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7
8 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
9 GREAT FALLS DIVISION

10 ANA SUDA and MARTHA HERNANDEZ,) CV-19-10-GF-BMM
11 Plaintiffs,)
12 v.) **DEFENDANT CBP**
13 UNITED STATES CUSTOMS AND) **AGENT PAUL O’NEILL’S**
BORDER PROTECTION; CBP) **BRIEF IN SUPPORT OF**
14 COMMISSIONER KEVIN K. MCALEENAN,) **12(b)(6) MOTION TO**
in his official capacity; CBP AGENT PAUL) **PARTIALLY DISMISS**
15 O’NEAL, in his individual and official) **PLAINTIFFS’**
capacities; and JOHN DOES 1-25, in their) **COMPLAINT**
16 individual and official capacities.)
17 Defendants.)

18 COMES NOW, Defendant Paul O’Neill (“Mr. O’Neill”) ¹, by and

19 ¹ Mr. O’Neill’s motion and supporting brief are filed in his *individual capacity* only. The United States of America
20 (“USA”) represents Mr. O’Neill in his official capacity along with all other above-named defendants. USA has filed a
motion to dismiss under Rules 12(b)(1) & 12(b)(6) on behalf of Mr. O’Neill in his official capacity. See *generally* Docs.
17–18, April 19, 2019. Of note, Plaintiffs’ Complaint affirmatively alleges that Mr. O’Neill “is sued in his official
capacity as an Agent in the Havre office.” Doc. 1 ¶ 20. The body of Plaintiffs’ Complaint does not contain any
affirmative allegation that Mr. O’Neill is being sued in his individual capacity.

1 through his counsel of record, Lance P. Jasper and Cory R. Laird of Reep,
2 Bell, Laird & Jasper, P.C., and pursuant to Rule 12(b)(6) of Federal Rules
3 of Civil Procedure respectfully submits his brief in support of his motion to
4 partially dismiss the Plaintiffs' Complaint.

5 **INTRODUCTION**

6 Plaintiffs seek a declaration under 28 U.S.C. § 2201 that “race,
7 accent, and language cannot create suspicion sufficient to justify seizure
8 and/or detention, except where the seizure is based on a specific and
9 reliable suspect description matching such characteristics.” See Doc. 1, ¶
10 95, Feb. 14, 2019. They similarly request that this Court “[p]reliminarily and
11 permanently enjoin Defendants from stopping and/or detaining individuals
12 on the basis of race, accent, and/or speaking Spanish, except where the
13 seizure is based on a specific and reliable suspect description matching
14 such characteristics.” *Id.*, p. 16. However, Plaintiffs' request for
15 declaratory and injunctive relief fails to state a claim upon which relief can
16 be granted, and therefore, should be dismissed.

17 First, Plaintiffs seek retrospective declaratory relief, which cannot be
18 afforded as a matter of law. Second, Plaintiffs lack standing to request
19 prospective injunctive relief because their likelihood of future injury is purely
20 speculative and neither imminent nor non-redressible through other legal

1 avenues. The foregoing defects with Plaintiffs' request for *injunctive* relief
2 renders their simultaneous request for prospective *declaratory* relief not yet
3 ripe for adjudication. As such, Plaintiffs' claim for declaratory and injunctive
4 relief must be dismissed.

5 PLAINTIFFS' FACTUAL ALLEGATIONS

6 For the purposes of this motion, Mr. O'Neill takes Plaintiffs' Complaint
7 *as alleged*, withholding any position on the veracity of the allegations
8 contained therein.

9 Plaintiffs allege that, on May 16, 2018, Mr. O'Neill detained Plaintiffs
10 after encountering them at a Town Pump Convenience Store in Havre,
11 Montana. *Id.* ¶ 8, 35. According to Plaintiffs, Mr. O'Neill's sole basis for
12 detaining Plaintiffs was that he heard them speaking Spanish. *Id.* ¶¶ 9–10,
13 50–51. Plaintiffs allege they were detained by Customs and Border Patrol
14 ("CBP") for approximately forty (40) minutes. *Id.* ¶ 62.

15 Plaintiffs assert that this detainment "is part of a longstanding pattern
16 of abusive seizures and investigations by local CBP agents." *Id.* ¶ 71. This
17 includes CBP agents within the Havre Sector targeting "Latinx² individuals
18 without justification, often based on their race." *Id.* ¶ 73. One example of
19 such behavior advanced by Plaintiffs, involves the unlawful seizure of five
20

² Plaintiffs allege that "Latinx is a gender-neutral term sometimes used in lieu of Latino or Latina." Doc. 1, ¶ 7 n. 1.

1 (5) Latinx men in violation of the Fourth Amendment to the United States
2 Constitution. *Id.* ¶ 74. A second example involves CBP agents detaining
3 two (2) lawful immigrants for over twenty-four (24) hours. *Id.* ¶ 75. Further,
4 Plaintiffs assert that Mr. O’Neill once interrogated another Latinx individual
5 while at a social gathering. *Id.* ¶ 80. There are no allegations that Mr.
6 O’Neill was acting in his official capacity as a CBP agent when he
7 encountered this individual. Of note, none of these incidents involved
8 Plaintiffs.

9 Finally, Plaintiffs allege they were singled out by a plain clothes CBP
10 agent while dancing at a local bar in Havre, Montana in February of 2018
11 when he sent a text message to several other CBP agents that “There are
12 two Mexicans at the bar.” Doc. 1, ¶ 76–77. This incident did not result in
13 the detainment of Plaintiffs or any official contact with CBP agents, nor are
14 there any allegations that the CBP agent was acting within the course and
15 scope of his duties as a CBP agent at the time the incident occurred. *Id.* ¶
16 78. There are no allegations that Mr. O’Neill was present, participated in,
17 or was even aware of this incident.

18 **STANDARD**

19 Complaints must include a “short and plain statement of the claim
20 showing that the [plaintiff] is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

1 While a complaint attacked under Rule 12(b)(6) “does not need detailed
2 factual allegations,” it cannot survive if there exists only a “formulaic
3 recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*,
4 550 U.S. 554, 555 (2007). “Factual allegations must be enough to raise a
5 right to relief above the speculative level.” *Id.* Dismissal under Rule
6 12(b)(6) is appropriate where “the complaint lacks a cognizable legal theory
7 or sufficient facts to support a cognizable legal theory.” *Menciondo v.*
8 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Here,
9 Plaintiffs’ claim for declaratory and injunctive relief lacks factual allegations
10 sufficient to survive a motion to dismiss.

11 **ARGUMENT**

12 **I. Plaintiffs’ Request for Declaratory and Injunctive Relief** 13 **Fails to State a Claim Upon Which Relief Can Be Granted.**

14 “In a case of actual controversy within its jurisdiction . . . any court of
15 the United States, upon the filing of an appropriate pleading, may declare
16 the rights and other legal relations of any interested party seeking such
17 declaration, whether or not further relief is or could be sought.” 28 U.S.C. §
18 2201. Here, Plaintiffs allege that a “ripe and justiciable controversy exists
19 with regard to the circumstances and legality of [their] detention.” Doc. 1 ¶
20 94. Therefore, Plaintiffs allege they “are entitled to a declaration in their
favor . . . that race, accent, and language cannot create suspicion sufficient

1 to justify seizure and/or detention, except where the seizure is based on a
2 specific and reliable suspect description matching such characteristics.” *Id.*
3 ¶ 95, p. 17. This Court is unable to afford such relief as a matter of law.

4 **A. Plaintiffs’ Request for Retrospective Declaratory**
5 **Relief Cannot Be Granted by this Court.**

6 As stated above, Plaintiffs allege that a ripe and justiciable
7 controversy exists regarding *the legality of their detention*. In doing so,
8 they seek a declaratory judgment that Mr. O’Neill’s seizure of them was
9 violative of the Fourth Amendment. *Id.* ¶¶ 94–95 (emphasis added). That
10 is, Plaintiffs seek a declaratory judgment that Mr. O’Neill’s purported
11 justification for detaining them is insufficient to form the requisite
12 reasonable suspicion necessary to initiate an investigatory stop. *Id.* ¶¶ 9,
13 12 (citing language as a proxy for race). In short, Plaintiffs seek a
14 declaratory judgment that Mr. O’Neill’s alleged detention of them was
15 unconstitutional.

16 Such a request seeks *retrospective* rather than *prospective* relief.
17 *See National Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 847 n. 5 (9th Cir.
18 2002) (“[W]e consider declaratory relief retrospective to the extent that it is
19 intertwined with a claim for monetary damages that requires us to declare
20 whether a past constitutional violation occurred.”) (quoting *People for the*
Ethical Treatment of Animals v. Rasmussen, 298 F.3d 1198, 1202 n. 2

1 (10th Cir. 2002)) (emphasis added). This Court cannot provide such relief.

2 The United States Supreme Court has affirmed the dismissal of a
3 plaintiff's request for retrospective declaratory relief when a declaratory
4 judgment "would have much the same effect as a full-fledged award of
5 damages." *Green v. Mansour*, 474 U.S. 64, 73–74 (1985) (holding "a
6 declaratory judgment that respondent violated federal law in the past would
7 have to stand on its own feet as an appropriate exercise of federal
8 jurisdiction . . . [t]his it cannot do"); see also *Idaho v. Coeur d'Alene Tribe of*
9 *Idaho*, 521 U.S. 261, 288 (1997) (stating "[a] federal court cannot award
10 retrospective relief, designed to remedy past violations of federal law")
11 (internal citations omitted). This is precisely the improper relief Plaintiffs
12 seek and it cannot be awarded as a matter of law.

13 Furthermore, requests for retrospective declaratory relief fail when a
14 claimant simultaneously asserts a claim under *Bivens v. Six Unknown*
15 *Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)³ for
16 the same alleged constitutional violations. See *Mendina v. Garcia*, 165 F.
17 Supp. 3d. 861, 894 (N.D. Cal. 2016); see also *Davis*, 307 F.3d at 847 n. 5
18 (stating when a request for retrospective declaratory relief is intertwined
19 with an identical request for monetary damages, the declaratory relief

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³ The court in *Bivens* recognized an independent cause of action for monetary damages when a federal official allegedly violates a plaintiff's constitutional rights. 403 U.S. at 397.

1 becomes “superfluous in light of the damages claim.”) (internal citations
2 and quotation marks omitted). This is the exact situation here.

3 Plaintiffs have advanced *Bivens* claims under both the Fourth and
4 Fifth Amendments for Mr. O’Neill’s detention of them on May 16, 2018.
5 Doc. 1, ¶¶ 8, 14, 83, 89. In doing so, Plaintiffs seek an award of monetary
6 damages. *Id.* p. 17. Plaintiffs’ Fourth and Fifth Amendment claims seek
7 monetary damages, which forecloses their ability to pursue declaratory
8 relief. Further, Plaintiffs base their allegations regarding a ripe and
9 justiciable controversy in the “circumstances and legality of [their]
10 detention.” *Id.* ¶ 94. This renders their declaratory relief retrospective in
11 nature and outside the jurisdiction of this Court. Based on the foregoing,
12 Plaintiffs’ claim for retrospective declaratory relief should be dismissed.

13 **B. Plaintiffs Lack Standing to Request Prospective**
14 **Injunctive Relief.**

15 A litigant must establish standing for each form of relief sought.
16 *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S.
17 167, 185 (2000). With respect to prospective injunctive relief, a litigant
18 cannot achieve Article III standing unless they: (1) fulfill the Article III case
19 or controversy requirement; and (2) “demonstrate a case or controversy . . .
20 that would justify the equitable relief sought.” *Hodgers-Durgin v. de la Vina*,
199 F.3d 1037, 1041 (9th Cir. 1999) (internal citations and quotation marks

1 omitted). The Supreme Court has previously noted that Article III “case or
2 controversy considerations obviously shade into those determining whether
3 the complaint states a sound basis for equitable relief.” *City of Los Angeles*
4 *v. Lyons*, 461 U.S. 95, 103 (1983) (internal citations and quotation marks
5 omitted). However, for the purposes of this motion, Mr. O’Neill confines his
6 argument to the second requirement—*demonstrating a case or*
7 *controversy that would justify the equitable relief sought.*⁴ With this in mind,
8 Plaintiffs cannot satisfy this requirement of Article III standing.

9 In order to demonstrate a case or controversy that justifies the
10 equitable relief requested, a plaintiff must advance allegations sufficient to
11 establish the “likelihood of substantial and immediate irreparable injury and
12 the inadequacy of remedies at law.” *Id.* That is, the “equitable remedy is
13 unavailable absent a showing of irreparable injury, a requirement that
14 cannot be met where there is no showing of any real or immediate threat
15 that plaintiffs will be wronged again.” *Hodgers-Durgin*, 199 F.3d at 1042
16 (internal citations omitted). This inquiry is limited to allegations involving
17 the named plaintiffs, with “any injury [others] may have suffered [being]
18 simply irrelevant to the question [of] whether the named plaintiffs are
19 entitled to the injunctive relief they seek.” *Id.* at 1045. Plaintiffs have failed

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⁴ Mr. O’Neill reserves his right to contest Plaintiffs’ satisfaction of the first requirement in subsequent filings with this Court.

1 to establish either a likelihood of substantial and immediate irreparable
2 injury or an inadequacy of remedies at law.

3 Additionally, the United States Court of Appeals for the Ninth Circuit
4 has found that separation of powers concerns are “relevant and significant”
5 with respect to counseling against injunctive relief. *Id.* at 1043. Pursuant to
6 this analysis, the United States Supreme Court has noted “it is not the role
7 of the courts, but that of the political branches, to shape the institutions of
8 government in such fashion as to comply with the laws and the
9 Constitution.” *Id.* (quoting *Lewis v. Casey*, 518 U.S. 343, 349–50 (1996)).

10 That is, the “distinction between the [courts and the political branches]
11 would be obliterated if, to invoke intervention of the courts, no actual or
12 imminent harm were needed, but merely the status of being subject to a
13 governmental institution that was not organized or managed properly.” *Id.*

14 The United States Court of Appeals for the Ninth Circuit explained
15 that “the co-equal branches of the federal government are entitled to the
16 widest latitude in the dispatch of their own internal affairs” finding that “[i]n
17 the absence of a likelihood of injury to the named plaintiffs, there is no
18 basis for granting injunctive relief that would restructure the operations of
19 the Border Patrol and that would require ongoing judicial supervision of an
20 agency normally, and properly, overseen by the executive branch.” *Id.*

1 (internal citations and quotation marks omitted). Indeed, such
2 considerations are crucial to the proper adjudication of Plaintiffs' request for
3 injunctive relief in this case. And, by applying these considerations,
4 Plaintiffs' allegations regarding future injury are revealed as mere
5 speculation and unsupported conclusions.

6 Here, Plaintiffs allege to have resided in Havre, Montana since 2010
7 and 2014, respectively. Doc. 1, ¶ 22. With the exception of the incident
8 that forms the basis of this litigation, Plaintiffs have not alleged *any other*
9 *incidents* which constitute formal detentions or even contacts with CBP
10 agents. See *Id.* ¶ 8 (emphasis added). Thus, in their nine (9) and five (5)
11 years in Havre, Montana, respectively, Plaintiffs have been subjected to
12 only one (1) investigatory stop by CBP agents. This is insufficient to
13 establish that there is a real or immediate threat that Plaintiffs will be
14 "wronged again." *Hodgers-Durgin*, 199 F.3d at 1039, 1045 (denying a
15 plaintiffs request for injunctive relief against CBP, in part, because he had
16 been stopped only once in ten (10) years). That is, Plaintiffs' Complaint, as
17 *alleged*, fails to establish the "likelihood of substantial and immediate
18 irreparable injury" necessary to achieve Article III standing. *Lyons*, 461
19 U.S. at 103 (emphasis added). Consequently, their claim for injunctive
20 relief must be dismissed.

1 The additional incidents contained in Plaintiffs' Complaint should be
2 briefly discussed. First, Plaintiffs rely on an incident involving five (5) Latinx
3 men in Havre, Montana, that was the subject of an opinion issued by the
4 United States Court of Appeals for the Ninth Circuit. Doc. 1, ¶ 74. Second,
5 Plaintiffs point to an incident that occurred in April of 2016 in Havre,
6 Montana, and formed the basis of litigation that proceeded before this
7 Court. *Id.* ¶ 75. Third, Plaintiffs' Complaint contains allegations regarding
8 a social gathering in which Mr. O'Neill "interrogated another individual
9 about her Mexican heritage." Doc. 1, ¶ 80.⁵ As has been stated above,
10 Plaintiffs cannot rely on incidents involving unnamed party's to support their
11 entitlement to injunctive relief. *Hodgers-Durgin*, 199 F.3d at 1045.
12 Consequently, these three (3) incidents *are wholly irrelevant to the question*
13 *of whether Plaintiffs have properly established a claim for injunctive relief*
14 and, thus, these alleged incidents should be disregarded by this Court.

15 Plaintiffs' Complaint contains allegations regarding only one (1) other
16 incident in which they are personally involved. Plaintiffs allege that, while
17 out dancing at a bar in Havre, Montana, a CBP agent, "also at the bar and
18 in plain clothes, took photos of them and sent the photos to other agents
19 with the message: 'There are two Mexicans at the bar.'" Doc. 1, ¶ 77.

20 ⁵ Plaintiffs' Complaint contains no allegations that Mr. O'Neill was acting within the scope and course of his duties as a CBP agent at that time, and, therefore, even if this incident involved Plaintiffs it cannot be properly or accurately described as a formal interrogation or detention by an agent of CBP.

1 Plaintiffs further allege that, *on information and belief*, they would have
2 been detained by the agent had another agent who received the message
3 not confirmed they were friends with his wife. *Id.* ¶ 78 (emphasis added).
4 As a threshold matter, allegations made “on information and belief” are
5 insufficient to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S.
6 662, 686, 678 (2009). Further, the allegations surrounding this alleged
7 incident fail to establish: (1) that Plaintiffs were ever detained or even came
8 into contact with CBP agents; or (2) that Mr. O’Neill was involved in the
9 incident at all. Such allegations are insufficient to establish that Plaintiffs
10 face any real or immediate threat of being wronged again.

11 Finally, Plaintiffs themselves have already proceeded in a manner
12 which establishes that there is not an “inadequacy of remedies at law” to
13 right the wrongs they seek to prevent. Indeed, Plaintiffs have already
14 recognized the availability of *Bivens* actions to seek redress for the alleged
15 violation of constitutional rights by federal actors. Doc. 1, ¶ 14. That is,
16 Plaintiffs have asked this Court to “[p]reliminarily and permanently enjoin
17 Defendants from stopping and/or detaining individuals on the basis of race,
18 accent, and/or speaking Spanish, except where the seizure is based on a
19 specific and reliable suspect description matching such characteristics.”
20 *Id.*, p. 16. Yet, Plaintiffs themselves are currently maintaining a *Bivens*

1 action to seek redress for what they allege to be such a stop. These claims
2 include leveling allegations that detainment on this basis can never occur
3 with reasonable suspicion, and therefore, violate the Fourth and Fifth
4 Amendments. *Id.* ¶¶ 11–12, 14, 65, 81–92. Thus, Plaintiffs have already
5 availed themselves to the remedy the law provides for the allegedly
6 unlawful detentions they seek to prevent through injunctive relief. This
7 similarly prevents the issuance of injunctive relief.

8 An injunction cannot issue in these circumstances, in which there are
9 “other avenues of relief open to [the Plaintiffs] for the serious conduct they
10 assert, and the abrasive and unmanageable intercession which the
11 injunctive relief they seek would represent.” *O’Shea v. Littleton*, 414 U.S.
12 488, 504 (1974). As stated by the United States Court of Appeals for the
13 Ninth Circuit in *Hodgers-Durgin*, “[w]hether the named plaintiffs are likely to
14 be stopped again by the Border Patrol is simply too speculative to warrant
15 an equitable judicial remedy” 199 F.3d at 1044. This is precisely the
16 case here, and, consequently, Plaintiffs’ claim for injunctive relief should be
17 dismissed.

18 **C. Plaintiffs’ Lack of Standing to Request**
19 **Prospective Injunctive Relief Renders Their Request**
20 **for Prospective Declaratory Relief Unripe.**

Because Plaintiffs lack standing to seek prospective injunctive relief

1 from this Court, they likewise cannot seek prospective declaratory relief.
2 “In suits seeking both declaratory and injunctive relief against a defendant’s
3 continuing practices, the ripeness requirement serves the same function in
4 limiting declaratory relief as the imminent-harm requirement serves in
5 limiting injunctive relief.” *Id.* Thus, when Plaintiffs’ claim for injunctive relief
6 fails to establish a likelihood of future injury, it similarly “renders their claim
7 for declaratory relief unripe.” *Id.*

8 The United States Supreme Court recognized this principle in the
9 context of “injunctions and imminency” and “declaratory judgments and
10 ripeness” by stating “[a] claim is not ripe for adjudication if it rests upon
11 contingent future events that may not occur as anticipated, or indeed may
12 not occur at all.” *Id.* (citing *Texas v. United States*, 523 U.S. 296, 300
13 (1998)) (internal citations and quotation marks omitted). Thus, Plaintiffs’
14 failure to properly plead their request for injunctive relief is fatal to their
15 request for prospective declaratory relief. Consequently, it must be
16 dismissed as a matter of law.

17 **CONCLUSION**

18 Plaintiffs’ claim for declaratory and injunctive relief under 28 U.S.C. §
19 2201 fails to state a claim upon which relief can be granted. First, Plaintiffs
20 seek retrospective declaratory relief which cannot properly be afforded by

1 an Article III court. Second, Plaintiffs' request for prospective injunctive
2 relief fails because of Plaintiffs' failure to establish a likelihood of
3 substantial and immediate irreparable injury that cannot otherwise be
4 remedied through existing legal processes. Finally, Plaintiffs' failure to
5 properly assert their request for injunctive relief renders their claim for
6 prospective declaratory relief unripe. Based on the foregoing, Mr. O'Neill
7 respectfully requests that this Court dismiss Plaintiffs' claim for declaratory
8 and injunctive relief leveled against him in his individual capacity.

9 DATED this 4th day of June, 2019.

10 REEP, BELL, LAIRD & JASPER, P.C.

11 By: /s/ Cory R. Laird
12 Attorneys for Defendant Paul O'Neill

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following persons by the following means:

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13 DATED this 4th day of June, 2019.

14 REEP, BELL, LAIRD & JASPER, P.C.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies this Brief complies with LR 7.1(d)(2)(B). This brief contains 3347 words, excluding the caption, Certificate of Service and the Certificate of Compliance. The word count function in the word processing software used to prepare this Brief was relied upon for this calculation.

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