IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GHASSAN ALASAAD, NADIA ALASAAD, SUHAIB ALLABABIDI, SIDD BIKKANNAVAR, JÉRÉMIE DUPIN, AARON GACH, ISMAIL ABDEL-RASOUL AKA ISMA'IL KUSHKUSH, DIANE MAYE, ZAINAB MERCHANT, MOHAMMED AKRAM SHIBLY, AND MATTHEW WRIGHT,

Plaintiffs,

v.

KIRSTJEN NIELSEN, SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY, IN HER OFFICIAL CAPACITY; KEVIN MCALEENAN, ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; AND THOMAS HOMAN, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY,

Defendants.

Civil Action No. 17-cv-11730-DJC

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
(LEAVE GRANTED ON FEBRUARY 5, 2018)

To be clear: no court has held that a border search of any kind requires probable cause and a warrant. Plaintiffs invite this Court to be the first. This Court should decline, not only because binding precedent precludes Plaintiffs' claims, but also because Plaintiffs lack standing.

I. Plaintiffs Cannot Show a Certainly Impending Injury

To establish standing for their sought prospective relief, Plaintiffs must show that their injury is "certainly impending or . . . there is a substantial risk that harm will occur." *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017). Plaintiffs agree that they must show a "substantial risk that their devices will *again* be searched and confiscated pursuant to Defendants' policies and practices." ECF No. 19 at 5 (emphasis added). Plaintiffs cannot establish such injury, as they concede that the odds of a future search for a given traveler "are 1 in 10,000 . . . ." *See* ECF No. 19 at 12 n.14.[1]

Rather than admit that this deficiency means they cannot bring their claims, Plaintiffs pivot, contending that their standing can be based on the presence of an "official policy," to which Plaintiffs have a "realistic risk of future exposure." *Id.* at 8. But the presence of a Government policy cannot establish Article III injury. What matters is whether these Plaintiffs will be injured by some future action of Defendants. *See Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992) (holding that it was "not . . . pertinent" whether the challenged practice was a "routine, daily procedure implemented as a matter of policy by the defendants," and rather the inquiry remains whether there is a "sufficient likelihood" of future injury).

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[1] In *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n. 5 (2013) the Court explained that the "substantial risk" standard applies where plaintiffs "may reasonably incur costs to mitigate or avoid" the risked harm. Plaintiffs have not alleged that any costs were incurred, and accordingly it is doubtful whether the "substantial risk" standard could apply here.

To this end, Plaintiffs erroneously argue that they need only show a "realistic risk of future exposure" to the challenged policies. *See Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997). As the Supreme Court has admonished, it is not enough to establish even an "objectively reasonable likelihood of future injury, as that standard is inconsistent with our requirement that threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 468 U.S. at 410 (internal quotations and citations omitted). Plaintiffs' "realistic risk" standard is inconsistent with binding precedent which requires "certainly impending" injury or "substantial risk." *Id*.

Likely realizing that the 1-in-10,000 chance of a future injury for the traveling public is not "certainly impending injury" or a "substantial risk," Plaintiffs argue that they are "more likely than other travelers to suffer harms in the future," despite lacking any such corresponding factual allegation in the Amended Complaint. *See* ECF No. 19 at 9. Yet after advancing the claim, Plaintiffs quickly back away. They aver only that past searches "*may* increase the likelihood of repeated searches," and that "whatever prompted officers to search Plaintiffs' devices *may* prompt future searches." *Id.* at 9-10 (emphasis added). Plaintiffs' need to speculate about the likelihood of their own future injury is indicative of their lack of standing.

In one final reach, Plaintiffs recast their injury as a "probabilistic harm," where standing is supposedly founded on an "increased risk of future injury." *Id*. at 11. Generally, this type of standing is asserted in the context of environmental and health law, where a harmful action is certain and the "probabilistic" inquiry looks to the likelihood of harm to the plaintiff. *See Virginia State Corp. Comm'n v. F.E.R.C.*, 468 F.3d 845, 848 (D.C. Cir. 2006) ("Outside the realm of environmental disputes . . . we have suggested that a claim of increased risk or probability cannot suffice."). As the First Circuit has explained, "were all purely speculative 'increased risks' deemed injurious, the entire requirement of 'actual or imminent injury' would

be rendered moot, because all hypothesized, non-imminent 'injuries' could be dressed up as 'increased risk of future injury.'" *Kerin v. Titeflex Corp.*, 770 F.3d 978, 983 (1st Cir. 2014) (quoting *Ctr. For Law and Educ. v. Dept. of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005)). Thus, Plaintiffs are unable to point to any case relying on "probabilistic injury" in the context of First and Fourth Amendment claims.

And even if such a theory of injury were relevant here, "the proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm . . . and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1298 (D.C. Cir. 2007). Plaintiffs put forward no plausible allegations that their risk of a future search of electronic devices at the border is "anything but remote." *Titeflex Corp.*, 770 F.3d at 983. Accordingly, Plaintiffs lack standing on this ground.

II. Plaintiffs Lack Standing to Seek Expungement

Plaintiffs' only other claimed basis for standing, the retention of their information by the Government, fares no better. Even if Plaintiffs had alleged plausible facts showing that Defendants actually retained their data, they have not stated a legal claim for which the remedy of expungement could be granted.[2] Plaintiffs do not dispute that, as a general matter, the Government may retain materials seized in violation of the Fourth Amendment and use them in various official proceedings, without running afoul of the Constitution. ECF No. 19 at 13. Thus,

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[2] The Response highlights the absence of plausible allegations of retention with regard to all Plaintiffs save Matthew Wright. With the exception of Matthew Wright, Plaintiffs fail to allege in the Amended Complaint or Response that any of their data was actually "obtained" or retained by Defendants, and the basis for such a claim. The absence of alleged facts defeats standing on this ground. *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged . . . .").

to support a remedy of expungement, Plaintiffs must establish that the retention of the information by the Government is itself unlawful. Yet Plaintiffs do not state any such claim in the Amended Complaint. Thus, the Court has no reason to order expungement, and Plaintiffs cannot show redressability for this unasserted claim.

III. Plaintiffs Fail to State a Claim

Were this Court to reach the merits, the Amended Complaint should be dismissed nonetheless. Well over a dozen courts, including this one, have rejected the arguments raised by Plaintiffs. The same result should obtain here.

Plaintiffs' contention that *Riley v. California*, 134 S. Ct. 2473 (2014), "dictates" a warrant requirement for device searches at the border has been roundly dismissed, both in light of the narrow issue before the Court, *see United States v. Ramos*, 190 F. Supp. 3d 992, 1002 (S.D. Cal. 2016) (explaining that the "Supreme Court had every intention to limit its holding to searches incident to arrest"), and because the analysis in *Riley* itself supports the warrantless search and detention of devices at the border. That is, the warrantless border search of an electronic device is "utterly consistent" with well-established justifications for the general border search exemption: "protecting the country by preventing unwanted goods from crossing the border into the country." *United States v. Feiten*, No. 15-20631, 2016 WL 894452, at *6 (E.D. Mich. Mar. 9, 2016); *see also United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) ("[T]he United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.").[3]

[3] Contrary to Plaintiffs' claims, electronic devices frequently serve as a conduit for contraband. *See, e.g.*, *United States v. Touset*, No. 1:15-CR-45-MHC, 2016 WL 1048047, at *4 (N.D. Ga. Mar. 11, 2016) (explaining that "persons who deal in child pornography tend to carry at least some of it with them when they travel"); *Gowadia v. United States*, No. 14-00481 SOM/KSC,

Neither Plaintiffs nor their amici cite a single court which has held that a warrant is required for a border search of any type. This is because the balance of interests concerning searches is "struck much more favorably to the Government at the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985). Thus, even for the most invasive searches, such as "strip-searches and body-cavity searches" at the border, only reasonable suspicion is required. *See United States v. Braks*, 842 F.2d 509, 512-13 (1st Cir. 1988).[4] Plaintiffs contend that a warrant is required for all border searches of electronic devices. Yet, it would make little sense to require reasonable suspicion to search a traveler's "alimentary canal" during a border search, but probable cause and a warrant to search their laptop. *Compare Montoya De Hernández*, 473 U.S. at 538 *with House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816, at *7 (D. Mass. Mar. 28, 2012) ("[The] search of one's personal information on a laptop computer . . . does not invade one's dignity and privacy in the same way as an involuntary x-ray, body cavity or strip search. . . ."). Plaintiffs have no response to the doctrinal incoherence that would result if they succeed here.

At bottom, there is no basis in law or logic to rule in Plaintiffs' favor on either their First or Fourth Amendment claims. The border search exemption applies equally to electronic devices. *See House*, 2012 WL 1038816, at *8. This Court should accordingly dismiss the Amended Complaint.

2015 WL 5838471, at *5 (D. Haw. Oct. 5, 2015) (discussing border search which uncovered classified "Top Secret" information); *United States v. Verma*, No. CRIMA H-08-699-1, 2010 WL 1427261, at *2 (S.D. Tex. Apr. 8, 2010) (noting border search of electronic devices revealing "over 100,000 images" of child pornography).

[4] Nor is a heightened standard required by the First Amendment. In addition, such a rule would create a safe harbor within electronic devices for contraband and evidence related to criminal or terrorist activity. The impractical and undesirable nature of such a rule at the border is apparent. *See United States v. Ickes*, 393 F.3d 501, 506-07 (4th Cir. 2005).

Respectfully submitted, Dated: March 1, 2018

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CERTIFICATE OF SERVICE

I certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, if any, on March 1, 2018.

/s/ Michael Drezner
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