

Hon. Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSE SANCHEZ, *et al.*,

Plaintiffs,

v.

UNITED STATES BORDER PATROL,
et al.,

Defendants.

No. CV12-5378-RJB

DEFENDANTS' MOTION TO
DISMISS FOR LACK OF
JURISDICTION

NOTED ON MOTION CALENDAR:
August 3, 2012

I. INTRODUCTION

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

1 equitable relief. Moreover, § 1357 does not provide a private cause of action.

2 Accordingly, this Court should dismiss their claims for lack of subject matter jurisdiction.

3 II. FACTUAL ALLEGATIONS

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

10 Plaintiff Sanchez

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

18 Sanchez alleges a second stop occurred during or around the summer of 2009. *Id.*
 19 ¶ 22. Sanchez alleges he was traveling in a vehicle which was stopped by the Border
 20 Patrol, and that during the stop he was questioned by two Border Patrol agents
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 28 ¹ Although irrelevant for purposes of this Motion, it should be noted that Defendants dispute many of Plaintiffs’ factual allegations.

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

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

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

12 Plaintiff Contreras

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

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

6 Plaintiff Grimes

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

17 **III. LEGAL STANDARD**

18 Because standing pertains to a federal court's subject matter jurisdiction, it is
19 properly raised in a Rule 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto.*
20 *Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "A Rule 12(b)(1) jurisdictional attack may
21 be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
22 2004). In reviewing a facial challenge, which contests the sufficiency of the pleadings,
23 the court considers only the allegations of the complaint, accepting such allegations as
24 true and drawing reasonable inferences in favor of the plaintiff. *Wolfe v. Strankman*, 392
25 F.3d 358, 362 (9th Cir. 2004). In resolving a factual attack, however, "the district court
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1 may review evidence beyond the complaint” and “need not presume the truthfulness of
2 the plaintiff’s allegations.” *Safe Air for Everyone*, 373 F.3d at 1039.

3 IV. ARGUMENT

4 **1. The Court Should Dismiss Plaintiffs’ Claims for Lack of Jurisdiction Because** 5 **Plaintiffs Have Failed to Establish Standing to Seek Equitable Relief.**

6 For this Court to exercise subject matter jurisdiction over Plaintiffs’ claims,
7 Plaintiffs must have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
8 (1992). “Standing addresses whether the plaintiff is the proper party to bring the matter
9 to the court for adjudication.” *Chandler*, 598 F.3d at 1122. When a plaintiff seeks
10 prospective equitable relief, the standing analysis involves two distinct components. *See*
11 *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999); *Stevens v. Harper*,
12 213 F.R.D. 358, 366-67 (E.D. Cal. 2002). First, courts consider the constitutional
13 requirements for standing, under which a plaintiff must show a credible threat of future
14 injury which is sufficiently concrete and particularized to meet the “case or controversy”
15 requirement of Article III. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-04 (1983).
16 Second, courts consider whether a plaintiff has established an entitlement to equitable
17 relief. *See Lyons*, 461 U.S. at 111; *Hodgers-Durgin*, 199 F.3d at 1042. In order to
18 establish such entitlement, the plaintiff must not only establish a likelihood of future
19 injury, but also show an imminent threat of irreparable harm. *Lyons*, 416 U.S. at 111;
20 *Stevens*, 213 F.R.D. at 366-67. A plaintiff’s equitable claims must be dismissed if they
21 fail to satisfy either inquiry. *See Hodgers-Durgin*, 199 F.3d at 1042.
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1 “In a class action, standing is satisfied if at least one named plaintiff meets the
2 requirements.” *See Bates v. United Parcel Serv.*, 511 F.3d 974, 985 (9th Cir. 2007). Any
3 injury to unnamed members of a proposed class, however, is irrelevant to the standing
4 analysis. *Hodgers-Durgin*, 199 F.3d at 1045. The party invoking federal jurisdiction has
5 the burden to establish standing, and the court presumes lack of jurisdiction unless the
6 claimant proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
7 375, 376-78 (1994); *Colwell v. Dept. of Health & Human Servs.*, 558 F.3d 1112, 1121
8 (9th Cir. 2009). Where a court lacks subject-matter jurisdiction, the action must be
9 dismissed. *See Fed. R. Civ. P. 12(b)(1)*.

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

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14 Plaintiffs lack standing because they have failed to satisfy the prerequisites for
15 equitable relief.² Although entitlement to equitable relief is related to the Article III
16 analysis, *see Lyons*, 461 U.S. at 103 (noting that Article III considerations “obviously
17 shade into those determining whether the complaint states a sound basis for equitable
18 relief”), “[t]he imminent threat showing is a separate jurisdictional requirement, arising
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21 ² Defendants do not concede that Plaintiffs satisfy the Article III test. Nevertheless,
22 because the lines of analysis are so similar and because Plaintiffs must meet both tests to
23 establish standing, this Court need only address whether Plaintiffs have established an
24 entitlement to equitable relief at this time. *See Hodgers-Durgin*, 199 F.3d at 1042. Such
25 an approach comports with the Ninth Circuit’s decision in *Hodgers-Durgin*, where the
26 court found it unnecessary to rule on the existence of Article III standing because the
27 plaintiffs were “not entitled to equitable relief.” *Id.* (“[E]ven if we assume the plaintiffs
28 have asserted sufficient likelihood of future injury to satisfy the ‘case or controversy’
requirement of Article III standing to seek equitable relief, we find that plaintiffs are not
entitled to equitable relief because of the second, alternative ground advanced in *Lyons*
. . .”). Defendants reserve the right to contest Article III standing in future filings with
this Court.

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

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

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19 In *Hodgers-Durgin*, the Ninth Circuit held that the plaintiffs had not established
20 their entitlement to equitable relief. There, two named plaintiffs filed a class action
21 complaint against the Border Patrol seeking a declaratory judgment that the Border
22 Patrol's roving patrol operations — whereby agents develop reasonable suspicion based
23 on their observations of moving traffic and other articulable facts — violated the Fourth
24 Amendment's prohibition on unreasonable searches and seizures. *Hodgers-Durgin*, 199
25 F.3d at 1038. The plaintiffs also sought an injunction prohibiting the Border Patrol from
26 conducting roving patrols and other allegedly unconstitutional practices and requiring the
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1 Border Patrol to implement measures “sufficient to prevent resumption of those
2 practices.” *Id.* at 1038-39.

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

12 Although the Ninth Circuit found the named plaintiffs’ factual allegations
13 somewhat distinguishable from those in *Lyons*, the court held that the plaintiffs lacked
14 standing. *Id.* at 1041-44. Specifically, the court held that an “equitable remedy is
15 unavailable absent a showing of irreparable injury, a requirement that cannot be met
16 where there is no showing of any real or immediate threat that the plaintiff[s] will be
17 wronged again — a ‘likelihood of substantial and immediate irreparable injury.’” *Id.* at
18 1042 (quoting *Lyons*, 461 U.S. at 111). Applying this standard, the Ninth Circuit held
19 that the named plaintiffs failed to demonstrate a sufficient likelihood of future injury to
20 warrant equitable relief. *Id.* at 1044. The Ninth Circuit found significant the fact that
21 both plaintiffs traveled frequently in their vehicles and saw Border Patrol agents regularly
22 while doing so, but each had only been stopped once. *Id.* The court held that it was not
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1 sufficiently likely that Lopez and Hodgers-Durgin themselves would again be stopped by
2 the Border Patrol and, thus, there was no basis for granting injunctive relief. *Id.* Further,
3 based on its finding that the plaintiffs failed to show a sufficient likelihood of future
4 harm, the Ninth Circuit held that the plaintiffs' claim for declaratory relief was not ripe
5 for review. *Id.* at 1044. As the court noted, "[a] claim is not ripe for adjudication if it
6 rests upon 'contingent future events that may not occur as anticipated, or indeed may not
7 occur at all.'" *Id.* (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). The
8 plaintiffs' claims that they would be stopped again by the Border Patrol were held to be
9 "simply too speculative to warrant an equitable judicial remedy, including declaratory
10 relief" ³ *Id.*

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

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

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

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

12 The plaintiffs filed a class action complaint which sought, among other things, an
13 injunction barring the Highway Patrol from asking motorists about their immigration
14 status on the basis of their Hispanic appearance. *Id.* at 729. The court held that the
15 named plaintiffs lacked standing to obtain equitable relief because they could not show a
16 likelihood that they would be questioned about their immigration status or have their
17 green cards seized again at some future time. *Id.* at 730-31. The court noted that the
18 plaintiffs had alleged only a single stop. *Id.* at 731. Additionally, the court reasoned that
19 even if the Highway Patrol were systematically discriminating against Hispanic-looking
20 motorists by questioning them about their immigration status and seizing green cards,
21 that injury was contingent on the Highway Patrol stopping the motorists in the first place.
22 *Id.* The court found that this contingency further diminished the likelihood that the
23 named plaintiffs would suffer an imminent injury without the injunction. *Id.* Thus, the
24 court ruled that the named plaintiffs did not have standing to seek the injunction that they
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1 requested. *Id.* at 733. The court further held that it could not consider the allegations of
2 unnamed class members in determining whether plaintiffs had standing to pursue
3 equitable relief, stating that “the named plaintiffs themselves must show that they are
4 likely to be repeat victims.” *Id.* at 733 (citing *Allee v. Medrano*, 416 U.S. 802, 828-29
5 (1974)).
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7 Like the plaintiffs in *Hodgers-Durgin* and *Farm Labor*, Plaintiffs have not shown
8 a “likelihood of substantial and immediate irreparable injury.” Despite living and
9 traveling in a rural area that Plaintiffs allege has seen a “dramatic increase” in the number
10 of Border Patrol agents, Plaintiff Grimes only alleges that he has been stopped once. A
11 single stop, however, is insufficient to establish a likelihood that he will be stopped again.
12 *See Hodgers-Durgin*, 199 F.3d at 1044 (finding it “not sufficiently likely” that plaintiffs
13 who had been stopped only once over the past 10 years would be stopped again); *Farm*
14 *Labor*, 95 F. Supp. 2d at 733 (holding that “the current named plaintiffs, having been
15 stopped but once, lack standing to seek equitable relief”). Plaintiff Contreras’ allegations
16 are insufficient for the same reasons: although Contreras alleges that he has been
17 “stopped” twice, the second alleged incident does not constitute a seizure under well-
18 settled Fourth Amendment jurisprudence. *United States v. Washington*, 490 F.3d 765,
19 770 (9th Cir. 2007) (“It is well established, however, that the Fourth Amendment is not
20 implicated when law enforcement officers merely approach an individual in public and
21 ask him if he is willing to answer questions.”); *Florida v. Royer*, 460 U.S. 491, 497
22 (1983) (“Law enforcement officers do not violate the Fourth Amendment by merely
23 approaching an individual on the street or in another public place, by asking him if he is
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1 willing to answer some questions, [or] by putting questions to him if the person is willing
2 to listen . . .”). Accordingly, Contreras only alleges one true “stop,” which, as noted
3 above, is insufficient to establish the requisite “likelihood of substantial and immediate
4 irreparable injury.” See *Hodgers-Durgin*, 199 F.3d at 1044; *Farm Labor*, 95 F. Supp. 2d
5 at 733.
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7 Finally, Plaintiff Sanchez’s allegations also fail to establish a likelihood that he
8 will be stopped again in the imminent future. Although Sanchez alleges he has been
9 stopped three times, the first alleged incident does not constitute a seizure under the
10 Fourth Amendment. See *Washington*, 490 F.3d at 770; *Royer*, 460 U.S. at 497. Indeed,
11 Sanchez does not allege that the officers pulled his car over, made a show of authority,
12 restricted his freedom in any way, or even spoke to him. Moreover, though Sanchez does
13 allege two vehicle stops that, if they occurred as alleged, do constitute seizures under the
14 Fourth Amendment, he alleges that those stops occurred during the summer of 2009 and
15 fall of 2011. See Complaint ¶¶ 22, 24. Thus, Sanchez’s alleged stops took place more
16 than two years apart, and the most recent occurred approximately six months prior to the
17 filing of Plaintiffs’ Complaint. Sanchez has not alleged that he has had any additional
18 interactions with or been stopped by the Border Patrol since then. As noted above, the
19 Olympic Peninsula is predominantly rural in nature and sparsely populated and Plaintiffs
20 allege that “there has been a dramatic increase in the number of Border Patrol agents
21 situated on the Olympic Peninsula.” Complaint ¶ 65. Viewed in that light, the fact that
22 Sanchez went more than two years without being stopped, as well as the fact that he has
23 not alleged any interaction with the Border Patrol in the six months preceding the filing
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1 of the Complaint, belies any argument that he faces a real and immediate threat that,
2 unless the court intervenes, he will be stopped again by the Border Patrol without
3 reasonable suspicion. *See Lyons*, 461 U.S. at 108 (concluding that Lyons lacked standing
4 and noting that “five months had elapsed between [the incident] and the filing of the
5 complaint, yet there was no allegation of further unfortunate encounters between Lyons
6 and the police”); *see also Mancha v. ICE*, No. 1:06-cv-2650, 2007 WL 4287766, *2
7 (N.D. Ga. Dec. 5, 2007) (holding plaintiffs lacked standing when “it ha[d] been over a
8 year” since the alleged incident and there was “no claim by the Plaintiffs that anything
9 similar has happened”).
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12 Plaintiffs’ one-off or infrequent interactions with the Border Patrol fall far short of
13 establishing an imminent threat of irreparable harm. *See Stevens*, 213 F.R.D. at 366.
14 Accordingly, Plaintiffs’ allegations that they themselves will be improperly stopped again
15 by the Border Patrol in the imminent future is “simply too speculative to warrant an
16 equitable judicial remedy, including declaratory relief” *Hodgers-Durgin*, 199 F.3d at
17 1044. Moreover, it is irrelevant whether any of the unnamed members of the purported
18 class has standing. *Id.* at 1045. As the court aptly stated in *Farm Labor*, “it is not
19 enough that the unnamed class members, as a group, almost certainly will be subject to
20 the practice in question: the named plaintiffs themselves must show that they are likely to
21 become repeat victims.” *Farm Labor*, 95 F. Supp. 2d. at 733 (citing *Allee v. Medrano*,
22 416 U.S. 802, 828-829 (1974)). Thus, the Court need only consider the allegations of
23 Plaintiffs Sanchez, Contreras, and Grimes to determine whether Plaintiffs have
24 adequately demonstrated that they are entitled to equitable relief. *See B.C. v. Plumas*
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1 *Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) (“A class of plaintiffs does not
2 have standing to sue if the named plaintiff does not have standing.”).

3 Based on their own allegations, Plaintiffs have failed to demonstrate a likelihood
4 of substantial and imminent irreparable injury sufficient to establish an entitlement to
5 injunctive relief against Defendants. Likewise, because the named plaintiffs fail to
6 establish imminent injury for the purposes of injunctive relief, their related claims for
7 declaratory relief must be dismissed as unripe. Accordingly, the Court should dismiss
8 Plaintiffs’ equitable claims for lack of subject matter jurisdiction.
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11 **2. 8 U.S.C. § 1357 Does Not Provide a Private Cause of Action.**

12 In addition to asserting claims under the Fourth Amendment, Plaintiffs also bring
13 a claim under 8 U.S.C. § 1357. *See* Complaint ¶¶ 83-87. Under their Second Claim for
14 Relief, Plaintiffs assert that Defendants violated § 1357 by “stopping the Plaintiffs and
15 Class Members without reasonable suspicion.” *Id.* ¶ 86. Section 1357 does not,
16 however, provide for a private cause of action; thus, this Court should dismiss Plaintiffs’
17 Second Claim for Relief for lack of subject matter jurisdiction.
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20 Congress established the powers of immigration officers in 8 U.S.C. § 1357.
21 Under § 1357(a)(2), Border Patrol agents (as immigration officers) are authorized “to
22 board and search for aliens any . . . vehicle” “within a reasonable distance from any
23 external boundary of the United States.” Border Patrol agents may only do so, however,
24 when they have “reasonable suspicion, based on specific articulable facts, that the person
25 being questioned is, or is attempting to be, engaged in an offense against the United
26 States or is an alien illegally in the United States.” 8 C.F.R. § 287.8(b)(2). As discussed
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1 above, Plaintiffs allege that the Border Patrol has been conducting vehicle stops without
2 reasonable suspicion. Even if Plaintiffs' allegations are accepted as true, however, that
3 does not empower them to bring an action under § 1357.
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5 “[T]he fact that a federal statute has been violated and some person harmed does
6 not automatically give rise to a private cause of action in favor of that person.” *Touche*
7 *Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (quotation omitted). “Instead, the
8 statute must either explicitly create a right of action or implicitly contain one.” *In re*
9 *Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230 (9th Cir. 2008). Statutes that
10 expressly create a private cause of action identify the persons able to bring suit, those
11 who are potentially liable, the forum for suit, and the potential remedy available. *See*
12 *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008).
13 Conversely, a statute that “does not mention the availability of any action to enforce its
14 mandates, nor . . . explicitly describe a forum in which suit may be brought or a plaintiff
15 for whom such a forum is available,” does not expressly create a private cause of action.
16 *In re Digimarc*, 549 F.3d at 1230. If a federal statute does not create an express private
17 cause of action, suit may only be brought if “Congress intended to provide the plaintiff
18 with a[n implied] private right of action.” *Id.*
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23 In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court created a four-factor test
24 for determining the existence of an implied private cause of action. The factors identified
25 by the Court are: (1) whether the plaintiff is a member of the class for whom the statute
26 was enacted to benefit; (2) whether there is any indication of legislative intent to create or
27 deny a remedy; (3) whether it is consistent with the legislative scheme to imply a remedy;
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1 and (4) whether the cause of action is one traditionally relegated to state law. *Cort*, 422
2 U.S. at 78. Although *Cort* identified four factors, subsequent Supreme Court and Ninth
3 Circuit case law has focused the analysis on the second factor — whether Congress
4 intended to provide the plaintiff with a private cause of action — as “the key inquiry in
5 this calculus.” See *In re Digimarc*, 549 F.3d at 1231 (internal quotation omitted); *Touche*
6 *Ross*, 442 U.S. at 578 (“The ultimate question is one of congressional intent, not one of
7 whether this Court thinks that it can improve upon the statutory scheme that Congress
8 enacted into law.”). “Indeed, the three *Cort* questions that are not explicitly focused on
9 legislative intent are actually indicia of legislative intent, such that the *Cort* test itself is
10 focused entirely on intent.” *Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007).

11 Therefore, “[t]he judicial task is to interpret the statute Congress has passed to determine
12 whether it displays an intent to create not just a private right but also a private remedy.”
13 *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). “Statutes that focus on the person
14 regulated rather than the individuals protected create no implication of an intent to confer
15 rights on a particular class of persons.” See *Alexander*, 532 U.S. at 289 (internal
16 quotations omitted); see also *In re Digimarc Corp.*, 549 F.3d at 1232 (same). “In the
17 absence of clear evidence of congressional intent, [courts] may not usurp the legislative
18 power by unilaterally creating a cause of action.” *In re Digimarc*, 549 F.3d at 1230-31.

19 Although the Ninth Circuit has not addressed whether 8 U.S.C. § 1357 creates a
20 private cause of action for violation of its provisions, the Sixth Circuit has held that it
21 does not. See *Chairez v. I.N.S.*, 790 F.2d 544, 548 (6th Cir. 1986). In *Chairez*, the court
22 considered and rejected the plaintiff’s contention that § 1357(a)(2) created a private cause
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1 of action for his claim of unlawful detention. The court noted that “Congress expressly
2 provided a statutory remedy for the illegal detention . . . by INS officials” by allowing
3 aliens to seek review via habeas corpus proceedings. 790 F.2d at 547. The court applied
4 the *Cort* factors, and concluded that there was “no substantial countervailing evidence of
5 congressional intent to permit such a supplementary remedy.” *Id.* at 548. Accordingly,
6 the court held that § 1357 does not create an implied private cause of action. *Id.*
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8 The rationale in *Chairez* applies equally well in the case at hand.⁴ The analysis is
9 the same despite the fact that Plaintiffs’ allege a violation of a different clause of
10 subsection (a)(2) than was at issue in *Chairez*. Plaintiffs already have an avenue for
11 challenging the allegedly unconstitutional actions of the Border Patrol via the Fourth
12 Amendment, as they did in their First Claim for Relief. Complaint ¶¶ 80-82. Indeed,
13 Plaintiffs’ First and Second Claims for relief assert the same factual bases and invoke the
14 same the legal test — whether Border Patrol agents had reasonable suspicion to make the
15 stops. *See id.* ¶¶ 80-82, 83-87. Moreover, as the Sixth Circuit correctly concluded, there
16 is no substantial evidence that Congress intended § 1357 to create an implied private
17 cause of action. Finally, § 1357 focuses on the persons regulated (immigration officers)
18 rather than the individuals protected, and thus does not imply an intent to confer a private
19 cause of action. *See Alexander*, 532 U.S. at 289 (“Statutes that focus on the person
20 regulated rather than the individuals protected create no implication of an intent to confer
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27 ⁴ It cannot reasonably be argued that § 1357 *expressly* creates a private cause of action as
28 it does not identify who may bring suit, those who are potentially liable, the forum for
suit, or the potential remedy available. *See Stoneridge Inv. Partners, LLC v. Scientific-*
Atlanta, Inc., 552 U.S. 148, 166 (2008).

1 rights on a particular class of persons.” (internal quotations omitted)); *In re Digimarc*
2 *Corp.*, 549 F.3d at 1232 (same). Accordingly, the Court should dismiss the Plaintiffs’
3 Second Claim for Relief for lack of subject matter jurisdiction.
4

5 **V. CONCLUSION**

6 For the foregoing reasons, this Court lacks subject matter jurisdiction and must
7 dismiss this case. Plaintiffs have not met their burden to establish standing to bring their
8 claims for equitable relief because they have not shown an entitlement to equitable relief.
9 Additionally, Plaintiffs’ claims under 8 U.S.C. § 1357 must be dismissed because the
10 statute does not provide a private cause of action. Accordingly, the Court should dismiss
11 this action pursuant to Federal Rule of Civil Procedure 12(b)(1).
12
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14 Respectfully submitted on July 12, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this July 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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