UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION, et al., Defendants.	)	No. 1:20-cv-852-LM

OFFICIAL DEFENDANTS'
MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to Rule 12(b)(1) or, in the alternative, Rule 12(b)(6), of the Federal Rules of Civil Procedure, the Official Defendants move this Court to dismiss Plaintiffs' Amended Complaint for lack of subject-matter jurisdiction, or, alternatively, for failure to state a plausible claim for relief.

In support of this Motion, the defendants refer the Court to the attached Declarations of Chief Patrol Agent Robert N. Garcia and Deputy Chief Patrol Agent Fortunato, the supporting memorandum of law, and the record of this litigation.

Therefore, the defendants request this Court dismiss the Amended Complaint in full either under Rule 12(b)(1) or Rule 12(b)(6).

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Director

INDRANEEL SUR (D.C. Bar No. 978017)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 616-8488
Indraneel.Sur@usdoj.gov

Of Counsel:
KRISTIN A. TAYLOR
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch

JOHN J. FARLEY
United States Attorney

By: /s/ Robert J. Rabuck
Robert J. Rabuck
First Assistant U.S. Attorney/Civil Chief
New Hampshire Bar No. 2087
53 Pleasant Street, 4th Floor
Concord, NH 03301
(603) 225-1552
Rob.Rabuck@usdoj.gov

By: /s/ Michael McCormack
Michael McCormack
Assistant U.S. Attorney
New Hampshire Bar No. 16470
53 Pleasant Street, 4th Floor
Concord, NH 03301
(603) 225-1552
Michael.McCormack2@usdoj.gov

Attorneys for Official Defendants

Dated: March 22, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, et al., Plaintiffs, v. U.S. CUSTOMS AND BORDER PROTECTION, et al., Defendants.	)	No. 1:20-cv-852-LM

OFFICIAL DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR RULE 12(b)(1) AND RULE 12(b)(6)
MOTION TO DISMISS THE AMENDED COMPLAINT

INTRODUCTION

The Official Defendants file this memorandum of law in support of their motion to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)") or, in the alternative, Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). The Amended Complaint demands forward-looking relief–an extraordinary injunction and a declaration—purportedly because Plaintiffs previously encountered temporary interior checkpoints allegedly operated in violation of the authorizing federal statute (8 U.S.C. § 1357(a)(3), in addition to the Fourth Amendment of the United States Constitution. That claim is now nonjusticiable. The original Plaintiff's own intention to travel in the vicinity of the anticipated checkpoints is no longer concrete, and the new Plaintiff was not subject to criminal investigation or prosecution. Moreover, as shown in the declarations Defendants file today, the critical characteristics of the checkpoints Plaintiffs encountered have also changed in the long months that have passed since the alleged encounters in 2017 through 2019. Alternatively, if the claim were justiciable, the fundamental obligation to avoid unnecessary constitutional decisions

requires that Plaintiffs present their claim under the Administrative Procedure Act ("APA"). Plaintiffs should not be allowed to bypass either the APA or the constitutional avoidance doctrine by proceeding to litigate their Fourth Amendment contention, given that Plaintiffs themselves have raised the prospect that the Court could instead remedy the alleged wrongs by ruling for Plaintiffs on their statutory contention, vacating the challenged agency orders, and remanding for further agency proceedings—as it would in remedying any garden-variety APA claim. In contrast, the injunction and declaration demanded cannot be reconciled with established limitations on federal jurisdiction and equitable relief, and should be denied.

SUMMARY OF THE ARGUMENT

The Amended Complaint should be dismissed for lack of subject-matter jurisdiction, or, alternatively, for failure to state a plausible claim for relief, for five main reasons.

First, the two Plaintiffs lack Article III standing. Their allegations seek to rely on "a highly attenuated chain of possibilities" insufficient to show a "certainly impending" threatened injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 416 (2013). Although this Court denied the Rule 12(b)(1) motion directed to the original complaint, key to that decision was Plaintiff Drewniak's averred intention to travel to the White Mountains on a path near the temporary interior checkpoint in Woodstock, NH that gave rise to his August 2017 arrest and subsequent state court victory, such that this Court reasoned that he alleged suffering an impending injury from the anticipated checkpoint operation. But Plaintiff Drewniak no longer alleges such an intention to travel to the White Mountains because of intervening personal circumstances. And Plaintiff Fuentes's nebulous allegations about his passage through past checkpoints (albeit not later than 2019, more than two years ago) cannot suffice to show injury-

in-fact to seek the injunction Plaintiffs have demanded, given that Fuentes does not allege he was ever arrested at any checkpoint.

Moreover, even apart from the deficiencies in Plaintiffs' own averments of standing, the declarations Defendants are filing today in support of the Rule 12(b)(1) motion clarify that the particular circumstances that gave rise to Plaintiff Drewniak's asserted Fourth Amendment violation in August 2017 are not likely to result in similar injury again to him (or anyone else). State police are no longer continuously present with United States Border Patrol ("USBP") agents at the agency's checkpoints. USBP agents now may seize and destroy personal use quantities of marijuana discovered on an individual during a checkpoint operation rather than referring those individuals to state law enforcement, reflecting New Hampshire's recent decriminalization of personal-use quantities of marijuana. Furthermore, the particular agency orders underpinning the checkpoint operations Plaintiffs allegedly encountered long ago expired. Indeed, USBP is not alleged to have operated any challenged checkpoint in Woodstock, NH after 2019. Other than sheer conjecture, there is no basis for concluding that the conditions giving rise to Drewniak's arrest will recur, as to Drewniak or any other person.

Second, Plaintiffs improperly attempt to rely on alleged injuries of and rights of parties not before the Court. Under the ordinary rule against third-party standing, Plaintiffs cannot establish either Article III injury-in-fact, or a facially plausible claim, by asserting the rights of—or seeking an expansive injunction purporting to restrain Defendants' law enforcement obligations toward—nonparties who allegedly passed through past checkpoints. Plaintiffs have neither "a 'close' relationship" with those nonparties, nor do Plaintiffs identify any "hindrance" to those nonparties' ability to protect their own interests. *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004).

Third, in an apparent attempt to circumvent the parameters of ordinary APA review *and* the constitutional avoidance doctrine, Plaintiffs have purported to seek relief exclusively under the Fourth Amendment. Yet Plaintiffs have alleged that the challenged checkpoints are *both* contrary to the pertinent statute, 8 U.S.C. § 1357(a)(3) (authorizing searches "for the *purpose of* patrolling the border to prevent the illegal entry of aliens") (emphasis added), *and* contrary to the Fourth Amendment, which *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), interpreted to disallow "a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 38. And Plaintiffs also contend that the checkpoints lack the "effectiveness" they argue the Fourth Amendment requires. But according to the Amended Complaint itself, the Court could simply decide the case entirely in Plaintiffs' favor on the statutory contention without reaching any constitutional contention, because if (as Plaintiffs allege) the checkpoints' purpose is other than preventing violations of immigration law, then the checkpoints are unauthorized by § 1357(a)(3)—which would be a traditional ground for their invalidation under the APA. By omitting any APA claim, the Amended Complaint apparently attempts to force this Court to decide the Fourth Amendment question instead.

That is a pleading gambit which the Court should reject. Plaintiffs' tactical choice cannot override the fundamental duty to decide the case on narrower grounds where possible to avoid constitutional issues. *Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 178–79 (1st Cir. 2021). One available path would thus be to hold Plaintiffs to their pleading choice, and dismiss the Amended Complaint. Another available path would be for the Court to enter an order construing the Amended Complaint as raising the identified statutory contention as well as the Fourth Amendment contention, through APA causes of action.

Fourth, either under Rule 12(b)(1) or 12(b)(6), the sweeping injunction Plaintiffs demand should be denied, and the relief should be confined to what the APA ordinarily affords, namely, vacatur of the challenged agency action and remand for further agency proceedings (not any injunction or other declaration). Plaintiffs demand an injunction against operation of "additional unconstitutional [USBP] checkpoints in New Hampshire for the purpose of drug interdiction," Am. Compl. ¶ 121 [hereinafter "AC"], and "additional unconstitutional [USBP] checkpoints on I-93 in Woodstock, [NH], that seize individuals without a warrant or reasonable suspicion," *id.* ¶ 122. Even if Plaintiffs were to have an injury-in-fact, they cannot use that as "leverage" to obtain such expansive relief free from the temporal, geographical, and other characteristics of the particular episodes in which Plaintiffs experienced purported seizures or searches. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). Among other flaws, the injunction demanded is cast in such indefinite terms that it would require Defendants to constantly seek ongoing guidance from this Court about what checkpoint operations are permissible, and it would require the Court to predict how the Fourth Amendment would apply to future interactions between Defendants and nonparty drivers passing through temporary interior checkpoints, foreclosing the Court's ability to consider case-specific circumstances critical to deciding any Fourth Amendment question.

Fifth, the declaration demanded should be denied because, even if there were jurisdiction to issue it, such a decree would lack any appropriate "useful purpose." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952). Plaintiff Drewniak already benefits from a state court victory, which was a determination ending his criminal case, and neither he nor Plaintiff Fuentes alleges any actual need for a parallel decision from this Court. To the contrary, given Plaintiffs'

inability to allege experiencing any allegedly improper checkpoint operations later than 2019, any such declaration would only address events of more than two years ago.

BACKGROUND

Jesse Drewniak filed the original complaint in August 2020 against Chief Patrol Agent Robert N. Garcia in his official capacity, United States Customs and Border Protection ("CBP"), and the USBP. Document Number ("DN") 1. Drewniak alleged that USBP conducted temporary interior checkpoints in the Woodstock, NH area that violated his Fourth Amendment rights because USBP operated the checkpoints "for the purpose of drug interdiction," and the plaintiff was "unreasonably seized . . . without a warrant or reasonable suspicion because the checkpoint's effectiveness (if any) at minimizing illegal entry from the border was outweighed by the degree of intrusion on his individual rights." DN 1 at 29–30. Drewniak sought injunctive and declaratory relief, to halt all future checkpoints conducted by USBP in New Hampshire. *Id.* at 29-31. The Court has recounted the details of Drewniak's allegations in its Order of April 2, 2021. DN 49; 2021 WL 1318028 ("MTD Order").

Plaintiffs filed the Amended Complaint on December 8, 2021. DN 64. The Amended Complaint states (albeit in a footnote) that Drewniak, a resident of Hudson, no longer travels to the White Mountains with frequency because of COVID-19 and recent challenges in his personal life, including an unfortunate family emergency. AC ¶ 101 n.21. Otherwise, the Amended Complaint is essentially the same as the original complaint, except that it adds a new plaintiff, Sebastian Fuentes. He allegedly lives in the Woodstock, NH area and traveled through USBP checkpoints near the town several times. AC ¶¶ 105-110. On two of those occasions, in August 2018 and June 2019, Fuentes allegedly traveled intentionally to the Woodstock checkpoints to "chronicle" his experiences on video and "his objection" to the checkpoints. AC ¶ 108.

Legal Standard For Rule 12(b)(1) And Rule 12(b)(6) Motions

Defendants' declarations filed today in support of the Rule 12(b)(1) motion challenge the completeness (and in that sense the accuracy) of the Amended Complaint's allegations of subject-matter jurisdiction. "Where a defendant challenges the accuracy of the plaintiffs' allegations, those allegations 'are entitled to no presumptive weight,' and 'the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties.'" *Freeman v. City of Keene*, No. 1:20-cv-963, 2021 WL 3513888, at *1 (D.N.H. Aug. 10, 2021) (McCafferty, J.) (quoting *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001)); *see Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (in examining subject-matter jurisdiction court "may inquire by affidavits or otherwise, into the facts as they exist").

To overcome a Rule 12(b)(6) motion, the pleading "must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Saldivar v. Racine*, 818 F.3d 14, 18 (1st Cir. 2016) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). Discarding "bald assertions, subjective characterizations and legal conclusions," *DM Research, Inc. v. Coll. Of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (quotation marks omitted), dismissal is proper when "the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture," *Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018) (quoting *SEC v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010) (en banc)).

ARGUMENT

A. Plaintiffs' Asserted Future Injuries Are Conjectural And Not Imminent Or Certainly Impending.

Article III of the Constitution limits federal courts' jurisdiction to actual "Cases" or "Controversies." The "threshold requirement" of Article III standing "ensures that" federal courts "act as judges, and do not engage in policymaking properly left to elected representatives." *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013)). To establish Article III standing, a plaintiff must establish (1) that he has "suffered an injury in fact . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) a sufficient "causal connection between the injury and the conduct complained of;" and (3) a "likel[ihood]" that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted). The plaintiff must "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp.,* 547 U.S. at 352; *see Clapper v. Amnesty Int'l USA*, 568 U.S. at 398, 409 (2013); *Summers v. Earth Island Inst.*, 555 U.S. 488, 494–97 (2009). So "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Because its "[r]elaxation … is directly related to the expansion of judicial power," the standing inquiry is "especially rigorous" when reaching the merits would force the judiciary "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper*, 568 U.S. at 408-09 (citations omitted).

To seek injunctive relief, the plaintiff must establish a present injury or an "actual and imminent"—not "conjectural"—threat of future injury. *Summers,* 555 U.S. at 493. That

imminent injury must be present "at the commencement of the litigation," *Davis v. Fed. Election Commission,* 554 U.S. 724, 732 (2008) (citation omitted), *i.e.*, here, the filing of the Amended Complaint, *see Freeman*, 2021 WL 3513888, at *9. Past alleged injuries cannot provide standing to seek future injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief[.]"). Rather, such a controversy exists only when a plaintiff establishes the existence of a "real and immediate threat" that he or she will be subjected to the same conduct that precipitated the litigation. *Id.* at 103. An "allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.'' *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2340 (2014) (quoting *Clapper*, 568 U.S. at 414–15 n.5) (cleaned up). "'[A]llegations of *possible* future injury,' on the other hand, 'are not sufficient.'" *Freeman*, 2021 WL 3513888, at *6 (quoting *Clapper*, 568 U.S. at 409) (in turn quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

The Amended Complaint's allegations satisfy neither of those formulations ("certainly impending" or "substantial risk"), because even the latter formulation is unsatisfied "in light of the attenuated chain of inferences necessary to find harm here." *See Clapper*, 568 U.S. at 414–15 n.5; *see also Doe v. N.H. Dep't of Corr. Comm'r*, No. 21-cv-604, 2022 WL 673251, at *2 (D.N.H. Mar. 7, 2022) (McCafferty, J.) ("To the extent plaintiff seeks an injunction based on a risk of future harm, 'he may pursue forward-looking[ ] injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.'") (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021)). (We refer below to the "certainly impending" formulation for convenience.)

i. Drewniak Now Lacks Concrete Plans To Travel Near Anticipated Checkpoints

This Court previously ruled that Drewniak sufficiently alleged Article III standing because he "is an avid outdoorsman who travels to the White Mountains virtually every week of the year" and will continue trips through Woodstock on I-93 with the same frequency and would likely encounter future checkpoints there. MTD Order, 2021 WL 1318028 at *11.

But now, Drewniak candidly avers (albeit in a footnote) that "in light of COVID-19, additional work responsibilities, and a family medical emergency, [he] travels to the White Mountains with less frequency than he once did or anticipated . . . when the case was first filed. While the future is beyond prediction, [he] ideally intends to resume his prior frequent transit to the North Country once his life circumstances again allow." AC ¶ 101 n.21. Drewniak's challenging and unfortunate circumstances show that there is no longer a real and immediate threat that he will suffer a future injury, which is a prerequisite for standing for injunctive or declaratory relief. *Gray v. Cummings*, 917 F. 3d 1, 19 (1st Cir. 2019); *see also Freeman*, 2021 WL 3513888, at *6 ([A]llegations of possible future injury . . . are not sufficient").

Laufer v. Acheson Hotels, LLC, No. 2:20-cv-00344, 2021 WL 1993555 (D. Maine May 18, 2021), presented a similar deficiency. Laufer was a disability rights advocate who tested hotel reservation systems under the Americans with Disabilities Act. Laufer's amended complaint averred that, since 2019, she had been planning a cross-country trip, including Maine, where the defendant's property was located. *Id* at *5. She averred that her trip was to begin when the pandemic ends. *Id*. The Court concluded that Laufer could not allege an immediate future injury when she had no immediate plan to travel to Maine, and thus lacked Article III standing. *Id.* at *6; *accord Laufer v. Looper*, No. 1:20-cv-02475, 2021 WL 5299585 at *5 (D. Colorado January 27, 2021); *Laufer v. Naranda Hotels*, *LLC*, Nos. 1:20-cv-2136 and 8:20-cv-

1974, 2020 WL 7384726 *5 (D. Md. Dec. 16, 2020); *Shoemaker v. Biden*, No. 1:21-cv-230, 2021 WL 2292287 at *3 (N.D. Ohio June 4, 2021).

As Drewniak acknowledges, his travel plans to the White Mountains are on "hold" "indefinite[ly]" for several reasons and will resume "when circumstances allow." AC ¶ 101 n.21. Such an "indefinite hold on" his "travel plans" necessarily "fails to establish an actual and imminent injury for purposes of prospective relief." *Looper*, 2021 WL 5299585 at *5. Until Drewniak can again allege the solid and immediate plans to travel to the White Mountains that was critical to this Court's prior Rule 12(b)(1) analysis, 2021 WL 1318028, at *11, Drewniak lacks immediate threat of future injury, and, hence, Article III standing.

ii. Fuentes Suffers No Continuing Effects From His Alleged Stops

Fuentes too lacks Article III standing to seek prospective relief. "[W]here standing is at issue, heightened specificity is obligatory at the pleading stage . . . . The complainant must set forth reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing." *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (citation omitted). Fuentes lacks such averments. He alleges that he traveled through border checkpoints "likely" in August 2017 and then again to "chronicle by video" his "objection to them" and his "experience" in August 2018 and June 2019. AC ¶¶ 107–08. But he does not allege that he "experience[d]" or was harmed by any of the characteristics or conditions that gave rise to, for example, the alleged arrest and subsequent state court prosecution of Drewniak. Fuentes does not allege he was subjected to secondary inspection, let alone that any such inspection resulted in

the filing of criminal charges against him for a drug offense (or, indeed, for any other offense). [1] So Fuentes has not alleged any continuing harm to himself from any secondary inspection or any criminal proceeding against him, or any lingering repercussions from any other federal agent conduct against him at his stops.

Moreover, under the rule against third-party standing (Part B, *infra*) and precedent limiting standing to the particular conditions giving rise to the injury-in-fact asserted (Part D, *infra*), Fuentes cannot make up for the deficiency by relying on the injury allegedly suffered by his co-plaintiff or by anyone else. Nor can Fuentes show injury-in-fact by relying on trips he caused to be initiated not for ordinary travel, but to "chronicle by video his experience . . . and his objection to" the checkpoints in 2018 and 2019, AC ¶ 108, given that litigants "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416; *see Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (plaintiff cannot "be heard to complain about damage inflicted by [his] own hand").

So, even assuming, *arguendo*, that on the merits Fuentes could show "past exposure to illegal conduct" under the Fourth Amendment (an assumption that is not facially plausible, as explained Part B, *infra*), Fuentes lacks "any continuing, present adverse effects" of such conduct,

[1] Fuentes allegedly was "seized" at a checkpoint in Woodstock in "Fall 2017—likely the August 2017 checkpoint." AC ¶ 9. Every vehicle at that checkpoint was allegedly stopped and subjected to preliminary inspection, at which agents asked drivers about citizenship, and "drug-detection dogs . . . performed 'pre-primary free air sniffs' of the vehicles," *id.* ¶¶ 3, 43, 69. But "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the [disputed] checkpoints does not transform the seizure into a search." *Edmond*, 531 U.S. at 40. The Amended Complaint does not aver that Fuentes was subjected to any other type of inspection at any checkpoint he encountered. *See id.* ¶¶ 9, 107–08 (alleging Fuentes was "ensnared in" or "went through" checkpoints).

meaning he lacks Article III standing for an injunction. *See Donahue v. City of Boston*, 371 F.3d 7, 14 (1st Cir. 2004) (citation omitted); *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) ("a merits question cannot be given priority over an Article III question").

iii. Plaintiffs Lack Impending Harm Because The Key Conditions Of The August 2017 Checkpoint That Resulted In Drewniak's Arrest No Longer Exist

In any event, even apart from the deficiencies in Plaintiffs' own averments, the current conditions described in the declarations Defendants file herewith show that Plaintiffs lack standing. The declarations establish that at least three critical conditions—or "specific circumstances" underpinning Plaintiffs' Fourth Amendment contention, AC ¶ 31, stemming from what they have characterized as a "policy" that resulted in the August 2017 arrest of Drewniak subsequently invalidated by the New Hampshire trial court—no longer exist. That arrest allegedly stemmed from (1) the continuous presence of state police officers "at the scene of" a USBP checkpoint to investigate and "prosecute" violation of state drug laws in state court, *see* AC ¶¶ 44, 45, 46, 49; (2) USBP "surrender[ing]" to those state police officers seized quantities of "personal use" marijuana for potential criminal proceedings, *see* AC ¶¶ 3, 44, 46 & n.6, 48, 50; and (3) then-existing agency orders purporting to authorize those checkpoints.

The changed circumstances far remove this case from *Dudley v. Hannaford Bros. Co*., 333 F. 3d 299, 306 (1st Cir. 2003), where the plaintiff showed "a real and immediate threat of ongoing harm" predicated on an "offending policy" that "remained *firmly in place*" (emphasis added). This Court found sufficient allegations in Drewniak's original complaint, for purposes of Article III injury-in-fact, supporting "the notion that the August 2017 checkpoint was erected pursuant to an official practice or policy." MTD Order, 2021 WL 1318028, at *12. But even assuming, *arguendo*, for Rule 12(b)(1) purposes only, that Defendants' checkpoint operations

under 8 U.S.C. § 1357(a)(3) could be characterized as a "policy," any such "policy" underpinning Drewniak's August 2017 encounter is not "firmly in place" here, *Dudley*, 333 F.3d at 306. In particular:

First, state police practice has changed. In August and September 2017, state and local law enforcement officers were continuously co-located with, and worked alongside, USBP agents at the Woodstock checkpoints, and handled violations of state law, took custody of evidence, and referred cases for state prosecution. See **Exhibit 1** (hereafter "Garcia Decl.") at ¶ 22. After 2017, it was New Hampshire State Police policy and practice to have no direct role in any future checkpoints, such as staffing having continuous presence at them: they would only be available to answer specific calls to assist USBP in limited circumstances. Garcia Decl. at ¶¶ 24–25. USBP leadership does not ask state or local officers to do otherwise. *Id.* at ¶¶ 26, 29–30. "[S]tate and local law enforcement's involvement in any aspect of an immigration checkpoint is now limited to specific requests for assistance in response to potential criminal activity enforceable under state law or an ongoing safety matter," according to the Swanton Sector's Deputy Chief Patrol Agent. See **Exhibit 2** (hereafter "Fortunato Decl.") at ¶ 6.

Second, since the time of Plaintiff Drewniak's encounter with a checkpoint, state law has changed and resulted in further change to USBP practice. The State's decriminalization of small quantities of marijuana in 2017 prompted another change in checkpoint practices—if federal prosecution was (and is) not likely, USBP agents may seize and destroy the marijuana, rather than turn it over to state or local officers. Fortunato Decl. at ¶ 7. Despite the change in New Hampshire law, marijuana remains unlawful under federal law. *Id*. at ¶ 8.

Third, the pertinent agency orders underlying Plaintiffs' encounters with USBP have expired. Temporary immigration checkpoints are not impromptu or informal exercises stood up

on the whim of an agent. They are official agency actions that can only occur with an operations order approved by Swanton Sector management and USBP Headquarters. Garcia Decl. at ¶¶ 8–9, 13, 20; Fortunato Decl. ¶ 3. Operations orders authorize temporary checkpoints for a limited time, usually a year. *Id.* at ¶ 10. In Swanton Sector, once an operations order expires, checkpoints for another period cannot occur without a new order. Fortunato Decl. at ¶¶ 3, 10. As of the filing of the Amended Complaint, *i.e.*, for fiscal year 2022, there was no operations order authorizing a checkpoint anywhere in New Hampshire. Garcia Decl. at ¶ 33. Nor does the USBP have any plan to seek an operations order for a checkpoint in the relevant geographic area for the fiscal year 2022. *Id.* at ¶ 32. The previous operations orders authorizing checkpoints in New Hampshire have expired. Fortunato Decl. at ¶ 10.

In the absence of an approved and current order, and given the changes in state police practice and in USBP practice described in the declarations filed today, neither Drewniak nor Fuentes can satisfy Article III standing by showing an actual or imminent risk of harm. *See Clapper*, 568 U.S. at 410. Or, in other words: for Drewniak's past experience of being prosecuted in state court for possession of a small amount of hash oil found at an immigration checkpoint (AC ¶¶ 61-95) to be repeated as to Drewniak or any other person, not only would an individual have to again drive through a checkpoint (along with a personal-use quantity of marijuana), but state police practice and USBP practice, tied to state law, would have to revert to the conditions that existed in August 2017, and USBP would have to adopt orders authorizing operations under those (now outdated) conditions. That is an impermissibly "attenuated chain of inferences necessary to find harm here." *See Clapper*, 568 U.S. at 414–15 n.5.

Nor can Plaintiffs satisfy redressability. *Cf.* Part D, *infra* (describing separate redressability deficiencies in the particular injunction demanded). For example, *Case v. Ivey*,

542 F. Supp. 3d 1245 (M.D. Ala. 2021), held that the plaintiffs lacked standing to seek injunctive relief from COVID-19-related orders that were no longer in effect when the lawsuit was filed. *Id.* at 1264. Because the orders had expired more than four months before the plaintiffs filed their complaint, they could not establish the "redressability" element of standing. *Id*. An "injunction prohibiting Defendants from enforcing provisions of their orders that have expired will not redress Plaintiffs' alleged injury." *Id*. Additionally, the expired provisions did not present an ongoing and continuous violation of federal law because they were no longer in effect. *Id*. Here, the last operations order that authorized New Hampshire checkpoints expired and is no longer in effect. Fortunato Decl. at ¶ 10. Plaintiffs face no actual or imminent threat from expired orders. At the same time, Plaintiffs cannot show redressability because the challenged action was not in effect when they filed their suit. *Case*, 542 F. Supp. 3d at 1264.

Against this backdrop, the Fourth Amendment violation Plaintiffs attempt to allege based on Drewniak's past arrest (which resulted in his state court victory, AC ¶¶ 89–95) simply cannot be characterized as anything other than speculative. Plaintiffs therefore fail to "satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410 (describing *Summers* as "rejecting a standing theory premised on a speculative chain of possibilities").

B. The Third-Party Standing Doctrine Forecloses Plaintiffs From Asserting The Rights Of Nonparty Drivers Not Before The Court

Purported rights of individual drivers not before the Court also cannot supply Article III jurisdiction over the injunctive relief claim asserted by the two Plaintiffs in this action, nor can those nonparty drivers' rights be invoked to establish the facial plausibility of Plaintiffs' claims.

Plaintiffs contend, AC ¶¶ 22–31, that the challenged checkpoints to which they were exposed were invalid, *inter alia*, under the Fourth Amendment, because they were "for the purpose of drug interdiction," not prevention of illegal immigration, and, moreover, they were otherwise lacking "effectiveness" under the Fourth Amendment. *See* AC ¶¶ 28–29 (citing *Edmond*, 531 U.S. at 41-42, and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)). But neither Plaintiff has Article III standing to seek an injunction predicated on those contentions, as explained above. And even if newly-added Plaintiff Fuentes were to have such standing, Fuentes's claim would fail under Rule 12(b)(6), *i.e.*, on the merits, because the Amended Complaint lacks factual allegations about *Fuentes's* checkpoint experiences showing he has a facially plausible claim that the checkpoints were for the "primary purpose" of criminal law enforcement, or that they were otherwise contrary to the Fourth Amendment. The averments about Fuentes, AC ¶¶ 105–10, do not show that any actions federal agents took as to Fuentes were primarily for the "general interest in crime control" rather than prevention of illegal immigration. AC ¶ 28. Moreover, those averments do not show that any of his stops differed in kind from those upheld in *Martinez-Fuerte*. *See Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004) (characterizing *Martinez-Fuerte* as "upholding stops of three-to-five minutes" involving "inquiry as to motorists' citizenship and immigration status," where agents "stopped all vehicles systematically"). Nor does Fuentes aver that at any of his stops, federal agents "acted in a discriminatory or otherwise unlawful manner while questioning" him. *See Lidster*, 540 U.S. at 428. The Amended Complaint therefore does not allege facts showing Fuentes has a facially plausible claim that his stops violated the Fourth Amendment.

Rather than make "non-conclusory" and "nonspeculative" allegations about Fuentes that show he has a plausible constitutional claim stemming from any stop he experienced, *Barchock*,

886 F.3d at 48, Plaintiffs have attempted to rely on allegations about the purported experiences of unnamed drivers *not* before the Court (although this action is not a putative class action). In that regard, the Amended Complaint emphasizes the total number of arrests and summonses resulting from the checkpoint that operated August 25–27, 2017, AC ¶¶ 3, 48; *see also id.* ¶ 50; purports to describe checkpoints operated in New Hampshire other than at Woodstock, *id.* at 17 n.10; attempts to depict purported arrests at the Woodstock checkpoint on dates when neither Plaintiff encountered or was arrested at the checkpoints, *id.* ¶¶ 53–54; attempts to depict as relevant the number of people who live in a 100-mile zone near the Canadian border, *id.* ¶ 23; asserts that USBP has purportedly experienced an "increasing role in drug law enforcement," *id.* ¶ 33; *see also id.* ¶¶ 34–35, 38, 59; attempts to depict arrests purportedly at checkpoints in Maine and Vermont, *id.* ¶¶ 55, 58; and discusses data (or lack thereof) for *national* or regional immigration-related apprehensions, including for situations not involving checkpoints, *id.* ¶¶ 36–37, 59. Additionally, Plaintiffs allege that "in at least some sectors along the northern border, there has been more outbound migration into Canada than there is inbound traffic in recent years." *Id.* ¶ 39. Plaintiffs also make broad pronouncements about CBP's general operations "elsewhere in the country," *see id.* ¶ 60, and allege that "abuses at [USBP] checkpoints involving service canines are [] common," *id.* ¶ 92. And, corresponding to those allegations about CBP's conduct as to individuals not before the Court, Plaintiffs outright seek to enjoin Defendants from "operating additional unconstitutional [USBP] checkpoints on I-93 in Woodstock, NH *that seize individuals without a warrant or reasonable suspicion*." *Id.* ¶ 122 (emphasis added). Additionally, Plaintiffs further allege that "[u]nless restrained from doing so, CBP and [USBP] will continue to violate the Fourth Amendment by enforcing this practice and/or custom of

conducting [USBP] checkpoints in New Hampshire *that seize individuals without a warrant or reasonable suspicion*." *Id.* ¶ 124 (emphasis added).

Those repeated allegations about, and the explicit request for injunctive relief against, checkpoint operations against non-party individuals reflect an assumption that Plaintiffs can assert the rights of those individuals, and not just themselves. But that assumption is wrong under the rule against third-party standing.

A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of [other] parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citing *Tileston v. Ullman*, 318 U.S. 44 (1943) (*per curiam*)). That requirement governs Fourth Amendment claims such as those asserted here: "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (internal marks and citations omitted). And that requirement governs even when a party asserts that alleged conduct affecting the party personally *also* affects a third party. *See*, *e.g.*, *United States v. Payner,* 447 U.S. 727, 731–732 (1980) (criminal defendant "lacks [third-party] standing under the Fourth Amendment to suppress . . . documents illegally seized from" his banker). Although this "general prohibition on a litigant's raising another person's legal rights" is distinct from Article III's requirement that the plaintiff suffer a concrete and particularized injury, it serves many of the same important purposes. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citation omitted). In general, only the party afforded a given constitutional right "has the appropriate incentive to challenge (or not challenge) governmental action" in a way that genuinely furthers the right-holder's interests, "and to do so with the necessary zeal and appropriate presentation." *Kowalski v. Tesmer*, 543 U.S. at125, 129 (2004). Moreover, adjudicating rights at the request of third parties could force courts to

consider "questions of wide public significance" in an "abstract" setting removed from the concrete circumstances of the right-holders. *Id*. (citation omitted).

Accordingly, to satisfy the third-party-standing doctrine, the litigant must show, not only that he "personally has suffered an injury in fact that gives rise to a sufficiently concrete interest in the adjudication of the third party's rights," but, further, "that the litigant has a close relationship to the third party"; and "that some hindrance exists that prevents the third party from protecting its own interests." *Council Of Ins. Agents & Brokers v. Juarbe-Jimenez*, 443 F.3d 103, 108 (1st Cir. 2006) (citation omitted); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 1623 n.3 (1989). Those factors are difficult to establish, since it is uncommon both for right-holders to be unable to sue and for another to be properly entrusted to press their interests. Importantly, courts have applied the third-party standing doctrine to dispose of a variety of claims alleging Fourth Amendment violations. [2] Here, even assuming, without deciding, that Plaintiffs' purported injury-in-fact qualifies them to assert the third-party-standing doctrine, the Amended Complaint still fails to allege facts sufficient to support the relationship or hindrance elements. In particular:

[2] *See, e.g.*, *Payner*, 447 U.S. 727, 731–732; *Alderman v. United States*, 394 U.S. 165, 171–76 (1969) ("It is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections."); *United States v. Acosta-Colon*, 741 F.3d 179 (1st Cir. 2013) (no standing to challenge arrest since the plaintiff was not one of the arrestees); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 69 (1974) (bank could not assert customer Fourth Amendment rights); *United States v. Salvucci*, 448 U.S. 83, 86 (1980) ("It is entirely proper to require of one who seeks to challenge the legality of a search ... that he establish that he himself was the victim of an invasion of privacy") (internal marks and citation omitted); *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1111 (9th Cir. 2001) ("[The plaintiff] has no standing to claim a violation of [daughter's] Fourth Amendment rights.") (citation omitted); *Daniels v. Southfort*, 6 F.3d 482, 484 (7th Cir. 1993) (plaintiff "lacks standing to complain about injuries to his friends" because "Fourth Amendment rights cannot be asserted vicariously").

As to the *relationship* element: The Amended Complaint does not allege *any* relationship—let alone one that is close—between either Plaintiff and the individuals traveling through New Hampshire at large so as to justify Plaintiffs' assertion of those individuals' Fourth Amendment rights. Lacking any alleged relationship, Plaintiffs have an even weaker argument for third-party standing than did the litigants in numerous cases in which alleged relationships were found insufficiently close, such as in *Kowalski*, where attorneys unsuccessfully sought to assert rights of their potential clients. 543 U.S. at 131.[3]

As to the *hindrance* element: The Amended Complaint describes no facts indicating that all individuals traveling through New Hampshire who may encounter a checkpoint operated by CBP or USBP would be hindered in asserting any related Fourth Amendment rights on their own behalf(s). Indeed, on the contrary, the Amended Complaint shows the opposite by describing successful assertions of Fourth Amendment rights by other individuals. In particular, aside from Drewniak, 15 other individuals (nonparties here) prevailed on state court motions to suppress evidence seized during encounters at the August 2017 checkpoint. AC ¶¶ 6, 87–89, 93. Other individuals could similarly assert their personal Fourth Amendment rights for any CBP or USBP checkpoint in the future, either through suppression motions in criminal cases, or otherwise. After all, following an allegedly illegal search or seizure, "[t]he victim can and very probably will object for himself when and if it becomes important for him to do so." *Alderman*, 394 U.S.

[3] *See also Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 796, 801 (D.C. Cir. 1987) (refugee-rights group lacked sufficiently close relationship with interdicted refugees); *Keller v. Finks*, No. 3:13-cv-03117, 2014 WL 1283211, *6–7 (C.D. Ill. Mar. 31, 2014) (estate administrator lacked sufficiently close relationship to assert Fourth Amendment rights on decedent's behalf); *LaSalle Nat. Bank of Chicago v. City of Chicago*, No. 1:04-cv-1158, 2004 WL 2101933, *3 (N.D. Ill. Sept. 17, 2004) (hotel owners and operators lacked sufficiently close relationship with their guests and employees who were stopped and questioned by police on hotel grounds).

at 174. Thus, "no obvious barrier exists that would prevent" any individual who has driven through a purportedly improper checkpoint "from asserting" his or her "own rights." *Renne v. Geary*, 501 U.S. 312, 320 (1991).[4]

The very purposes of limiting third-party standing are to prevent courts from "decid[ing] abstract questions of wide public significance" in cases where "judicial intervention may be unnecessary," and to ensure that when courts do decide such questions, their decisions are based on "appropriate presentation" of the right-holders' interests. *Kowalski*, 543 U.S. at 129 (citation omitted). Those purposes are squarely implicated here, where Plaintiffs seek to have this Court decide a constitutional question of broad public impact, based on purported harms to individuals best positioned to protect themselves.

C. Constitutional Avoidance Doctrine Requires Either Dismissal Because Plaintiffs Have Not Identified A Cause Of Action For Their Statutory Claim, Or, At A Minimum, That The Court Construe Plaintiffs' Claims As Arising Under The APA

Alternatively, even if Plaintiffs were to have Article III standing, the fundamental obligation to avoid unnecessary constitutional adjudication requires that their claim be dismissed or, at a minimum, refocused via the APA.

Plaintiffs contend that the checkpoints violated the Fourth Amendment because their "primary purpose" was "general crime control," AC ¶ 2 (citing *Edmond*, 531 U.S. at 41–42), and they purportedly lacked constitutionally-required "effectiveness," *id.* ¶ 29 (citing *Martinez-*

[4] *See also Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000); *LaSalle Nat. Bank*, 2004 WL 2101933, at *3 (hotel-owner could not assert rights of patrons and employees); *Alhawarin v. McCament*, No. 17-cv-3444, 2018 WL 6265081, *1–4, 7–8 (C.D. Cal. Mar. 29, 2018) (spouse, spouse's former wife, and family members were not hindered from vindicating their own Fourth Amendment rights as to spouse's visa application); *Microsoft Corp. v. United States Dep't of Just.*, 233 F. Supp. 3d 887, 912–16 (W.D. Wash. 2017) (company lacked standing to vindicate customers' Fourth Amendment rights).

Fuerte). *Cf. Martinez-Fuerte*, 428 U.S. at 566 (holding that "stops for brief questioning routinely conducted at permanent [USBP] checkpoints are consistent with the Fourth Amendment"). Yet if, as Plaintiffs allege, the "primary purpose" of the checkpoints were "general crime control" contrary to *Edmond*, then the "purpose" of the checkpoints would *not* be "to *prevent* the illegal entry of aliens into the United States," contrary to 8 U.S.C. § 1357(a)(3) (emphasis added).

And, indeed, Plaintiffs themselves identify a way they could win this case on statutory grounds. They aver that the "actual power" of Defendants "is circumscribed" under "the express terms" of 8 U.S.C. § 1357(a)(3) *in addition to* the Fourth Amendment, AC ¶ 24, and Plaintiffs emphasize that, under that statute, the searches are "authorized . . . only 'for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States[,]'" AC ¶ 25; *id.* ¶ 113 (quoting that provision, with "see also" signal). Similarly, this Court, in rejecting damages, observed: "The thrust" of the original complaint "is that, although CBP's *stated* purpose in conducting the August 2017 checkpoint and others like it may be consistent with . . . statutory authority, its *actual* purpose was general crime control—an end which CBP is *not authorized to pursue under* § 1357(a)(3)." MTD Order, 2021 WL 1318028, at *6 (emphasis added).

The logical relationship between the statutory "purpose" contention and the constitutional "primary purpose" contention carries a logical consequence: If the Court were to decide the statutory contention in Plaintiffs' favor, and therefore hold that the "purpose of" the challenged checkpoints was *not* "to prevent the illegal entry of aliens" (§ 1357(a)(3)), then the Court could invalidate the checkpoints as contrary to *the statute*. That would eliminate any need to interpret the Fourth Amendment. Indeed, in attempting to prove that the "purpose of" the checkpoints

was not prevention of unlawful immigration under the statute, Plaintiffs could still press their contention that its "primary purpose" was "general crime control and drug interdiction," AC ¶ 2, and Plaintiffs allege that inquiry even entails "considering . . . the effectiveness of the checkpoint with respect to its stated goal," *id.* ¶ 30. But the Amended Complaint seeks to avoid such a statutory decisional path: it does not allege *any* cause of action advancing the statutory contention. Instead, Plaintiffs seek injunctive and relief revolving *exclusively* around the constitutional contention. AC ¶¶ 117, 121, 122, 124; Prayer for Relief, ¶¶ C–D. That is, after purporting to identify agency action contrary to *both* the statute *and* the Fourth Amendment, Plaintiffs have framed the requested relief as centering *only* on the constitutional question.

Such a striking refusal to allege a cause of action through which the Court could decide on the identified narrower, statutory ground, putting all of Plaintiffs' eggs in the Fourth Amendment basket, appears to be calculated to force the Court to rule on the Fourth Amendment question. But the federal courts have a *fundamental* obligation to decide a case on narrower alternative grounds where doing so would avoid unnecessary decision on a constitutional claim. Indeed, "[u]nder the doctrine of constitutional avoidance, 'federal courts are not to reach constitutional issues where alternative grounds for resolution are available.'" *M & N*, 6 F.4th at 178 (citing, *inter alia*, *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) ((per curiam), for teaching that court "ordinarily 'will not decide a constitutional question if there is some other ground upon which to dispose of the case'"); *see also N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 582-83 & n.23 (1979) ("Before deciding the constitutional question, it was incumbent on [lower courts] to consider whether the statutory grounds might be dispositive."). Under that doctrine, in *M & N*, the First Circuit concluded that "the relief available under the APA adequately addresse[d]" the plaintiff's "remedial requests" against Social Security

Administration rules governing attorney fee awards, "and that, hence, resolving the constitutional questions" the plaintiff presented under the equal protection and due process guarantees "would be inconsistent with" the "obligation to avoid doing so where a non-constitutional disposition is possible." 6 F.4th at 178–79. On that basis the First Circuit determined it "unnecessary and, indeed, inappropriate for" the court "to reach" the constitutional claims. *Id.*

Unlike the challengers in *M & N*, Plaintiffs here—effectively attempting to circumvent that decision—have refrained from asserting an APA cause of action, or even any alternative cause of action through which the Court could decide the statutory contention in Plaintiffs' favor. Notably, the Amended Complaint does not attempt to allege that Plaintiffs have a cause of action directly under § 1357(a)(3) itself. For its part, the statute's plain language does not suggest that Plaintiffs can obtain an injunction simply by asserting that the agency is "exceed[ing]" the "statutory mandate." *Cf. United States v. De La Cruz*, 835 F.3d 1, 6 (1st Cir. 2016) (declining suppression remedy for § 1357(a)(2) violation, where officers by assumption "exceeded their federal statutory mandate" but did not allegedly violate Fourth or Fifth Amendment).

Faced with Plaintiffs' effort to evade the constitutional avoidance doctrine, the Court could take either of two paths. The first path would be to hold Plaintiffs to the logical consequence of their pleading choice, and dismiss the Amended Complaint in full.[5] That would

[5] *See Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 39–40 (D.D.C. 2018) (dismissing constitutional claim under avoidance canon, where "[t]he specifics of plaintiffs' allegations are a far better fit for th[e] doctrinal box" of a "classic APA claim" "than they are for a constitutional one") (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)), *dismissed as moot sub nom. Jafarzadeh v. McAleenan*, No. 1:16-cv-1385, 2019 WL 2303854 (D.D.C. May 30, 2019); *accord Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181, 237–38 (S.D.N.Y. 2010), *aff'd in part on other grounds sub nom. Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013).

presumably leave the door open for Plaintiffs to seek leave under Rule 15 to amend and to file a new pleading adding a cause of action (whether under the APA, or otherwise) through which the Court decide the statutory contention.

Alternatively, the Court could take the second path, and enter an order refocusing the Amended Complaint. The avoidance canon requires that this action be refocused to concentrate on whether Defendants "exceeded [their] statutory authority" when they approved the disputed checkpoints under 8 U.S.C. § 1357(a)(3), and, once that refocusing is complete, "no 'constitutional question whatever' is raised," "'only issues of statutory interpretation.'" *See Dalton v. Specter*, 511 U.S. 462, 473–74 & n.6 (1994) (citation omitted). As *M & N* and other First Circuit decisions suggest, the APA supplies a natural blueprint for refocusing the Amended Complaint. "It is a bedrock principle that the power of an executive agency administering a federal statute is authoritatively prescribed by Congress. When an agency acts in a manner not authorized by statute, its action is *ultra vires* and a violation of the APA." *Ryan v. U.S. Immigration & Customs Enforcement*, 974 F.3d 9, 19 (1st Cir. 2020) (citations omitted). In that regard, the "APA's omnibus judicial-review provision . . . permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014).

To be sure, Plaintiffs may have tactical reasons for declining to invoke the APA. For example, the APA is subject to limitations on discovery. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Camp v. Pitts*, 411 U.S. 138, 140–42 (1973); *see also Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) (recognizing limit to record review was appropriate even on non-APA constitutional claims). The APA also

forecloses the "kind of broad programmatic attack" that seeks "'*wholesale* improvement of [a] program by court decree.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (quoting *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 891 (1990)). But, of course, the Court should not reward Plaintiffs for their choice to sidestep the APA. That is especially so where, as here, it would force the Court to "reach out to make novel or unnecessarily broad pronouncements on constitutional issues" given that (according to the Amended Complaint itself) the case "can be fully resolved on a narrower ground" furnished by Plaintiffs' *own* identification of an asserted statutory violation. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); *see United States v. Raines*, 362 U.S. 17, 21 (1960) (courts must "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it"); *cf. E. Bridge, LLC v. Chao*, 320 F.3d 84, 91 (1st Cir. 2003) (where "constitutional claim" was "recharacterization of" "administrative claim," court did "not allow plaintiffs to circumvent the statutory review process with an agile game of word play").

Accordingly, at a minimum, if the Court does not dismiss the Amended Complaint outright, the Court should enter an order construing the Amended Complaint as raising APA claims. By contrast, it would be "unnecessary and, indeed, inappropriate for" the Court "to reach" Plaintiffs' Fourth Amendment claim given that, according to their own pleading, the Court could rule in their favor on narrower, statutory grounds. *M & N*, 6 F.4th at 178–79.

D. Plaintiffs Are Not Entitled To The Particular Injunction Demanded

Even if Plaintiffs were to have Article III injury-in-fact, they are not entitled to the sweeping injunction the Amended Complaint demands against USBP operations as to any individuals not before the Court in this action. Such expansive relief cannot be reconciled with fundamental equitable limitations on injunctions against government agencies, nor with the

ordinary method by which agency action is reviewed and, if unlawful, remediated. Courts enforce those limitations through Article III standing requirements,[6] through the limits of review of agency action (e.g., the remedial limitations of the APA), or through the public interest balance that is a prerequisite to federal injunctive relief. [7]

As explained above in Part C, if the Amended Complaint were not dismissed, the action should be refocused under the APA, and the Court should confine any prospective relief here to the relief that would be available under the APA—which, after all, is the "classic" vehicle for asserting that agency action is arbitrary, capricious, or otherwise contrary to law. *Jafarzadeh*, 321 F. Supp. 3d at 39–40; *see* 5 U.S.C. § 706(2) (A)–(D). In such a refocusing, Plaintiffs should be limited to, at most, the garden-variety APA remedy: an order vacating the final agency action challenged and remanding those orders to the agency for further proceedings. The "ordinary remand rule" teaches that, "[g]enerally speaking," a reviewing court "should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam). The availability of remand obviates the need to consider any other extraordinary equitable relief. Where "the record before the agency does not

[6] "Whether an injury is redressable depends on the relationship between 'the judicial relief requested' and the 'injury' suffered." *California v. Texas*, 141 S. Ct. 2104, 2215 (2021) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). That is, under Article III, "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

[7] *Compare eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (equity requires that "the public interest would not be disserved by a permanent injunction"), *with Nken v. Holder*, 556 U.S. 418, 435 (2009) (balance of harms and public interest factors "merge when the Government is the opposing party"). Moreover, even if "a constitutional violation" were plausibly alleged, the court would be "required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406 (1977) (internal quotations and citations omitted).

support the agency action, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Lorion*, 470 U.S. at 744.

Plaintiffs instead seek an injunction against operation of "additional unconstitutional [USBP] checkpoints in New Hampshire for the purpose of drug interdiction," AC ¶ 121, and "additional unconstitutional [USBP] checkpoints on I-93 in Woodstock, [NH], that seize individuals without a warrant or reasonable suspicion," *id.* ¶ 122. But the particular injury-in-fact Plaintiffs have alleged bears little connection to such expansive relief.

First, the geographic scope of the injunction demanded is unacceptably broad. Neither Plaintiff has alleged personal harm from any disputed "checkpoints in New Hampshire" other than the particular checkpoints they traveled through in Woodstock. AC ¶¶ 4, 9, 62, 107–08. Nor does either Plaintiff allege recurring harm will occur at any "checkpoints in New Hampshire" except at or near the location of the previous Woodstock checkpoints. *See id.* ¶¶ 8, 10, 101, 104, 110; *cf. id.* ¶ 102 (alleging Drewniak's fear of checkpoint "on I-93 South"). And, as to Fuentes, the Amended Complaint does not allege USBP subjected him to an attempted "drug interdiction" or a secondary inspection and search of his vehicle, charged him with any offense, or detained or arrested him at any "checkpoint[] in New Hampshire," whether in Woodstock or elsewhere. *See id.* ¶¶ 9, 107–08. Any injunctive relief as to any checkpoint other than those operated within Woodstock is therefore improper.

Second, the temporal scope of the injunction demanded is unacceptably broad. The dates of the purportedly unlawful conduct do not support continuing judicial supervision of USBP checkpoint operations into the indefinite future. Drewniak's only alleged checkpoint encounter occurred more than four and a half years ago. AC ¶¶ 4, 62–69, 71–82. And, the Amended Complaint further concedes that Drewniak no longer "frequently travels" on the road where the

Woodstock checkpoint operated, instead alleging that he actually engages in such travel "with less frequency" than when he began this suit. *Id.* ¶¶ 8 & n. 3, 101 n. 21, 103. For his part, Fuentes allegedly last encountered a checkpoint more than two and a half years ago. *Id.* ¶¶ 9, 108. The date of that encounter, June 9, 2019, is also the last alleged date of any checkpoint in Woodstock. *See id.* ¶ 51. That was almost two-and-a-half years before Plaintiffs filed the Amended Complaint. The Amended Complaint therefore supplies no ground for an injunction of any future effect, let alone of indefinite future effect.[8]

Third, the injunction demanded impermissibly seeks relief for claims and parties not before the Court—as though, contrary to law, the Plaintiffs before the Court could seek relief "in gross." *See Gill*, 138 S. Ct. at 1934 ("standing is not dispensed in gross," so a "plaintiff's remedy must be tailored to redress the plaintiff's particular injury") (quoting *Cuno*, 547 U.S. at 353). Plaintiffs' effort to obtain expansive relief concerning Defendants' canine operations vividly illustrate that flaw. Plaintiffs' personal experiences with such canine operations is limited: Drewniak allegedly underwent—at one traffic stop in Woodstock in August 2017—a canine search at a secondary inspection. AC ¶¶ 68–70, 72–73, 75–79. Meanwhile, although Fuentes may have been subject to "'pre-primary free air sniffs'" by a canine at some time, there is no allegation that Defendants subjected Fuentes himself to a canine sniff. Veering away from Plaintiffs' own limited allegations about experience with canines, the Amended Complaint

[8] Plaintiffs rely on a news media article to assert that "[USBP] has stated that 'it plans on using more checkpoints in northern New England in the future.'" AC ¶ 103 (citing Kathleen Masterson, *Broad Jurisdiction of U.S. Border Patrol Raises Concerns about Racial Profiling*, WBUR (Oct. 11, 2017), https://www.wbur.org/news/2017/10/11/border-patrol-stops-profiling). The cited article's publication predates by many months the last checkpoint encounter of Fuentes in June 2019. AC ¶ 108. That article cannot be taken as a nonconclusory factual allegation showing Defendants' current or future plans.

attempts to seek systematic redress of purported "abuses at [USBP] checkpoints involving service canines [that] are both common and rarely investigated . . . includ[ing] dozens of troubling accounts of service canines falsely alerting at vehicle checkpoints, resulting in prolonged detention and searches of innocent travelers." *Id.* ¶ 92; *see also id.* ¶¶ 46, 49, 88. Against that background, the dramatic relief sought—an injunction prohibiting any stop of any person on any road in New Hampshire where a trained canine is nearby sniffing the air—is anything but "tailored" to the alleged injuries of Drewniak or Fuentes. Rather, it reflects a pre-existing policy disagreement with canine operations. AC ¶ 92 n.20.

Importantly, even if Plaintiffs were to have Article III standing to pursue some injunctive relief, they cannot "leverage" such standing to obtain systematic transformation of Defendants' canine deployment or other law enforcement practices. *See DaimlerChrysler*, 547 U.S. at 340 (enforcing rule against exploitation of standing as to one claim as "leverage" to assert another). Article III standing "would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration." *Lewis*, 518 U.S. at 357; *see id.* at 360 (overturning broad, system-wide injunction requiring changes in prison libraries and legal assistance programs where only two inmates were either illiterate or did not speak English); *DaimlerChrysler*, 547 U.S. at 352–53 ("'[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established'").

Fourth, the injunction demanded is irreconcilable with the law enforcement tasks Defendants are statutorily responsible for carrying out in Woodstock, in New Hampshire, and indeed nationwide. By purporting to prevent operation of "*unconstitutional* [USBP]

checkpoints" AC, Prayer for Relief, Paras. C–D (emphasis added), the injunction demanded would provide Defendants no guidance about what operations they could conduct without returning to the court for further proceedings (with the risk of contempt proceedings also lurking). By directing Defendants to obey the Constitution, the injunction demanded does not specify "in reasonable detail" prohibited acts. Fed. R. Civ. P. 65(d)(1); *see Healey v. Spencer*, 765 F.3d 65, 74 n.6 (2014). It is akin to the kind of "obey-the-law" injunction that courts reject because they do not provide sufficient guidance, or notice consistent with due process, about what conduct is actually permissible. *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989); *EEOC v. Aviation Port Servs.*, No. 1:18cv10909, 2020 WL 1550564 at *11 (D. Mass. April, 2020).

For the Court to enter such an injunction would also substantially interfere with Defendants' efforts to carry out their statutory responsibilities,[9] including under 8 U.S.C. § 1357(a)(3), in which Congress authorized Defendants to operate immigration checkpoints. *See also United States v. Gabriel*, 405 F. Supp. 2d 50, 57 (D. Me. 2005). At a minimum, laborious additional proceedings in this Court would be necessary (meaning years of litigation) to decide what Defendants could do to avoid risking contempt proceedings. That is, even though Plaintiffs

[9] Congress has charged the Department of Homeland Security ("DHS") and its components, including CBP, with "securing the homeland." 6 U.S.C. § 111(b)(1)(A) and (E); *see also* 6 U.S.C. § 211(c)(5); *id*. § 211(c)(8)(B); *id*. § 211(e)(1), (3)(A) and (B). DHS officers, including USBP agents, are specifically authorized, "without warrant," to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States"; to "make arrests" for certain offenses; and to "have access," "within a distance of twenty-five miles from any" international border, "to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.S.C. § 1357(a)(1)–(5); *see* 8 C.F.R. 287.5(a)–(d); *see generally United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

do not challenge § 1357(a)(3), they demand an injunction that would effectively require Defendants to obtain the Court's permission for all immigration-related checkpoints in New Hampshire. *See* AC ¶¶ 1, 9, 43, 69, 107–08, 119, 122.

Fifth, the injunction demanded would interfere with the role of the Article III courts to decide Fourth Amendment questions on a factual record appropriately tied to the circumstances of each disputed search or seizure. It is no accident that, in those instances where courts have examined particular checkpoints under *Martinez-Fuerte*, they have traditionally done so on motions to suppress brought by individual criminal defendants.[10] In actual criminal prosecutions, courts can assess the alleged violation of the Fourth Amendment in light of the entire record underlying the challenged search and seizure, as informed by other Fourth Amendment doctrines that could apply. [11]

Granting the injunction demanded here would require the Court to reach a conclusion about future checkpoint operations without the guidance ordinarily gleaned from case-specific facts and circumstances. *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc). That would call for the Court to hazard a guess about situations implicating Fourth Amendment

[10] *See United States v. Alatorre-Verdugo*, No. 4:17-cr-770, 2018 WL 6729664, *1, *6–7 (D. Ariz. June 11, 2018) (recommending suppression motion denial stemming from immigration checkpoint search), *aff'd*, 2018 WL 6727292, *1 (D. Ariz. Dec. 21, 2018); *United States v. William*, 603 F.3d 66, 67–71 (1st Cir. 2010) (affirming sentencing after denial of suppression motion as to illegal drugs found during sobriety checkpoint stop); *United States v. Gentle*, No. 1:06-cr-10355, 2008 WL 623400, *1–3, 5 (D. Mass. Mar. 4, 2008) (denying suppression motion stemming from routine vehicular traffic stop).

[11] *See*, *e.g.*, *Gabriel*, 405 F. Supp. at 52–53, 62–63 (denying suppression motion resulting from immigration checkpoint search); *United States v. Giuffrida*, No. 1:11-cr-95, 2012 WL 177955 at *1, *5–8 (D. Me. Jan. 19, 2012) (recommending suppression motion denial stemming from detention and canine "sniff search" of vehicle), *aff'd*, 2012 WL 406959, at *1 (D. Me. Feb. 8, 2012).

issues that simply cannot be foreseen: "[I]t is difficult for a court to pronounce how the Fourth Amendment might apply to a general set of facts," because that would require "predict[ing] all of the factual scenarios that might arise and answer[ing] exactly how the Fourth Amendment would apply to all of them." Orin S. Kerr, *The Limits of Fourth Amendment Injunctions*, 7 J. TELECOMM. & HIGH TECH. L. 127, 133 (2009). "Fourth Amendment decisions are too fact-sensitive for courts to use injunctive relief to craft broad-ranging injunctions." *Id.* at 138.

Importantly, this action is not a purported class action, unlike those at issue in *Rahman v. Chertoff*, 530 F.3d 622 (7th Cir. 2008), but comparison to that case highlights the critical flaws in the injunction demanded here. The *Rahman* plaintiffs contended that delays experienced in reentry to the United States from travel abroad because of watch list enforcement violated the Fourth and Fifth Amendments. *Id.* at 623. The Seventh Circuit reversed orders certifying two nationwide classes, because the named plaintiffs' claims were not typical of class claims under Rule 23, given the "ambulatory" and expansive nature of the intended class. *Id.* at 628. "Improper arrests," the court admonished, "are best handled by individual suits for damages (and potentially through the exclusionary rule), *not* by a structural injunction designed to make every error by the police an occasion for a petition to hold the officer (and perhaps the police department as a whole) in contempt of court. Just so with stops at the border." *Id.* at 626–27 (emphasis added). "Decisions favorable to particular plaintiffs," the court added, "will have their effect in the normal way; through the force of precedent." *See id.* at 627–28.

Application of those principles to this action weighs decisively in favor of rejecting the requested injunction—not at the end of the case, after months or years of exhaustive discovery and motions practice, but now, if only so that the parties can focus on the only "inadequac[ies] that produced the injury in fact that the plaintiff[s] ha[ve] established," which are the only

"inadequac[ies]" the Court can properly remedy. *Lewis*, 518 U.S. at 357. Conversely, granting the relief demanded cannot be a responsible exercise of the Court's equitable powers.

E. A Declaration Regarding Past Conduct Would Serve No Useful Purpose

The Court should also decline, based on "considerations of practicality and wise judicial administration," *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995), to issue a declaration regarding the legality of "the August 2017 [USBP] checkpoint and other checkpoints in which [Plaintiffs] were detained," AC ¶ 119, because it would lack any appropriate "useful purpose," *Wycoff*, 344 U.S. at 244.

As a threshold matter, for essentially the same reasons that Plaintiffs lack Article III standing, there is no "substantial controversy . . . of sufficient immediacy and reality to warrant" a declaration. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). But even if Plaintiffs had alleged facts sufficient to meet the Article III minimum, the declaration sought would properly be denied on the merits. Precedent "caution[s] against declaratory judgments on issues of public moment . . . in speculative situations," and Plaintiffs' allegations that they will encounter checkpoints in the future of the particular characteristics they alleged existed in 2017 through 2019 is exactly such a "speculative situation[]." *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 40-41 (1st Cir. 2006) (quoting *Pub. Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam) (citing *Eccles v. Peoples Bank*, 333 U.S. 426, 432 (1948))).

The required "immediacy" is absent here, moreover, because Plaintiffs already purport to benefit from a state court's judgment agreeing with their asserted Fourth Amendment theory, AC ¶¶ 89–95, and Plaintiffs have asserted only a disagreement regarding "past act[s]" or "past conduct" not appropriately redressed through a declaration that would have future effect. *See Brown v. Rhode Island*, 511 F. App'x 4, 6 (1st Cir. 2013) (per curiam); *Pagliaroni v. Mastic*

Home Exteriors, Inc., 310 F. Supp. 3d 274, 294 (D. Mass. 2018); *see also Katz v. McVeigh*, 931 F. Supp. 2d , 336 (D.N.H. 2013) ("issuance of a declaratory judgment deeming past conduct illegal is . . . not permissible as it would be merely advisory") (quoting *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013). In other words, because the combination of circumstances that gave rise to this action no longer exists, including the change in state law, and because Plaintiff Drewniak already benefits from a state court's pronouncement on the Fourth Amendment question the Amended Complaint now asks this Court to determine, the declaration sought from this Court would be of no "useful purpose" or "practical assistance in setting the underlying controversy to rest," so it should not be issued. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 693 (1st Cir. 1994); *see Warner v. Frontier Ins. Co.*, 288 F. Supp. 2d 127, 130–31 (D.N.H. 2003).

CONCLUSION

The Amended Complaint should be dismissed in full under Rule 12(b)(1) because Plaintiffs' claim is now nonjusticiable. The new claim of Plaintiff Fuentes also lacks facial plausibility and should be in dismissed under Rule 12(b)(6). If the Court rules otherwise, the constitutional avoidance doctrine still requires refocusing the Amended Complaint as raising APA claims (one challenging Defendants' actions as contrary to 8 U.S.C. § 1357(a)(3), and one challenging those actions under the Fourth Amendment). Such a refocusing would allow the Court to avoid the constitutional question, if it were to agree with Plaintiffs on their statutory contention. Under such a refocusing, Plaintiffs' remedy should be confined, at most, to the ordinary APA remedy of vacatur and remand, not to the extraordinary injunction or useless declaration they demand.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Director

INDRANEEL SUR (D.C. Bar No. 978017)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 616-8488
Indraneel.Sur@usdoj.gov

Of Counsel:
KRISTIN A. TAYLOR
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch

JOHN J. FARLEY
United States Attorney

By: /s/ Robert J. Rabuck
Robert J. Rabuck
First Assistant U.S. Attorney/Civil Chief
New Hampshire Bar No. 2087
53 Pleasant Street, 4th Floor
Concord, NH 03301
(603) 225-1552
Rob.Rabuck@usdoj.gov

By: /s/ Michael McCormack
Michael McCormack
Assistant U.S. Attorney
New Hampshire Bar No. 16470
53 Pleasant Street, 4th Floor
Concord, NH 03301
(603) 225-1552
Michael.McCormack2@usdoj.gov

Attorneys for Official Defendants

Dated: March 22, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, and SEBASTIAN FUENTES Plaintiffs, v. U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, MARK A. QUALTER, ROBERT N. GARCIA, and RICHARD J. FORTUNATO Defendants.	)	Civil Action 1:20-cv-00852

DECLARATION OF ROBERT N. GARCIA IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

I, Robert N. Garcia, pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I currently serve as the Chief Patrol Agent, Swanton Sector, U.S. Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security (CBP), and I submit this declaration in support of the Government's Motion to Dismiss the Amended Complaint in the above-captioned matter. The statements made herein are based on my personal knowledge as well as on information provided to me in my official capacity as Chief Patrol Agent.

2. As Chief Patrol Agent, I am the senior-most management official who is responsible for planning, organizing, and directing U.S. Border Patrol enforcement operations within Swanton Sector's area of responsibility, which includes eight Border Patrol stations and 295 miles of U.S. and Canadian border in the states of New York, Vermont, and New Hampshire.

3. The Beecher Falls Border Patrol Station (Beecher Falls Station), which is under my oversight, is responsible for patrolling, and conducting enforcement activities in the State of New Hampshire.

4. Within the Beecher Falls Station's area of responsibility, and Swanton Sector overall, temporary immigration checkpoints have been utilized to carry out the U.S. Border Patrol's operational mission of immigration enforcement.

5. In general, immigration checkpoints are strategically located to stop vehicles and individuals seeking to evade immigration law requirements traveling from the international land border to the interior of the United States.

6. Checkpoints along the Northern Border are often located on interstate highways and roadways that serve as main thoroughfares from the U.S.-Canadian border to major cities in the interior, such as Boston and New York City.

7. In my position as Chief Patrol Agent, I am responsible for the approval of all enforcement activities memorialized in an operations order submitted by a station within my area of responsibility.

8. An operations order is a written overview of planned enforcement activities conducted by U.S. Border Patrol personnel that do not constitute daily work assignments and routine enforcement actions.

9. The purpose of an operations order is to serve as a written plan for U.S. Border Patrol personnel participating in the planned enforcement activity, as well as an internal guide for management overseeing the operation.

10. The duration of operations orders vary based on the logistics and scope of the planned enforcement activity, but all include a finite period of time for execution of the operation. Typically, operations orders for immigration checkpoints are submitted and reviewed annually.

11. A typical operations order contains the following sections: (1) an executive summary; (2) a description of the general situation, terrain/weather, criminal element in the area, and friendly forces; (3) an explanation of the mission of the operation; (4) an operation execution

plan; (5) logistical components; (6) communication and command staff; and (7) may include an administration, execution and intelligence annex.

12. Depending upon the nature and scope of the operation order, various levels of review and approval occur before the order is finalized, approved, and executed.

13. Immigration checkpoints are an enforcement tool available by law to U.S. Border Patrol to carry out its mission. 8 U.S.C. § 1357(a)(3). For Swanton Sector operations orders involving immigration checkpoints, the following is required before execution: (1) approval from the Sector Chief Patrol Agent; (2) legal review by the local Office of Chief Counsel; and (3) notification to the Chief of the Law Enforcement Operations Directorate at U.S. Border Patrol Headquarters. This approval process is typically memorialized in an internal CBP document entitled "Law Enforcement Operations Directorate Operations Order Checklist."

14. U.S. Border Patrol marks operations orders as "law enforcement sensitive" because they include detailed information relating to active intelligence information, ongoing known criminal elements in the geographic region, and reveal law enforcement tactics, techniques and procedures (TTPs). As a result, certain information contained in operations orders are not shared with the general public to preserve the integrity of active intelligence information and ongoing surveillance of known criminal enterprises, ensure the continued effectiveness of law enforcement investigative techniques to identify criminal activity, and to protect the safety and well-being of U.S. Border Patrol personnel.

15. Typically, checkpoints include a primary inspection area and a secondary inspection area. Vehicles that enter the checkpoint are normally processed through the primary inspection area. In this area, occupants of a vehicle are generally asked brief questions to confirm their citizenship and lawful immigration status, and the vehicle may be subject to a free-air canine sniff by U.S. Border Patrol canines. U.S. Border Patrol canines also may conduct free-air sniffs of vehicles in the pre-

primary area to help expedite the processing of vehicles through the checkpoint. All U.S. Border Patrol canines undergo rigorous training and receive certification as dual detection canines that identify the presence of concealed humans and narcotics.

16. Only certain vehicles and individuals, however, will be selected to undergo a more thorough secondary inspection. Referral of a vehicle for secondary inspection generally occurs when Border Patrol agents seek to conduct a full immigration inspection or when suspicion develops of a potential violation of some other law (i.e., customs, narcotics, or other criminal violations). During a secondary inspection, Border Patrol agents may: (a) ask questions; (b) request to inspect immigration documents; (c) make plain view observations; (d) conduct searches of a person or a vehicle; (e) perform exterior canine sniffs of a vehicle; (f) press down on trunk; (g) tap exterior fuel tanks; and (h) any other actions necessary to confirm or dispel violations of law.

17. The Beecher Falls Station has, on occasion, utilized immigration checkpoints as a tool to conduct the Agency's critical immigration enforcement mission in New Hampshire, a border state located along the U.S-Canadian international boundary.

18. From 2012 to 2016, the Beecher Falls Station did not conduct any immigration checkpoints in New Hampshire because of enforcement priorities and other considerations, as well as manpower and budgetary constraints.

19. In 2017, after receiving the necessary funding and manpower, the Beecher Falls Station prepared an operations order detailing its planned enforcement activities through the re-initiation of immigration checkpoints.

20. The operations order for the 2017 immigration checkpoints underwent legal sufficiency review by Agency counsel and was reviewed and approved by both U.S. Border Patrol management within Swanton Sector and U.S. Border Patrol Headquarters.

21. New Hampshire state and local law enforcement were not involved in the planning or

preparation of the immigration checkpoints or the Border Patrol operations order. After receiving the required approval to conduct the checkpoints, Beecher Falls Station management requested the assistance and presence of state and local law enforcement in advance of the checkpoints to investigate any potential violations of state law identified by Border Patrol personnel.

22. In 2017, Beecher Falls Station conducted two immigration checkpoints in Woodstock, New Hampshire, one from August 25 to August 27, 2017, and a second from September 26 to September 28, 2017. In addition to U.S. Border Patrol personnel, state and local law enforcement were continuously present for the duration of the checkpoints. During those checkpoints, state and local law enforcement's role included working alongside U.S. Border Patrol personnel and handling all violations of state law, to include the referral of certain cases for state prosecution.

23. It was during the August 2017 checkpoint operation that Plaintiff Jesse Drewniak traveled through the immigration checkpoint and was subsequently issued a criminal citation for possession of personal use marijuana in violation of New Hampshire state law, a misdemeanor offense.

24. In September of 2017, after the ACLU New Hampshire challenged state prosecutions of individuals found in possession of marijuana at the immigration checkpoint, the New Hampshire State Police leadership met with Beecher Falls Station and Swanton Sector management. After that meeting, the New Hampshire State Police notified local U.S. Border Patrol management at the Beecher Falls Station that the State Police would no longer provide direct support to U.S. Border Patrol at immigration checkpoints.

25. Also at that time, the New Hampshire State Police informed Border Patrol that it would only respond to U.S. Border Patrol requests for assistance at immigration checkpoints on a case-by-case basis based on officer safety concerns, exigent circumstances, or potential violations of state law.

26. As a result of the New Hampshire State Police change in practice, all subsequent checkpoints no longer had state and local law enforcement continuously present for the duration of the operation unlike the 2017 checkpoints.

27. In 2018, the Beecher Falls Station conducted four immigration checkpoints in Woodstock, New Hampshire on the following dates: May 27-29, 2018; June 15-17, 2018; August 21-23, 2018; and September 25-27, 2018. Based upon available information, it was during the August 2018 operation that plaintiff Sebastian Fuentes traveled through U.S. Border Patrol's immigration checkpoint. During this operation, Mr. Fuentes was not arrested, charged, or otherwise criminally prosecuted for any violations of Federal law. Additionally, during this operation, U.S. Border Patrol did not refer Mr. Fuentes to state and local law enforcement for any suspected violations of state law.

28. In 2019, the Beecher Falls Stations conducted four immigration checkpoints. Two immigration checkpoints were conducted in Columbia, New Hampshire on April 7, 2019, and May 27, 2019. A third immigration checkpoint was conducted in Woodstock, New Hampshire from June 8 to June 9, 2019. A fourth immigration checkpoint was conducted in Lebanon, New Hampshire, from September 3 to September 6, 2019.

29. The 2019 checkpoints, like the 2018 checkpoints, no longer had state and local law enforcement continuously present for the duration of the operation. Instead, state and local law enforcement only provided limited assistance in response to specific requests by the U.S. Border Patrol based upon officer/public safety concerns, exigent circumstances, or potential violations of state law.

30. Additionally, as a result of the New Hampshire State Police's change in policy, U.S. Border Patrol no longer requests the continuous presence of state and local law enforcement in advance of planned immigration checkpoints in the State of New Hampshire. Instead, U.S. Border

Patrol only makes requests for assistance in response to specific instances of potential violations of state law or for officer/public safety reasons.

31. From September 2019 to present, Swanton Sector Border Patrol has not operated an immigration checkpoint in the State of New Hampshire.

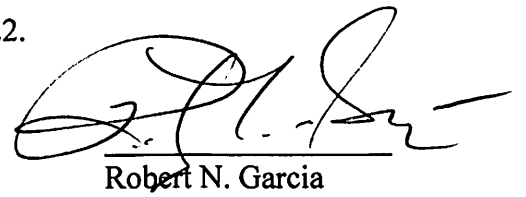
32. Moreover, to date, Swanton Sector Border Patrol has no planned immigration checkpoints in the State of New Hampshire scheduled for fiscal year 2022.

33. Further, to date, no approved operations orders exist for fiscal year 2022 that would authorize an immigration checkpoint in the State of New Hampshire.

34. The location and operation of any future immigration checkpoint within Swanton Sector is subject to change based upon a variety of factors to include, among others, logistics, law enforcement needs, and staffing/budgetary considerations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of March, 2022.



Robert N. Garcia
Chief Patrol Agent
U.S. Border Patrol
Swanton, Vermont

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, and SEBASTIAN FUENTES Plaintiffs, v. U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, MARK A. QUALTER, ROBERT N. GARCIA, and RICHARD J. FORTUNATO Defendants.	)	Civil Action 1:20-cv-00852

DECLARATION OF RICHARD J. FORTUNADO IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

I, Richard J. Fortunato, pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. On July 18, 2021, I reported for duty as the Deputy Chief Patrol Agent, Swanton Sector, U.S. Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security. I submit this declaration in support of the Government's Motion to Dismiss the Amended Complaint in the above-captioned matter. The statements made herein are based on my personal knowledge as well as on information provided to me in my official capacity as Swanton Sector's Deputy Chief Patrol Agent.

2. In addition to serving as Deputy Chief Patrol Agent, beginning on July 25, 2021, I have intermittently carried out the duties of Acting Chief Patrol Agent. In both roles, I serve as a senior management official who is involved in the planning, organizing, and directing of U.S.

Border Patrol enforcement operations within Swanton Sector's area of responsibility, to include any immigration checkpoints in the State of New Hampshire.

3. Within Swanton Sector, immigration checkpoints are conducted after an operations order is prepared and approved for a set time frame.

4. Since July 18, 2021, no immigration checkpoints have been conducted in the State of New Hampshire.

5. Additionally, to date, no immigration checkpoints are scheduled to occur in 2022.

6. Following the New Hampshire State Police's change in policy to no longer provide ongoing support at U.S. Border Patrol's immigration checkpoints, the Beecher Falls Border Patrol Station no longer requests the continuous presence of state and local law enforcement in advance of a planned New Hampshire immigration checkpoint. Moreover, state and local law enforcement's involvement in any aspect of an immigration checkpoint is now limited to specific requests for assistance in response to potential criminal activity enforceable under state law or an ongoing safety matter.

7. On July 18, 2017, the State of New Hampshire decriminalized the possession of personal use marijuana. NH Rev. Stat. § 318-B:2-c (2017). Consequently, if U.S. Border Patrol discovered a personal use amount of marijuana on an individual during an immigration checkpoint and Federal prosecution was not initiated, U.S. Border Patrol agents may seize and destroy the contraband.

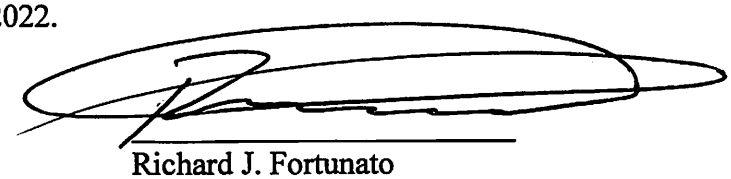
8. Despite the change in New Hampshire state law, federal law remains unchanged. Schedule I of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, continues to list marijuana as a federally prohibited controlled substance. 21 U.S.C. § 812.

9. The location and operation of any future immigration checkpoint within Swanton Sector is subject to change based upon a variety of factors to include, among others, logistics, law enforcement needs, and staffing/budgetary considerations.

10. To date, all previous operations orders authorizing the use of immigration checkpoints in the State of New Hampshire are expired and no longer in effect.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of March, 2022.



Richard J. Fortunato
Deputy Chief Patrol Agent
U.S. Border Patrol
Swanton, Vermont