Hon. Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSE SANCHEZ, *et al.*,

Plaintiffs,

v.

UNITED STATES BORDER PATROL, *et al.*,

Defendants.

No. CV12-5378-RJB

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF JURISDICTION

NOTED ON MOTION CALENDAR: August 10, 2012

Defendants hereby respond to Plaintiffs' Opposition (Dkt. No. 19) to Defendants' Motion to Dismiss ("Defendants' Motion," Dkt. No. 15). Despite their arguments to the contrary, the named Plaintiffs have failed to establish a likelihood that they themselves will be stopped again in the imminent future by the Border Patrol without reasonable suspicion. Therefore, Plaintiffs lack standing to seek equitable relief. Additionally, Plaintiffs' Second Claim for Relief ("Second Claim") must be dismissed for lack of jurisdiction whether Plaintiffs bring it under 8 U.S.C. § 1357 or, as they now assert, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*

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I. Plaintiffs Have Not Established that They Have Standing to Seek Equitable Relief, Therefore Their Claim Must Be Dismissed.

It is axiomatic that for this Court to exercise subject matter jurisdiction over Plaintiffs' claims, Plaintiffs must have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Moreover, the Court must presume lack of jurisdiction, unless the Plaintiffs as the party invoking federal jurisdiction prove otherwise. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376-78 (1994); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009). Plaintiffs did not establish standing to seek equitable relief in their Complaint, and they have not done so in their Opposition to Defendants' Motion.

As noted in Defendants' Motion, Plaintiffs lack standing because they have not shown a "likelihood of substantial and immediate irreparable injury." *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 731-33 (N.D. Ohio 2000). In their Opposition to Defendants' Motion, Plaintiffs essentially assert three arguments. First, Plaintiffs maintain that Plaintiff Sanchez has standing because he has been stopped more than once. Opposition at 7-10. Second, Plaintiffs assert that the Complaint contains "ample allegations of the likelihood of future unlawful stops," beyond just the alleged prior stops. *See id*. at 10-11. Finally, Plaintiffs contend that the Court should wait to determine whether standing exists until discovery has been completed. *Id*. at 12-13. None of these arguments are availing.

A. Plaintiff Sanchez's Two Alleged Stops Do Not Establish a Likelihood of Substantial and Immediate Irreparable Injury.

None of the named Plaintiffs—including Plaintiff Sanchez—has standing to seek equitable relief. Although Plaintiffs are correct that they must establish standing to seek equitable relief for only one named plaintiff, *see Bates v. United Parcel Serv.*, 511 F.3d 974, 985

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(9th Cir. 2007), they have not done so. Plaintiffs' primary argument is that because "Mr. Sanchez has been stopped three times and seized at least twice," he has sufficiently established a likelihood of substantial and immediate irreparable injury, and *Hodgers-Durgin* and the other cases cited by Defendants do not apply. *See* Opposition at 9-10. Plaintiffs assert a similar argument with regard to Plaintiff Contreras. *Id*. at 10.

First, it bears repeating that although Plaintiffs allege that there have been a total of six "stops" of the three named Plaintiffs, two of the interactions, even as alleged, were consensual encounters that do not implicate the Fourth Amendment. Defendants' Motion at 11-12. Accordingly, and as developed more fully in Defendants' Motion, Plaintiffs Contreras and Grimes have each alleged only one Fourth-Amendment implicating interaction with the Border Patrol. *See id.* For purposes of their Motion only, however, Defendants do not contest that Plaintiff Sanchez has been stopped twice by the Border Patrol.[1]

Plaintiff Sanchez's two stops do not, however, establish a likelihood of substantial and immediate irreparable injury. To support their position to the contrary, Plaintiffs rely heavily on the Ninth Circuit's statement in *Nicacio v. INS* that "the possibility of recurring injury ceases to be speculative when actual repeated incidents are documented." 797 F.2d 700, 702 (9th Cir. 1985). Plaintiffs implicitly concede that the Ninth Circuit's decision in *Hodgers-Durgin* recognized that *Nicacio* was no longer good law, but contend that it "did not reject the central holding of *Nicacio*—that multiple past encounters established that it was not speculative that

[1] Plaintiffs cite an unpublished Ohio Court of Appeals decision for the proposition that the first alleged stop of Plaintiff Sanchez implicates the Fourth Amendment because an individual may be "seized" when officers followed him home, turned on their lights, and approached him as he exited his vehicle. *See State v. Hale*, No. 98AP-490, 1998 WL 894716 (Ohio Ct. App. Dec. 24, 1998). Here, however, Plaintiffs have not alleged that the Border Patrol agents turned on their flashing lights nor that they ever had any interaction with Plaintiff Sanchez—and these are important differences. *See, e.g.*, *United States v. Robert L.*, 874 F.2d 701, 703 (9th Cir. 1989) ("It is well settled that when a law enforcement officer signals a motorist to stop by use of a siren or red light, there has been a seizure which must be justified under the Fourth Amendment.") (quotations and alterations omitted).

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future encounters would occur."[2] Opposition at 7. Plaintiffs' contention rests on the fact that the Ninth Circuit did not expressly reject such language in *Nicacio*, but it ignores the fact that the *Hodgers-Durgin* court did, in fact, implicitly reject that "central holding."

In *Hodgers-Durgin*, the Ninth Circuit noted that, unlike the individuals named as plaintiffs, several non-plaintiff members of the class had suffered "more frequent and more recent" injuries. 199 F.3d at 1045. After identifying several class members, each of whom had been stopped three or more times, the *Hodgers-Durgin* court stated "[w]ere those individuals named plaintiffs, they *might* well be able to demonstrate the likelihood of injury required to pursue equitable relief." *Id*. (emphasis added). As the Ninth Circuit recognized, more than one prior vehicle stop *might*, but does not always, provide an individual with standing to seek equitable relief. *See id.* Therefore, the Ninth Circuit's decision in *Hodgers-Durgin* directly controverts Plaintiffs' argument that "multiple past stops of any plaintiff *in and of itself is sufficient* to establish standing." Opposition at 8 (emphasis added).

Moreover, Plaintiffs' argument relies on interpreting the term "multiple" to mean "two or more." While that is a potential interpretation, given the court's discussion in *Hodgers-Durgin* it is not the most likely interpretation. Notably, despite having previously cited *Nicacio* within the same paragraph, the Ninth Circuit did not cite *Nicacio* as an example of a situation in which multiple stops supported standing to seek equitable relief. *See Hodgers-Durgin*, 199 F.3d at 1045. Instead, the court cited *Wooley v. Maynard*, 430 U.S. 705 (1977), a case involving three prosecutions, and *Kolender v. Lawson*, 461 U.S. 352 (1983), a case involving fifteen stops. *Id*. Likewise, each of the unnamed class members who the *Hodgers-Durgin* court said "might" have standing had three or more past stops. *Id*.

[2] Defendants note that in spite of Plaintiffs' extensive discussion of *Nicacio*, they have not brought a claim against Defendants for failure to comply with the *Nicacio* judgment. Indeed, were Plaintiffs to do so, they would have to do so in the Eastern District of Washington, the district from which the injunction issued.

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Therefore, what is clear from *Hodgers-Durgin* and *Farm-Labor* is that a single stop is insufficient to establish standing to seek injunctive relief. Such cases do not, however, stand for the proposition that two prior stops automatically establish standing. Although Plaintiffs contend otherwise, they implicitly acknowledge this fact. *See* Opposition at 10 ("[T]he *Hodgers-Durgin* court recognized that when a plaintiff has been stopped multiple times, the plaintiff is *more likely* entitled to equitable relief.") (emphasis added). In light of *Hodgers-Durgin*, the position that two prior stops automatically establish standing is untenable in this circuit.

B. Plaintiffs' Complaint Fails to Allege Facts Supporting a Reasonable Inference that the Named Plaintiffs Themselves Are Likely to Be Stopped Again by the Border Patrol Without Reasonable Suspicion.

The facts as alleged in Plaintiffs' Complaint do not support a reasonable inference that, unless the Court intervenes, the named Plaintiffs themselves are likely to be stopped again in the imminent future by the Border Patrol without reasonable suspicion. In their Opposition, however, Plaintiffs contend that there are "ample allegations of the likelihood of future unlawful stops." Opposition at 10. Plaintiffs provide four reasons why they believe their allegations establish such a likelihood—none of which actually do so.

First, Plaintiffs argue that this case is distinguishable from *Hodgers-Durgin* and *Farm Labor* because "there is no evidence before the Court as to how frequently the Border Patrol crossed paths with the plaintiffs and did not stop them." Opposition at 10. Rather, they note that the "record is silent" regarding how often the Border Patrol could have seen the named Plaintiffs and thus how often they could have stopped them. *Id*. Plaintiffs further contend that the "Border Patrol's presence in the Olympic Peninsula has significantly ramped up recently." *Id*. Based on these facts, Plaintiffs maintain that the "only inference that can be drawn . . . is [that] the likelihood of future interactions is higher than past interactions." *Id*.

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Far from being the only inference, however, Plaintiffs' contention is not even a reasonable one given the facts they have alleged. Indeed, their contention is belied by their own prior acknowledgment in their Opposition that all of the incidents alleged in the Complaint have "*happened since* the staffing on the Olympic Peninsula dramatically increased from four agents earlier to over forty now." *Id*. at 4 (emphasis added). Accepting as true Plaintiffs' allegation that all of their alleged stops have *happened since* the dramatic increase in the number of Border Patrol agents, it is unreasonable to assume that the named Plaintiffs are any more likely to be stopped now than they were in the past. Rather, they should be equally as likely. Moreover, given the Olympic Peninsula's rural nature and the extremely limited routes of ingress and egress, as well as the "dramatic increase" in the number of Border Patrol agents, the only reasonable inference is that the named Plaintiffs have in fact seen the Border Patrol regularly. Indeed, if the named Plaintiffs do not see the Border Patrol regularly they cannot reasonably contend that they face any real *likelihood* that they will be unlawfully stopped again. Plaintiffs cannot have it both ways.

And how likely is it that the named Plaintiffs will themselves get stopped again? Based on the facts alleged in Plaintiffs' Complaint, only one of the named Plaintiffs, Plaintiff Sanchez, has been stopped more than once, and his stops occurred more than two years apart. *See* Complaint ¶¶ 22, 24. None of the named Plaintiffs alleged any stop by—or even any interaction with—the Border Patrol in the six months immediately preceding the filing of the Complaint, nor have they asserted any stops in the more than three months since filing this action. Thus, the only reasonable inference supported by the facts alleged in Plaintiffs' Complaint is that the named Plaintiffs see the Border Patrol regularly but have not been and are unlikely to be stopped again.

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Second, Plaintiffs argue that this 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." Opposition at 11. Plaintiffs thus appear to contend that because Defendants have asserted a facial challenge under Federal Rule of Civil Procedure 12(b)(1) all allegations in their Complaint, factual and legal, must be taken as true and all inferences must be drawn in their favor. While the standard for facial challenges under Rule 12(b)(1) is quite favorable to the non-moving party, it is not without limitation. Rather, this Court need only accept the *facts* as alleged and need only draw *reasonable* inferences. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation."); *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (the court need not accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences).

Thus, this Court need not accept as true Plaintiffs' legal conclusion that the Border Patrol's stops were based solely on the named Plaintiffs' appearance and race. Indeed, Plaintiffs have not alleged that, prior to the time they conducted the stops, the Border Patrol agents could see the driver or passengers of the vehicles well enough to make out their appearance or race. Nor have they alleged that any Border Patrol agent indicated a stop was based on race or appearance. This Court should not accept Plaintiffs' conclusion when the sole factual allegations supporting such a conclusion are that the named Plaintiffs were not told why they were stopped and they happen to have a particular appearance or be of a certain race.

Third, Plaintiffs argue that standing exists here because where an official policy endorsing the unlawful conduct exists, there is a sufficient likelihood of future harm to establish

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standing to seek equitable relief. *See* Opposition at 11. The cases cited by Plaintiffs do indeed address the existence of an official policy or officially sanctioned behavior. *See Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 988 (D. Ariz. 2011) ("The fact that Plaintiffs have demonstrated that there is a genuine issue of material fact as to whether MCSO has a *racial profiling policy* . . . grants them standing"); *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) ("The district court in this case explicitly found that the defendants engaged in a standard pattern of *officially sanctioned* officer behavior.") (emphasis added). But Plaintiffs have not alleged the existence of an official policy in their Complaint. Indeed, although the Complaint does at times use the phrase "policy and practice," or some derivation thereof, the allegations regarding policy are conclusory at best. *See* Complaint ¶¶ 51, 69, 70, 75. More importantly, Plaintiffs make clear in their Complaint that they are actually challenging the "lack of an established policy." Complaint ¶ 64 ("*The lack of an established policy and procedure* encourages or at least allows for the Border Patrol's stopping of vehicles or participating in vehicle stops that are based on nothing other than the ethnic and/or racial appearance of a vehicle's occupants") (emphasis added). Nor does the quotation taken from a news article and attributed to Supervisory Border Patrol Agent Jose Romero officially endorse or sanction any unlawful behavior. Even as quoted by Plaintiffs, Agent Romero stated that a gut feeling was only part of a decision on whether to question an individual concerning immigration status, and the quote does not address when Border Patrol agents should, or do, conduct a vehicle stop. *See* Opposition at 11 (attributing to Agent Romero the statement, "Questioning someone's immigration status comes *partly* from a 'gut feeling' the agent might have about the person") (emphasis added). Plaintiffs thus find no support in the cases dealing with official policies for their argument that standing exists here.

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Finally, Plaintiffs attempt to bolster their otherwise failing argument that they have standing by again citing interactions with the Border Patrol which do not implicate the Fourth Amendment. *See* Opposition at 11-12. Plaintiffs' repeated reference to interactions which constitute consensual encounters is nothing more than an attempt to bootstrap consensual encounters into a case where Plaintiffs are alleging violations of the Fourth Amendment. Moreover, Plaintiffs incorrectly contend that the fact that Plaintiff Contreras has been questioned twice by the Border Patrol about his immigration status results in a heightened likelihood that he will be stopped in the future. Opposition at 12. It is simply not a reasonable inference to assume that because a Border Patrol agent speaks with an individual while standing outside of a courthouse, the individual is more likely to get stopped by all Border Patrol agents while traveling in a vehicle.

In sum, Plaintiffs' Complaint fails to allege facts sufficient to establish a likelihood that any of the named Plaintiffs will themselves again, in the immediate future, be subjected to a vehicle stop conducted by the Border Patrol without reasonable suspicion.

C. This Court Need Not Defer a Determination Regarding Standing Until Discovery Has Been Completed.

Plaintiffs' final argument does not support their contention that standing exists based on the allegations in their Complaint; rather, Plaintiffs suggest that this Court defer determining whether standing exits until discovery is completed. Opposition at 12. Discovery is unnecessary, however, because Defendants have not challenged the factual allegations of Plaintiffs' Complaint, Plaintiffs have not articulated a need for discovery to respond to Defendants' Motion, and because it is apparent based solely on Plaintiffs' allegations that the named Plaintiffs lack standing to seek equitable relief.

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In support of their contention that discovery is warranted, Plaintiffs primarily rely on *Melendres v. Maricopa Cnty.*, No. CV-070-2513, 2009 WL 2707241 (D. Ariz. Aug. 24, 2009) and *Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930 (C.D. Cal. 2009). Both cases are distinguishable.

In *Melendres*, although the court noted that challenges to standing were "more properly raised when courts have the benefit of an evidentiary record," the court did not say that such a record was required. 2009 WL 2707241, at *4. Indeed, the *Melendres* court itself actually proceeded to rule on the defendants' motion to dismiss without a record. *Id*. Although the court denied the defendants' motion, it suggested that the defendants could challenge the existence of standing later if warranted based on further evidentiary development. *Id*. ("Plaintiffs' Complaint is sufficient, in the absence of an evidentiary record to the contrary. . . ."). Importantly, however, the plaintiffs in *Melendres* had alleged that the law enforcement officers were acting pursuant to an "officially sanctioned policy, practice, or pattern of conduct" which the court found added "special weight to the likelihood of future harm." *Id*. As noted above, Plaintiffs here have not alleged the existence of such an official policy or officially sanctioned unlawful conduct.

Gordon similarly involved a challenge by plaintiffs that there was an officially-sanctioned policy or practice of engaging in unlawful conduct. 687 F. Supp. 2d at 938-39. In their lawsuit, the plaintiffs challenged "a series of warrantless raid-style searches performed under the auspices of an administrative health and safety inspection" which they alleged had been conducted mostly on African American-run barbershops. *Id*. at 933-34. The *Gordon* court's decision to defer a ruling on whether the plaintiffs had standing was based on "the serious possibilities raised by the allegations now in the complaint that [an officially-sanctioned] policy or practice *may* exist." *Id*. at 940. The court noted that such "possibilities" existed because the

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plaintiffs had alleged that one of the inspectors told the press that such raids were not a "one-time event." *Id*. at 938, 940.

Again, as noted above, Plaintiffs have not made any allegations demonstrating that there is such a policy, nor have they made any allegations from which it can be inferred that there is even a possibility that such a policy does in fact exist. *Id*. at 940 ("[T]he suggestion that such a policy could be in place is no substitute for an allegation actually demonstrating that there is one in place or, at least, an allegation from which it can be inferred that such policy does in fact exist."). Indeed, Plaintiffs have made clear that they are challenging the *lack* of a policy. Complaint ¶ 64. And although Plaintiffs refer to a statement attributed to Agent Jose Romero, Agent Romero's statement does not address when Border Patrol agents should, or do, conduct a vehicle stop, nor does it officially endorse or sanction any unlawful behavior. Agent Romero stated that a gut feeling was only *part* of a decision on whether to question an individual concerning immigration status, indicating that factors beyond a gut feeling are considered. *See* Opposition at 11.

Finally, allowing the parties to engage in discovery prior to ruling on standing may be important in some cases, but it is not warranted here. Defendants have not challenged the factual allegations of Plaintiffs' Complaint and Plaintiffs have not articulated a need for discovery to respond to Defendants' Motion. Moreover, discovery, which imposes a substantial economic burden on Defendants, is inappropriate when it is apparent from Plaintiffs' own allegations that the named Plaintiffs lack standing to seek equitable relief. Accordingly, this Court should not defer a ruling on whether Plaintiffs have standing until discovery has been completed.

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II. Plaintiffs' Second Claim Must Be Dismissed Because This Court Lacks Jurisdiction to Review the Claim Under the APA.

Plaintiffs do not contest Defendants' assertion that 8 U.S.C. § 1357 does not create a private cause of action. Opposition at 13-14. Instead, Plaintiffs contend that they seek to bring their Second Claim under the APA. *Id*. at 13. Defendants' confusion regarding Plaintiffs' basis for bringing their Second Claim is understandable because Plaintiffs labeled the claim "Violation of 8 U.S.C. § 1357" and only referenced the APA in passing. *See* Complaint at 19. More importantly, however, Plaintiffs cannot bring their Second Claim under the APA because they have an alternative remedy available under the Fourth Amendment. *See Sackett v. E.P.A.*, 132 S. Ct. 1367, 1372 (2012) ("The APA's judicial review provision also requires that the person seeking APA review of final agency action have 'no other adequate remedy in a court.'"). Indeed, Plaintiffs' first and second claims are for all intents and purposes the same, and in fact request identical relief. As such, Plaintiffs' Second Claim is both superfluous and patently deficient and must be dismissed.[3]

CONCLUSION

For the foregoing reasons, this Court lacks subject matter jurisdiction and must dismiss this case. Plaintiffs have not met their burden to establish standing to bring their claims for equitable relief because they have not shown an entitlement to equitable relief. Additionally, Plaintiffs' Second Claim must be dismissed even if it is brought under the APA because Plaintiffs have an adequate alternative remedy. Accordingly, the Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1).

[3] Even if there were no alternative remedy available, Plaintiffs' Second Claim would fail because: (1) the Border Patrol activities which Plaintiffs challenge are not "final agency actions" because they neither mark the consummation of an agency's decision making process nor determine legal rights and obligations, *see Bennet v. Spear*, 520. U.S. 154, 177-78 (1997); and (2) Plaintiffs seek broad, programmatic relief, *see Lujan*, 497 U.S. at 882; *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) ("Nor is this programmatic challenge made justiciable by the fact that the [plaintiffs] identified some specific [actions] in their pleadings that they argue are final agency actions.").

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Respectfully submitted on August 10, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this August 10, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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