the proceeding, and *Nicacio*'s main point—that a plaintiff has standing to pursue injunctive relief when he/she has been stopped more than once—remains good law. Plaintiffs reserve the right to rely on what happened to class members as this litigation proceeds. *See Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001) ("When a named plaintiff asserts injuries that have been inflicted upon a class of plaintiffs, we may consider those injuries in the context of the harm asserted by the class as a whole, to determine whether a credible threat that the named plaintiff's injury will recur has been established.")

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ethnic or racial appearance of the vehicle's occupants. Complaint ¶¶ 57 - 64.[2] And while Border Patrol's interactions with a plaintiff that did not amount to a seizure may not violate the Fourth Amendment, it does not follow that those incidents are not relevant to determining whether those individuals are likely to be the subject of future vehicle stops by Border Patrol. As the number of Border Patrol agents on the Olympic Peninsula expands (from four in 2006 to over forty in 2012), plaintiffs have a greater likelihood of crossing paths with Border Patrol agents now than they did when the prior stops occurred. Past events indicate that it is likely that a Border Patrol agent will in the future have a hunch or "gut feeling" about the immigration status of one or more of the plaintiffs that will result in yet another unlawful vehicle stop. These circumstances do not just allow for entry of injunctive relief, they compel that result.

Finally, defendants' argument about 8 U.S.C. § 1357 not creating a private right of action misses the mark. Plaintiffs do not rely on § 1357 creating a private right of action. Rather, they maintain that the Court has jurisdiction pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 702, to review agency action in violation of § 1357 as interpreted by defendants themselves in the operative regulations. Complaint ¶¶ 19, 87.

II. STATEMENT OF FACTS

At issue in this case, is Border Patrol's current practice of stopping vehicles or participating in vehicle stops on the Olympic Peninsula without reasonable suspicion in order to seize and interrogate the occupants of the vehicles. Complaint ¶ 2. Border Patrol agents have violated plaintiffs' Fourth Amendment rights by stopping vehicles on the Peninsula based on hunch or intuition, including conducting stops solely because plaintiffs appeared to be persons of color. *Id.* ¶¶ 52, 57. As a result, the three named Plaintiffs commenced this action to vindicate their rights,

[2] Although all the allegations in the Complaint must be taken as true in this facial challenge to jurisdiction, as defendants acknowledge, Motion at 2, it is noteworthy that this allegation is supported by the additional allegation that a Border Patrol representative has acknowledged that Border Patrol agents are making stops based on a "gut feeling" about a person's immigration status. Complaint ¶ 71.

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and the rights of class members who have been—and/or who have present fear that in the future they will be—unreasonably seized and/or interrogated by Border Patrol and its agents. *Id.* ¶ 1.

All of the stops that give rise to this action occurred after late 2008, when Border Patrol stepped up its roving patrol activities (after its checkpoint procedures were roundly criticized). *See id.* ¶¶ 43-50. During the last four years since Border Patrol increased its reliance on roving patrols on the Olympic Peninsula, the three plaintiffs have had six encounters with Border Patrol agents. *Id.* ¶¶ 20-32. All of these incidents happened since the staffing on the Olympic Peninsula dramatically increased from four agents earlier to over forty now. *Id.* ¶ 65.[3] And all of these encounters are consistent with the statement of Port Angeles Station Supervisor Jose Romero that Border Patrol agents base their decisions about who to question about their immigration status on "gut feelings" about the people that they come across. *Id.* ¶¶ 70-71. Indeed, plaintiffs believe that each of these stops was made solely on a Border Patrol agent's hunch based solely on the ethnic appearance of the person stopped. *Id.* ¶¶ 21, 23, 25, 28, 30, 32, 57.

The first plaintiff is Jose Sanchez. Mr. Sanchez resides in Forks, Washington where he works as a correctional officer for the Olympic Corrections Center. *Id.* ¶ 6. He is a United States citizen, having been born in the United States, and is of Latino/Hispanic descent. *Id.*

Mr. Sanchez has been stopped and interrogated three times since the winter of 2008-2009. *Id.* ¶ 20-26. First, Border Patrol agents followed Mr. Sanchez's vehicle until he arrived at his home. *Id.* ¶ 20. When he arrived at his home, the agents approached him, but backed away when he started recording the stop on his cell phone. *Id.* The agents never provided a reason that justified following Mr. Sanchez until he reached his residence and then approaching him there. *Id.* [4]

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[3] A Border Patrol agent stationed on the Olympic Peninsula recently provided testimony to Congress about the "bad combination" created by the large increase in the number of agents on the Olympic Peninsula, the fact that the area was "remote" and had "no border activity," and the resulting boredom of the "high-energy men" assigned there. *Id.* ¶¶ 67-68.

[4] Defendants assert that this stop does not constitute a seizure under the Fourth Amendment. Motion at 12 (focusing on fact that there is no allegation "that the officers pulled his car over, made a show of authority, restricted his freedom in any way, or even spoke to him"). However, defendants provide no citation for the proposition that a vehicle stop, and thus a seizure, has not occurred when law enforcement officers follow a vehicle until the driver gets to his residence and only do not proceed with interrogation when deterred by the person demonstrating that he intends to

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Mr. Sanchez was again stopped and interrogated during the summer of 2009 when the vehicle in which he and a family member were traveling was stopped by Border Patrol agents. *Id.* ¶ 22. During this stop, two Border Patrol agents interrogated Mr. Sanchez about his immigration status. *Id.* Although the agents claimed they stopped him because the vehicle windows were too dark, they did not ask for proof of insurance or vehicle registration, and when Mr. Sanchez provided those documents, the agents refused to inspect them. *Id.* Instead, the agents only wanted to see Mr. Sanchez's identification and to interrogate him regarding how long he had been in the United States. *Id.*

The third stop of Mr. Sanchez occurred during the fall of 2011. *Id.* ¶ 24. Again, while traveling in Forks, Border Patrol agents stopped the vehicle that Mr. Sanchez was in. *Id.* And again, two Border Patrol agents interrogated Mr. Sanchez regarding his immigration status. *Id.* The Border Patrol agents told him that they had stopped the vehicle because its windows were too dark, even though the driver's side window was not tinted. *Id.* Once more, the agents only wanted to see Mr. Sanchez's identification and they interrogated him regarding how long he had been in the United States. *Id.*

Ismael Ramos Contreras, the second plaintiff, is an eighteen-year-old resident of Forks, Washington, who recently graduated from Forks High School. *Id.* ¶ 7. He is a United States citizen, having been born in the United States. *Id.*

Like Mr. Sanchez, Mr. Ramos Contreras is of Latino/Hispanic descent. *Id.* And like Mr. Sanchez, Border Patrol has more than once interrogated Mr. Ramos Contreras about his immigration status. While the first incident was not a vehicle stop, it demonstrates that Border Patrol, for no reason, singled out Mr. Ramos Contreras for questioning as he was going about his daily life activities. A Border Patrol agent approached Mr. Ramos Contreras as he was walking out

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document the stop with his cell phone. There is some authority supporting that the events could constitute a Fourth Amendment seizure. *See, e.g.*, *State v. Hale*, No. 98AP-490, 1998 WL 894716, at *3 (Ohio Ct. App. Dec. 24, 1998) (defendant seized when officers followed him home, turned on their lights, and approached him as he exited the vehicle). More importantly, defendants' argument misses the point: even if not "seized," Mr. Sanchez was followed and approached by Border Patrol at his home simply because of his appearance as a Hispanic-American. Complaint ¶ 21.

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of the Clallam County District Courthouse in Forks. *Id.* ¶ 29. The agent questioned Mr. Ramos Contreras regarding his immigration status, asking him where he lived and where he was born. *Id.*

On July 22, 2011, Border Patrol agents stopped a vehicle in which Mr. Ramos Contreras and four others were in while traveling in Port Angeles, Washington. *Id.* ¶ 27. Once stopped, one agent tried unsuccessfully to grab the keys from the vehicle. *Id.* The driver then handed the keys to that agent, who retained the keys for the rest of the stop. *Id.* Border Patrol agents then interrogated Mr. Ramos Contreras regarding his immigration status. *Id.* The agents never provided him with a reason for the stop. *Id.* Instead, they insisted that Mr. Ramos Contreras and the other occupants hand over their identifying documents. *Id.*

The third plaintiff is Ernest Grimes. *Id.* ¶¶ 8, 31. Mr. Grimes is a resident of Neah Bay, Washington on the Olympic Peninsula and is a correctional officer at Clallam Bay Corrections Center and a part-time police officer for the Neah Bay Police Department. *Id.* ¶ 8. Mr. Grimes is an African-American United States citizen. *Id.*

His vehicle stop occurred on October 15, 2011. *Id.* ¶ 31. As Mr. Grimes was traveling near Clallam Bay, Border Patrol agents stopped his vehicle. *Id.* After the vehicle was stopped, the agent approached the passenger window of Mr. Grimes' car and interrogated Mr. Grimes about his immigration status, even though Mr. Grimes was wearing his correctional-officer uniform. *Id.* The Border Patrol agent did not provide Mr. Grimes with any reason for stopping Mr. Grimes' vehicle. *Id.*[5]

III. LEGAL STANDARD

Defendants correctly indicate, Motion at 2, that in reviewing a *facial* jurisdictional motion under Fed. R. Civ. P. 12(b)(1), the Court must accept plaintiffs' allegations as true and give plaintiffs the benefit of all reasonable inferences. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). By contrast, in a *factual* jurisdictional challenge, the defendants can contest the truth of the factual allegations in the Complaint, *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.

[5] The Border Patrol agent held his hands on his holstered weapon and seemed scared and volatile. *Id.*

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2000), but first plaintiffs must be given an opportunity to conduct discovery relating to the jurisdictional issues, *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). Given that defendants have asserted a facial jurisdictional challenge, the Court should only grant defendants' motion if the claim is "wholly insubstantial and frivolous." *Safe Air for Everyone*, 373 F.3d at 1039 (quoting *Bell v. Hood*, 327 U.S. 678 (1946)).

IV. ARGUMENT

A. Plaintiffs Have Standing to Seek Equitable Relief.

To have standing to seek injunctive or declaratory relief, plaintiffs only need to demonstrate that the requested relief is not "speculative"—that at least one of the named plaintiffs is reasonably likely to suffer the alleged injury again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (setting forth the standard for standing).[6] If one named plaintiff has standing, the Court does not need to decide whether the other plaintiffs have standing. *Preminger v. Peake*, 552 F.3d 757, 764 (9th Cir. 2008) (quoting *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993)).

Ninth Circuit precedent is clear: "[t]he possibility of recurring injury ceases to be speculative when actual repeated incidents are documented." *Nicacio*, 797 F.2d at 702. In *Nicacio*, the court determined that there was standing to seek equitable relief regarding vehicle stops when it had been demonstrated that the same persons had been stopped more than once in the past. *Id.*.

The strength of the *Nicacio* precedent is confirmed by the Ninth Circuit's subsequent discussion of the issue in *Hodgers-Durgin*. The *Hodgers-Durgin* court did not reject the central holding of *Nicacio*—that multiple past encounters established that it was not speculative that future encounters would occur—but instead held that the particular plaintiffs before it had not suffered multiple stops in the past. 199 F.3d at 1044.

Nor did the court in *Hodgers-Durgin* foreclose the possibility that a plaintiff could prove that future injury was not speculative, thereby allowing for injunctive relief, even where the plaintiff

[6] While standing involves consideration of two separate principles—Article III "case or controversy" and an evaluation of whether plaintiffs can demonstrate an entitlement to equitable relief, *id.* at 101-103, 111—defendants concede for purposes of their motion that there is an Article III case or controversy. Motion at 6 n.2.

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had only been stopped once in the past. Rather, the court pointed out that each named plaintiff had only been stopped once in the past despite having passed the immigration officers repeatedly for an extended ten year period. *Id.*

In other words, while under *Nicacio* multiple past stops of any plaintiff in and of itself is sufficient to establish standing, standing can also be demonstrated by a combination of a single stop of each plaintiff with other factors indicating that they are reasonably likely to be stopped again. As *Hodgers-Durgin* indicates, this might include the number of stops in relation to the opportunity to be stopped. 199 F.3d at 1044. It also may include Border Patrol policy or pattern of practice that indicates that one or more of the plaintiffs are sufficiently likely to be singled out again. *See, e.g.*, *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 986 (D. Ariz. 2011) (concluding there was standing, in part, because defendants had made statements that "a fact finder *could* interpret" as sanctioning a policy or practice of illegally stopping vehicles based solely on the occupant's Hispanic appearance) (emphasis added).

1. Defendants' Singular Reliance on Cases Involving Single Past Stops Alone Supports Denial of Their Motion.

Defendants rely on cases where no individual was stopped more than once. Those cases are easily distinguishable from the present circumstances, where a single plaintiff (Mr. Sanchez) was stopped three times, and seized at least twice.

The Ninth Circuit succinctly summarized the facts of *Hodgers-Durgin*, on which defendants place the most reliance, as follows:

> Mr. Lopez [a named plaintiff] drives between 400 and 500 miles a week and sees Border Patrol agents nearly every day. Ms. Hodgers-Durgin [the other named plaintiff] drives between Rio Rico and Nogales at least four or five times a week and sees Border Patrol agents "all over the place" whenever she travels. Yet Mr. Lopez and Ms. Hodgers-Durgin were each stopped only once in 10 years.

199 F.3d at 1044. The special concurring opinion of Judge Reinhardt echoed these facts in explaining why he agreed with the outcome of the case:

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> The facts on summary judgment revealed that both named plaintiffs had been driving for many years on the roads at issue, and both had seen Border Patrol agents nearly every day during this time. In spite of their frequent travel and the Border Patrol's substantial presence, each named plaintiff had been stopped just once. Moreover, Ms. Hodgers-Durgin's sole stop occurred immediately after her car slowed suddenly on the freeway, stopped for several minutes at an empty intersection, and then continued extremely slowly over a highway overpass. In light of her erratic behavior on the road, it is not surprising that she was stopped by a law enforcement officer. On the basis of the factual record before us, the court's opinion correctly concludes that Mr. Lopez and Ms. Hodgers-Durgin have failed to make a showing that there is any likelihood that either of them will again be stopped by the Border Patrol.

Id. at 1047-48 (Reinhardt, C.J., concurring). Simply put, the Ninth Circuit determined that being stopped once despite literally thousands of opportunities to be stopped indicated that it was too speculative it would happen again. Judge Reinhardt further pointed out that at least one of the stops followed certain unique circumstances.

The other case on which defendants rely also involved one-off interactions with law enforcement. In *Farm Labor Organizing Committee*, two plaintiffs filed a class action alleging that the Highway Patrol violated their Fourth Amendment rights by systematically asking all Hispanic-looking individuals about their immigration status when stopped for routine traffic violations. 95 F. Supp. 2d at 730-32. But, the class was represented by two named plaintiffs who each had only been stopped once. *Id.* at 731. In fact, the two named plaintiffs had been traveling together when they were stopped for a minor traffic violation. *Id.* at 727. Just as in *Hodgers-Durgin*, the court found that due to plaintiffs' single interaction, it was not sufficiently likely that they would suffer the alleged injury again. *Id.* at 733. The court also noted that because the plaintiffs only encountered the Highway Patrol after committing a traffic violation, that any future interaction with the Highway Patrol was contingent upon another violation of the law before they could be interrogated. *Id.* at 731.

These cases are clearly different from the present circumstances. Mr. Sanchez has been stopped three times and seized at least twice. Mr. Ramos Contreras also has been interrogated

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twice. This circumstance alone is sufficient to deny the Motion to Dismiss. Where someone has been stopped multiple times, "[t]he possibility of recurring injury ceases to be speculative when actual repeated incidents are documented" making standing to pursue equitable relief proper. *Nicacio*, 797 F.2d at 702. Even the *Hodgers-Durgin* court recognized that when a plaintiff has been stopped multiple times, the plaintiff is more likely entitled to equitable relief. 199 F.3d at 1044-45. There, the court recognized the sharp contrast between the one-off interactions of the named plaintiffs and the repeated stops that several unnamed class members had suffered. *Id.* at 1045. One of the unnamed class members had been stopped three times and another had been stopped four times. *Id.* The court noted that had one of those class members been a named plaintiff, the outcome of the jurisdiction question likely would have been different. *Id.*

2. The Complaint Contains Ample Allegations of the Likelihood of Future Unlawful Stops.

The cases upon which defendants rely are also distinguishable on grounds other than the fact that plaintiffs in those cases had only been injured once before.

For one thing, unlike in *Hodgers-Durgin*, there is no evidence before the Court as to how frequently the Border Patrol crossed paths with the plaintiffs and did not stop them. In *Hodgers-Durgin*, despite driving the same stretch of road several thousand times over the course of ten years, the named plaintiffs were only stopped once. 199 F.3d at 1044. The record showed that the named plaintiffs saw Border Patrol agents "nearly every day" and "all over the place." *Id.* While it is true that the Complaint alleges how Border Patrol's presence in the Olympic Peninsula has significantly ramped up recently, the only inference that can be drawn from that is the likelihood of future interactions is higher than past interactions. The record is silent on how many times Border Patrol could have seen, and thus had a hunch about the plaintiffs and stopped them to ask about their immigration status.

Similarly, there are no circumstances before the Court that could justify any of the stops of plaintiffs, as was the case in *Hodgers-Durgin* and *Farm Labor Organizing Committee.* To the

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contrary, the record before the Court is that the Border Patrol agents offered no explanations for the stops, even when asked. Complaint ¶¶ 27, 31. The Court must accept as true the allegation that the sole basis for the stops was the Border Patrol agents' intuition based solely on the color and nature of the plaintiffs' skin and hair.

While past stops are certainly relevant to determining whether a sufficient likelihood of future injury exists, they are far from the only relevant consideration. "If such a policy [of unlawful practices] exists, it presents a sufficient likelihood that named Plaintiffs will suffer ongoing harm. Continued, ongoing harm results from a pattern or practice of constitutional violation or policies promoting constitutional violations." *Ortega-Melendres*, 836 F. Supp. 2d at 987-88 (quoting *Comm. for Immigrant Rights of Sonoma v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177, 1195 (N.D. Cal. 2009)) (internal quotations omitted). In *Ortega-Melendres*, the court found the plaintiffs had standing to pursue injunctive relief in part because the defendants had made statements that "a fact finder *could* interpret" as sanctioning the illegal practice of stopping the vehicles solely because the occupants appeared to be Hispanic. *Id.* at 986 (emphasis added); *see also La Duke v. Nelson*, 762 F.2d 1318, 1324-26 (9th Cir. 1985) (plaintiffs had standing in part because the INS had an official policy endorsing the unlawful immigration raids).

The Complaint contains ample allegations of the existence of a policy or practice sanctioning unlawful stops based on just hunch or racial or ethnic profiling. These allegations are supported by the words of Port Angeles Station Supervisor Jose Romero, who was quoted in the Peninsula Daily News as having stated, "Questioning someone's immigration status comes partly from a 'gut feeling' the agent might have about the person." Complaint ¶¶ 70-71.

And even if the first of the three stops of Mr. Sanchez was not a Fourth Amendment seizure—which plaintiffs do not concede—that stop still is relevant to show the existence of a pattern or practice that could result in Mr. Sanchez being stopped yet again. Similarly, regardless of whether or not Border Patrol's interrogation of Mr. Ramos Contreras outside the courthouse is ultimately determined to be a Fourth Amendment seizure, it is plainly still relevant. The simple fact

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is that Mr. Ramos Contreras—a United States citizen going about his daily life on the Peninsula—has been questioned twice by the Border Patrol about his immigration status. The fact that only one of those times involved a vehicle stop does not reduce the likelihood that the next time also might involve a vehicle stop.

3. The Court Should Defer Determining Standing Until a Full Factual Record has Been Developed.

Finally, deciding whether there is sufficient likelihood that plaintiffs will be stopped in the future is typically inappropriate on a motion to dismiss because the parties have not had the benefit of discovery. In a number of cases since *Hodgers-Durgin*, courts have concluded that Article III standing exists, but that the ultimate question about whether an injunction is available requires factual development. For instance, in *Melendres v. Maricopa County*, the court rejected a motion to dismiss, holding, and relying on *Hodgers-Durgin*, that the plaintiffs had established a "case or controversy" when they alleged in their complaint "that they did nothing illegal to prompt the stops, detentions, and other alleged challenged activity," and that, unlike in *Hodgers-Durgin*, a sufficient factual record had not yet been developed to allow the court to rule on whether the plaintiffs were not sufficiently likely to be stopped again. No. CV–07–2513–PHX–GMS, 2009 WL 2707241, at *3 (D. Ariz. Aug. 29, 2009). The importance of an evidentiary hearing was further emphasized in *Gordon v. City of Moreno Valley*:

> This brings the Court to the last and, ultimately, most salient point—it is entirely too early in this case to conclude whether or not a policy or practice is in place that would put the plaintiffs in real danger of being continually subjected to these raid-style inspections as part of the otherwise routine inspections of their business establishments authorized by statute. The decision in many of the standing cases cited to by the parties occurred after an evidentiary hearing (or upon the submission of declarations and evidence in conjunction with a preliminary injunction motion) or on a motion for summary judgment after discovery had been completed in the case.

687 F. Supp. 2d 930, 940 (C.D. Cal. 2009); *see also Lyons*, 461 U.S. at 99-100 (decision made after evidentiary hearing on preliminary injunction motion); *Hodgers-Durgin*, 199 F.3d at 1039 (decision made on a motion for summary judgment). As the *Gordon* Court explained, "[g]iven the serious

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possibilities raised by the allegations now in the complaint that such a policy or practice *may* exist, and given that the evidence needed to properly allege that fact one way or the other rest largely in the hands of the defendants" the court refused to tender a ruling on standing before discovery had been conducted. *Gordon*, 687 F. Supp. 2d at 940-41; s*ee also Bassette v. City of Oakland*, No. C-00-1645 JCS, 2000 WL 33376593, at *6 (N.D. Cal. Aug. 11, 2000) (holding that it would be inappropriate to decide standing without a full evidentiary record).

Among other factual allegations, the Complaint alleges that Defendants have failed to comply with a Court order requiring them to maintain records of the basis for all stops. In upholding a challenge to this requirement, the Ninth Circuit stated that "it is difficult to imagine a remedy that would be less burdensome to the government and at the same time serve in any way to prevent future constitutional violations." *Nicacio*, 797 F.2d at 706. Yet, it is precisely this safeguard that has been cast aside. Plaintiffs should have the opportunity to develop the factual record to demonstrate that defendants indeed have a practice of failing to comply with one of the primary safeguards ordered by a district court precisely to avoid similar unconstitutional stops.

B. Plaintiffs Need Not Demonstrate that There is a Private Right of Action Under 8 U.S.C. § 1357, Because Jurisdiction Exists Under the Administrative Procedure Act.

Under the Administrative Procedure Act (APA), any person aggrieved by agency action in violation of federal law can file an action seeking an injunction. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Plaintiffs invoked this provision of the APA in the Complaint. Complaint ¶ 19. The APA creates "a basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). Judicial review should only be denied "upon a showing of 'clear and convincing' evidence of a contrary legislative intent." *Id.* at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 380 (1962)).

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As a result, there is no need for plaintiffs to establish, or the Court to decide, the existence of an implied private right of action under 8 U.S.C. § 1357.[7] As explained in an opinion by then-Judge Breyer, recently quoted by the Ninth Circuit with approval:

> It is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the *federal* government, for there is hardly ever any need for Congress to do so. That is because federal action is nearly always reviewable for conformity with statutory obligations without any such 'private right of action.'

San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1095-96 (9th Cir. 2005) (quoting *N.A.A.C.P. v. Sec'y of HUD*, 817 F.2d 149, 152 (1st Cir. 1987)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 316-17 (1979) (concluding it is not necessary to make finding of a private right of action where review is available under the APA); *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995) (concluding that plaintiff need not establish private right of action under another statute where APA provides avenue for review of agency action).

The principal case on which defendants rely—*Chairez v. INS*, 790 F.2d 544 (6th Cir. 1986)—is inapposite. It does not address the APA at all. This may have been due to the fact that the plaintiff in *Chairez* sought damages, *id.* at 544, and the APA is less available for claims for damages than for injunctive relief, 5 U.S.C. § 702. Here, as defendants are quick to point out, Motion at 1, plaintiffs seek only equitable relief, meaning that plaintiffs' claims here are squarely within the contours of judicial review of agency actions contemplated by the APA. Indeed, at least one court has concluded that it had jurisdiction to review agency actions in violation of §1357 under the APA. *See, e.g.*, *Renteria-Villegas v. Metro. Gov't of Nashville & Davidson Cnty.*, 3:11-00218, 2011 WL 4048523, at * 5 (M.D. Tenn. Sept. 12, 2011) (concluding that under the APA, there is

[7] Plaintiffs agree with defendants that there is no express private right of action set forth in this statute. On the other hand, § 1357 also does not expressly preclude review, and therefore there is a cause of action under the APA. 5 U.S.C.§ 701(a)(1) (The APA applies . . . "except to the extent that - (1) [a federal] statute[] preclude[s] judicial review . . . .").

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federal court jurisdiction to review agreements made pursuant to §1357(g)). As a result, the Court should deny defendants' attempt to dismiss this claim.

V. CONCLUSION

Plaintiffs' Complaint alleges facts necessary to defeat defendants' Motion to Dismiss and to provide this Court jurisdiction. The Court should deny the Motion to Dismiss.

DATED this 6th day of August, 2012.

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CERTIFICATE OF SERVICE

On the 6th day of August, 2012, I caused to be served upon the following, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION

Timothy M. Belsan Trial Attorney United States Department of Justice Office of Immigration Litigation District Court Section Ben Franklin Station, P.O. Box 868 Washington, DC 20044 Attorney for Defendants	___ Via hand delivery ___ Via U.S. Mail, 1st Class, Postage Prepaid ___ Via Overnight Delivery ___ Via Facsimile ___ Via Email X Via ECF
Rebecca S. Cohen Assistant United States Attorney United States Attorney's Office 700 Stewart Street, Suite 5220 Seattle, Washington 98101-1271 Attorney for Defendants	___ Via hand delivery ___ Via U.S. Mail, 1st Class, Postage Prepaid ___ Via Overnight Delivery ___ Via Facsimile ___ Via Email X Via ECF

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 6th day of August, 2012.

s/Nicholas P. Gellert
Nicholas P. Gellert, WSBA No. 18041

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