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' MOTION TO DISMISS FOR LACK OF JURISDICTION NOTED ON MOTION CALENDAR: August 3, 2012

I. INTRODUCTION

On April 26, 2012, Plaintiffs filed a Complaint alleging that the United States Border Patrol is conducting traffic stops "without appropriate reasonable suspicion" on the Olympic Peninsula of Washington State as a result of racial profiling. Complaint ¶ 2 (Dkt. No. 1). Plaintiffs have styled their Complaint as a class action, *id*. ¶¶ 1-5, 72-79, and have alleged violations of the Fourth Amendment and 8 U.S.C. § 1357. *Id*. ¶¶ 80-87. Plaintiffs request declaratory judgment and injunctive relief, but do not seek compensatory damages. *Id*. at p. 20-21. Plaintiffs, however, lack standing to seek

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equitable relief. Moreover, § 1357 does not provide a private cause of action. Accordingly, this Court should dismiss their claims for lack of subject matter jurisdiction.

II. FACTUAL ALLEGATIONS

The three named plaintiffs in this action allege interactions with Border Patrol that are unrelated. Each of their allegations is summarized below, and should be considered true for purposes of this Motion.[1] For each of the interactions, Plaintiffs allege that a stop was made without reasonable suspicion and occurred because Plaintiffs or other occupants of vehicles appeared to be persons of color based on their complexion and hair color. *See* Complaint ¶¶ 21, 23, 25, 28, 30, 32.

Plaintiff Sanchez

Plaintiff Jose Sanchez (Sanchez) alleges that he has been "stopped" by the Border Patrol in Forks, Washington, on three occasions. First, Sanchez alleges that during or around the winter of 2008-2009, he was in a vehicle that was followed by one or more Border Patrol agents. *Id.* ¶ 20. When the vehicle arrived at Sanchez's house, he alleges that the Border Patrol agents began approaching him and that he "began to record the stop with his cell phone." *Id.* According to Sanchez, the agents then left. *Id.* Sanchez does not allege that he had any contact with the agents.

Sanchez alleges a second stop occurred during or around the summer of 2009. *Id.* ¶ 22. Sanchez alleges he was traveling in a vehicle which was stopped by the Border Patrol, and that during the stop he was questioned by two Border Patrol agents

[1] Although irrelevant for purposes of this Motion, it should be noted that Defendants dispute many of Plaintiffs' factual allegations.

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concerning his immigration status. *Id*. Sanchez further alleges that he was informed that the vehicle had been stopped because the window tint was too dark and that the agents only wanted to see his ID and ask how long he had been in the United States. *Id*.

Finally, Sanchez alleges he was stopped by the Border Patrol for the third time during or around the fall of 2011. *Id*. ¶ 24. He alleges that he was again in a vehicle which was stopped because the window tint was too dark, and that the agents only wanted to see his ID and ask how long he had been in the United States. *Id*.

Sanchez alleges he tried to file a complaint with the Border Patrol via telephone, but was informed that the supervisor would not provide the names of the agents involved over the phone. *Id*. ¶ 26. He alleges that the Border Patrol supervisor stated, "we have certain cars that we need to pull over." *Id*.

Plaintiff Contreras

Plaintiff Ismael Ramos Contreras (Contreras) alleges that he has been "stopped" by the Border Patrol on two occasions. First, Contreras alleges that on July 22, 2011, he and four other individuals were traveling in a vehicle which was stopped by the Border Patrol in Port Angeles, Washington. *Id*. ¶ 27. Contreras alleges that once the vehicle was stopped, a Border Patrol agent "unsuccessfully tried to grab the keys from the vehicle," and upon receiving them from the driver "retained the keys for the duration of the stop." *Id*. Contreras further alleges that Border Patrol agents questioned him regarding his immigration status and insisted that he hand over his identifying documents, but that the agents "failed to provide [him] with a reason for the stop." *Id*.

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Contreras alleges a second stop occurred on December 2, 2010, outside the Clallam County District Courthouse in Forks. *Id.* ¶ 29. According to Contreras, a Border Patrol agent in plainclothes approached him and questioned him about his immigration status, as well as where he lived and where he was born. *Id.*

Plaintiff Grimes

Plaintiff Ernest Grimes (Grimes) alleges only one interaction with the Border Patrol. Grimes alleges that on October 15, 2011, the vehicle he was in was stopped by the Border Patrol near Clallam Bay, Washington. *Id.* at 31. He alleges that a Border Patrol agent approached his passenger window with his hand on his holstered weapon. *Id.* Grimes alleges that he was questioned regarding his immigration status despite the fact that he was wearing a correctional-officer uniform at the time, and that no reason was given for the stop. *Id.*

III. LEGAL STANDARD

Because standing pertains to a federal court's subject matter jurisdiction, it is properly raised in a Rule 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In reviewing a facial challenge, which contests the sufficiency of the pleadings, the court considers only the allegations of the complaint, accepting such allegations as true and drawing reasonable inferences in favor of the plaintiff. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In resolving a factual attack, however, "the district court

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may review evidence beyond the complaint" and "need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone*, 373 F.3d at 1039.

IV. ARGUMENT

1. The Court Should Dismiss Plaintiffs' Claims for Lack of Jurisdiction Because Plaintiffs Have Failed to Establish Standing to Seek Equitable Relief.

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). "Standing addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication." *Chandler*, 598 F.3d at 1122. When a plaintiff seeks prospective equitable relief, the standing analysis involves two distinct components. *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999); *Stevens v. Harper*, 213 F.R.D. 358, 366-67 (E.D. Cal. 2002). First, courts consider the constitutional requirements for standing, under which a plaintiff must show a credible threat of future injury which is sufficiently concrete and particularized to meet the "case or controversy" requirement of Article III. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-04 (1983). Second, courts consider whether a plaintiff has established an entitlement to equitable relief. *See Lyons*, 461 U.S. at 111; *Hodgers-Durgin*, 199 F.3d at 1042. In order to establish such entitlement, the plaintiff must not only establish a likelihood of future injury, but also show an imminent threat of irreparable harm. *Lyons*, 416 U.S. at 111; *Stevens*, 213 F.R.D. at 366-67. A plaintiff's equitable claims must be dismissed if they fail to satisfy either inquiry. *See Hodgers-Durgin*, 199 F.3d at 1042.

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"In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *See Bates v. United Parcel Serv.*, 511 F.3d 974, 985 (9th Cir. 2007). Any injury to unnamed members of a proposed class, however, is irrelevant to the standing analysis. *Hodgers-Durgin*, 199 F.3d at 1045. The party invoking federal jurisdiction has the burden to establish standing, and the court presumes lack of jurisdiction unless the claimant proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376-78 (1994); *Colwell v. Dept. of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009). Where a court lacks subject-matter jurisdiction, the action must be dismissed. *See* Fed. R. Civ. P. 12(b)(1).

a. Plaintiffs Have Not Established an Entitlement to Equitable Relief.

Plaintiffs lack standing because they have failed to satisfy the prerequisites for equitable relief.[2] Although entitlement to equitable relief is related to the Article III analysis, *see Lyons*, 461 U.S. at 103 (noting that Article III considerations "obviously shade into those determining whether the complaint states a sound basis for equitable relief"), "[t]he imminent threat showing is a separate jurisdictional requirement, arising

[2] Defendants do not concede that Plaintiffs satisfy the Article III test. Nevertheless, because the lines of analysis are so similar and because Plaintiffs must meet both tests to establish standing, this Court need only address whether Plaintiffs have established an entitlement to equitable relief at this time. *See Hodgers-Durgin*, 199 F.3d at 1042. Such an approach comports with the Ninth Circuit's decision in *Hodgers-Durgin*, where the court found it unnecessary to rule on the existence of Article III standing because the plaintiffs were "not entitled to equitable relief." *Id.* ("[E]ven if we assume the plaintiffs have asserted sufficient likelihood of future injury to satisfy the 'case or controversy' requirement of Article III standing to seek equitable relief, we find that plaintiffs are not entitled to equitable relief because of the second, alternative ground advanced in *Lyons* . . ."). Defendants reserve the right to contest Article III standing in future filings with this Court.

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independently from Article III, that is grounded in the traditional limitations on the court's power to grant injunctive relief." *Stevens*, 213 F.R.D. at 366 (citing *Lyons*, 461 U.S. at 111; *Hodgers-Durgin*, 199 F.3d at 1042). To establish an entitlement to injunctive relief, the plaintiff must allege an imminent threat of irreparable harm. *Id*.

Additionally, in order to obtain declaratory relief, a plaintiff must show that his claim is ripe for adjudication. *Hodgers-Durgin*, 199 F.3d at 1044. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* (quoting *Texas v. United States*, 523 U.S. 296 (1998)). "In suits seeking both declaratory and injunctive relief against a defendant's continuing practices, the ripeness requirement serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief." *Id.* "Therefore, where the named plaintiffs fail to establish imminent injury for the purposes of injunctive relief, their related claims for declaratory relief must be dismissed as unripe." *Stevens*, 213 F.R.D. at 367.

In *Hodgers-Durgin*, the Ninth Circuit held that the plaintiffs had not established their entitlement to equitable relief. There, two named plaintiffs filed a class action complaint against the Border Patrol seeking a declaratory judgment that the Border Patrol's roving patrol operations — whereby agents develop reasonable suspicion based on their observations of moving traffic and other articulable facts — violated the Fourth Amendment's prohibition on unreasonable searches and seizures. *Hodgers-Durgin*, 199 F.3d at 1038. The plaintiffs also sought an injunction prohibiting the Border Patrol from conducting roving patrols and other allegedly unconstitutional practices and requiring the

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Border Patrol to implement measures "sufficient to prevent resumption of those practices." *Id*. at 1038-39.

The first named plaintiff in *Hodgers-Durgin*, Lopez, claimed that he drove on the same stretch of Highway I-19 in Arizona two or three times a week, and that every time he traveled that stretch of I-19 he saw Border Patrol agents. *Id*. at 1039. Despite seeing Border Patrol agents regularly, however, Lopez alleged only one encounter with the Border Patrol in a ten-year period. *Id*. Similarly, the second named plaintiff, Hodgers-Durgin, claimed she drove a specific stretch of highway approximately four to five times a week, and that she saw Border Patrol agents "all over the place" while traveling that route. *Id*. Nevertheless, like Lopez, Hodgers-Durgin alleged only one encounter with the Border Patrol in a ten-year period. *Id*.

Although the Ninth Circuit found the named plaintiffs' factual allegations somewhat distinguishable from those in *Lyons*, the court held that the plaintiffs lacked standing. *Id*. at 1041-44. Specifically, the court held that an "equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff[s] will be wronged again — a 'likelihood of substantial and immediate irreparable injury.'" *Id*. at 1042 (quoting *Lyons*, 461 U.S. at 111). Applying this standard, the Ninth Circuit held that the named plaintiffs failed to demonstrate a sufficient likelihood of future injury to warrant equitable relief. *Id*. at 1044. The Ninth Circuit found significant the fact that both plaintiffs traveled frequently in their vehicles and saw Border Patrol agents regularly while doing so, but each had only been stopped once. *Id*. The court held that it was not

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sufficiently likely that Lopez and Hodgers-Durgin themselves would again be stopped by the Border Patrol and, thus, there was no basis for granting injunctive relief. *Id*. Further, based on its finding that the plaintiffs failed to show a sufficient likelihood of future harm, the Ninth Circuit held that the plaintiffs' claim for declaratory relief was not ripe for review. *Id*. at 1044. As the court noted, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id*. (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). The plaintiffs' claims that they would be stopped again by the Border Patrol were held to be "simply too speculative to warrant an equitable judicial remedy, including declaratory relief . . . ."[3] *Id.*

[3] In reaching its holding in *Hodgers-Durgin*, the Ninth Circuit was also mindful of Supreme Court precedent that federal courts should exercise extreme caution in granting equitable relief that could interfere with the operations of the Executive branch:

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution . . . . [T]he distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly.

Hodgers-Durgin, 199 F.3d at 1043 (quoting *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996)). The Ninth Circuit provided further that, "[i]n the absence of a likelihood of injury to the named plaintiffs, there is no basis for granting injunctive relief that would restructure the operations of the Border Patrol and that would require ongoing judicial supervision of an agency normally, and properly, overseen by the executive branch." *Id.* at 1044.

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Similarly, in *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723 (N.D. Ohio 2000), the court ruled that the named plaintiffs in a civil rights class action failed to demonstrate a likelihood that the Ohio State Highway Patrol would again unlawfully interrogate them and seize their green cards, based on their Hispanic appearances alone. 95 F. Supp. 2d at 733. The named plaintiffs alleged that they were traveling on a highway when Ohio State Highway Patrol pulled them over for a faulty headlight. *Id*. During the traffic stop, officers asked to see the plaintiffs' identification and green cards, ultimately seizing the green cards and only returning them four days later. *Id*. at 728.

The plaintiffs filed a class action complaint which sought, among other things, an injunction barring the Highway Patrol from asking motorists about their immigration status on the basis of their Hispanic appearance. *Id*. at 729. The court held that the named plaintiffs lacked standing to obtain equitable relief because they could not show a likelihood that they would be questioned about their immigration status or have their green cards seized again at some future time. *Id*. at 730-31. The court noted that the plaintiffs had alleged only a single stop. *Id*. at 731. Additionally, the court reasoned that even if the Highway Patrol were systematically discriminating against Hispanic-looking motorists by questioning them about their immigration status and seizing green cards, that injury was contingent on the Highway Patrol stopping the motorists in the first place. *Id*. The court found that this contingency further diminished the likelihood that the named plaintiffs would suffer an imminent injury without the injunction. *Id*. Thus, the court ruled that the named plaintiffs did not have standing to seek the injunction that they

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requested. *Id*. at 733. The court further held that it could not consider the allegations of unnamed class members in determining whether plaintiffs had standing to pursue equitable relief, stating that "the named plaintiffs themselves must show that they are likely to be repeat victims." *Id*. at 733 (citing *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974)).

Like the plaintiffs in *Hodgers-Durgin* and *Farm Labor*, Plaintiffs have not shown a "likelihood of substantial and immediate irreparable injury." Despite living and traveling in a rural area that Plaintiffs allege has seen a "dramatic increase" in the number of Border Patrol agents, Plaintiff Grimes only alleges that he has been stopped once. A single stop, however, is insufficient to establish a likelihood that he will be stopped again. *See Hodgers-Durgin*, 199 F.3d at 1044 (finding it "not sufficiently likely" that plaintiffs who had been stopped only once over the past 10 years would be stopped again); *Farm Labor*, 95 F. Supp. 2d at 733 (holding that "the current named plaintiffs, having been stopped but once, lack standing to seek equitable relief"). Plaintiff Contreras' allegations are insufficient for the same reasons: although Contreras alleges that he has been "stopped" twice, the second alleged incident does not constitute a seizure under well-settled Fourth Amendment jurisprudence. *United States v. Washington*, 490 F.3d 765, 770 (9th Cir. 2007) ("It is well established, however, that the Fourth Amendment is not implicated when law enforcement officers merely approach an individual in public and ask him if he is willing to answer questions."); *Florida v. Royer*, 460 U.S. 491, 497 (1983) ("Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is

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willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . . ."). Accordingly, Contreras only alleges one true "stop," which, as noted above, is insufficient to establish the requisite "likelihood of substantial and immediate irreparable injury." *See Hodgers-Durgin*, 199 F.3d at 1044; *Farm Labor*, 95 F. Supp. 2d at 733.

Finally, Plaintiff Sanchez's allegations also fail to establish a likelihood that he will be stopped again in the imminent future. Although Sanchez alleges he has been stopped three times, the first alleged incident does not constitute a seizure under the Fourth Amendment. *See Washington*, 490 F.3d at 770; *Royer*, 460 U.S. at 497. Indeed, Sanchez does not allege that the officers pulled his car over, made a show of authority, restricted his freedom in any way, or even spoke to him. Moreover, though Sanchez does allege two vehicle stops that, if they occurred as alleged, do constitute seizures under the Fourth Amendment, he alleges that those stops occurred during the summer of 2009 and fall of 2011. *See* Complaint ¶¶ 22, 24. Thus, Sanchez's alleged stops took place more than two years apart, and the most recent occurred approximately six months prior to the filing of Plaintiffs' Complaint. Sanchez has not alleged that he has had any additional interactions with or been stopped by the Border Patrol since then. As noted above, the Olympic Peninsula is predominantly rural in nature and sparsely populated and Plaintiffs allege that "there has been a dramatic increase in the number of Border Patrol agents situated on the Olympic Peninsula." Complaint ¶ 65. Viewed in that light, the fact that Sanchez went more than two years without being stopped, as well as the fact that he has not alleged any interaction with the Border Patrol in the six months preceding the filing

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of the Complaint, belies any argument that he faces a real and immediate threat that, unless the court intervenes, he will be stopped again by the Border Patrol without reasonable suspicion. *See Lyons*, 461 U.S. at 108 (concluding that Lyons lacked standing and noting that "five months had elapsed between [the incident] and the filing of the complaint, yet there was no allegation of further unfortunate encounters between Lyons and the police"); *see also Mancha v. ICE*, No. 1:06-cv-2650, 2007 WL 4287766, *2 (N.D. Ga. Dec. 5, 2007) (holding plaintiffs lacked standing when "it ha[d] been over a year" since the alleged incident and there was "no claim by the Plaintiffs that anything similar has happened").

Plaintiffs' one-off or infrequent interactions with the Border Patrol fall far short of establishing an imminent threat of irreparable harm. *See Stevens*, 213 F.R.D. at 366. Accordingly, Plaintiffs' allegations that they themselves will be improperly stopped again by the Border Patrol in the imminent future is "simply too speculative to warrant an equitable judicial remedy, including declaratory relief . . . ." *Hodgers-Durgin*, 199 F.3d at 1044. Moreover, it is irrelevant whether any of the unnamed members of the purported class has standing. *Id*. at 1045. As the court aptly stated in *Farm Labor*, "it is not enough that the unnamed class members, as a group, almost certainly will be subject to the practice in question: the named plaintiffs themselves must show that they are likely to become repeat victims." *Farm Labor*, 95 F. Supp. 2d. at 733 (citing *Allee v. Medrano*, 416 U.S. 802, 828-829 (1974)). Thus, the Court need only consider the allegations of Plaintiffs Sanchez, Contreras, and Grimes to determine whether Plaintiffs have adequately demonstrated that they are entitled to equitable relief. *See B.C. v. Plumas*

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Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999) ("A class of plaintiffs does not have standing to sue if the named plaintiff does not have standing.").

Based on their own allegations, Plaintiffs have failed to demonstrate a likelihood of substantial and imminent irreparable injury sufficient to establish an entitlement to injunctive relief against Defendants. Likewise, because the named plaintiffs fail to establish imminent injury for the purposes of injunctive relief, their related claims for declaratory relief must be dismissed as unripe. Accordingly, the Court should dismiss Plaintiffs' equitable claims for lack of subject matter jurisdiction.

2. 8 U.S.C. § 1357 Does Not Provide a Private Cause of Action.

In addition to asserting claims under the Fourth Amendment, Plaintiffs also bring a claim under 8 U.S.C. § 1357. *See* Complaint ¶¶ 83-87. Under their Second Claim for Relief, Plaintiffs assert that Defendants violated § 1357 by "stopping the Plaintiffs and Class Members without reasonable suspicion." *Id.* ¶ 86. Section 1357 does not, however, provide for a private cause of action; thus, this Court should dismiss Plaintiffs' Second Claim for Relief for lack of subject matter jurisdiction.

Congress established the powers of immigration officers in 8 U.S.C. § 1357. Under § 1357(a)(2), Border Patrol agents (as immigration officers) are authorized "to board and search for aliens any . . . vehicle" "within a reasonable distance from any external boundary of the United States." Border Patrol agents may only do so, however, when they have "reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States." 8 C.F.R. § 287.8(b)(2). As discussed

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above, Plaintiffs allege that the Border Patrol has been conducting vehicle stops without reasonable suspicion. Even if Plaintiffs' allegations are accepted as true, however, that does not empower them to bring an action under § 1357.

"[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (quotation omitted). "Instead, the statute must either explicitly create a right of action or implicitly contain one." *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230 (9th Cir. 2008). Statutes that expressly create a private cause of action identify the persons able to bring suit, those who are potentially liable, the forum for suit, and the potential remedy available. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008). Conversely, a statute that "does not mention the availability of any action to enforce its mandates, nor . . . explicitly describe a forum in which suit may be brought or a plaintiff for whom such a forum is available," does not expressly create a private cause of action. *In re Digimarc*, 549 F.3d at 1230. If a federal statute does not create an express private cause of action, suit may only be brought if "Congress intended to provide the plaintiff with a[n implied] private right of action." *Id.*

In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court created a four-factor test for determining the existence of an implied private cause of action. The factors identified by the Court are: (1) whether the plaintiff is a member of the class for whom the statute was enacted to benefit; (2) whether there is any indication of legislative intent to create or deny a remedy; (3) whether it is consistent with the legislative scheme to imply a remedy;

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and (4) whether the cause of action is one traditionally relegated to state law. *Cort*, 422 U.S. at 78. Although *Cort* identified four factors, subsequent Supreme Court and Ninth Circuit case law has focused the analysis on the second factor — whether Congress intended to provide the plaintiff with a private cause of action — as "the key inquiry in this calculus." *See In re Digimarc*, 549 F.3d at 1231 (internal quotation omitted); *Touche Ross*, 442 U.S. at 578 ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."). "Indeed, the three *Cort* questions that are not explicitly focused on legislative intent are actually indicia of legislative intent, such that the *Cort* test itself is focused entirely on intent." *Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007). Therefore, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *See Alexander*, 532 U.S. at 289 (internal quotations omitted); *see also In re Digimarc Corp.*, 549 F.3d at 1232 (same). "In the absence of clear evidence of congressional intent, [courts] may not usurp the legislative power by unilaterally creating a cause of action." *In re Digimarc*, 549 F.3d at 1230-31.

Although the Ninth Circuit has not addressed whether 8 U.S.C. § 1357 creates a private cause of action for violation of its provisions, the Sixth Circuit has held that it does not. *See Chairez v. I.N.S.*, 790 F.2d 544, 548 (6th Cir. 1986). In *Chairez*, the court considered and rejected the plaintiff's contention that § 1357(a)(2) created a private cause

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of action for his claim of unlawful detention. The court noted that "Congress expressly provided a statutory remedy for the illegal detention . . . by INS officials" by allowing aliens to seek review via habeas corpus proceedings. 790 F.2d at 547. The court applied the *Cort* factors, and concluded that there was "no substantial countervailing evidence of congressional intent to permit such a supplementary remedy." *Id*. at 548. Accordingly, the court held that § 1357 does not create an implied private cause of action. *Id*.

The rationale in *Chairez* applies equally well in the case at hand.[4] The analysis is the same despite the fact that Plaintiffs' allege a violation of a different clause of subsection (a)(2) than was at issue in *Chairez*. Plaintiffs already have an avenue for challenging the allegedly unconstitutional actions of the Border Patrol via the Fourth Amendment, as they did in their First Claim for Relief. Complaint ¶¶ 80-82. Indeed, Plaintiffs' First and Second Claims for relief assert the same factual bases and invoke the same the legal test — whether Border Patrol agents had reasonable suspicion to make the stops. *See id.* ¶¶ 80-82, 83-87. Moreover, as the Sixth Circuit correctly concluded, there is no substantial evidence that Congress intended § 1357 to create an implied private cause of action. Finally, § 1357 focuses on the persons regulated (immigration officers) rather than the individuals protected, and thus does not imply an intent to confer a private cause of action. *See Alexander*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer

[4] It cannot reasonably be argued that § 1357 *expressly* creates a private cause of action as it does not identify who may bring suit, those who are potentially liable, the forum for suit, or the potential remedy available. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008).

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rights on a particular class of persons." (internal quotations omitted)); *In re Digimarc Corp.*, 549 F.3d at 1232 (same). Accordingly, the Court should dismiss the Plaintiffs' Second Claim for Relief for lack of subject matter jurisdiction.

V. 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' claims under 8 U.S.C. § 1357 must be dismissed because the statute does not provide a private cause of action. Accordingly, the Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted on July 12, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this July 12, 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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