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

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR RULE 12(b)(1) MOTION TO DISMISS

Defendants Chief Patrol Agent Robert N. Garcia, U.S. Customs and Border Protection, and U.S. Border Patrol, file this memorandum of law in support of their motion to dismiss pursuant to Rule 12(b)(1).[1]

I. INTRODUCTION

A. The Complaint and Allegations of Constitutional Violations

On August 11, 2020, the plaintiff filed the present complaint, asserting two causes of action. Document Number ("DN") 1. The first cause of action is a personal damages claim against two Border Patrol agents, alleging that they violated his Fourth Amendment rights when they "erected a warrantless checkpoint in August 2017 for the primary purpose of drug

[1] With respect to Chief Patrol Agent Garcia, when an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States. *Burgos v. Milton*, 709 F.2d 1, 2 (1st Cir. 1983); *see also Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (suit against IRS employees in their official capacities is a suit against the United States).

interdiction." DN 1 at 29. The personal liability defendants will respond to this claim in a separately filed dispositive motion.

The second cause of action is a claim against Chief Patrol Agent Robert N. Garcia in his official capacity, United States Customs and Border Protection ("CBP"), and the United States Border Patrol ("USBP"), alleging that the checkpoint violated the Fourth Amendment because it operated "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. Based on these allegations, the plaintiff seeks injunctive and declaratory relief, to halt all future checkpoints conducted by USBP in New Hampshire. *Id*. at 29-31.

B. United States Border Patrol Temporary Checkpoints

Temporary immigration checkpoints are used to carry out Border Patrol's mission of immigration enforcement. Declaration of Chief Patrol Agent Robert N. Garcia ("Garcia Dec."), attached as Exhibit A, at 2.

In general, USBP checkpoints are strategically located and constructed in a way to stop vehicles and individuals seeking to evade immigration law requirements and traveling from the international land border to the interior of the United States. Garcia Dec. at 2. Checkpoints along the Northern Border are often located on interstate highways that serve as main thoroughfares from the United States-Canadian border to major cities in the interior, such as Boston and New York City. *Id*.

Checkpoints usually include a primary inspection area and a secondary inspection area. Garcia Dec. at 2. Vehicles that enter the checkpoint will be processed through the primary

inspection area. *Id*. In that area, occupants of a vehicle are asked questions about their immigration or citizenship status and the vehicle may be subject to a free-air canine sniff by USBP canines. *Id*. USBP canines also conduct free-air sniffs of vehicles in the pre-primary area to expedite the processing of vehicles through the checkpoint. *Id*. All USBP canines undergo rigorous training and receive certification as dual detection canines that are able to identify the presence of concealed humans and narcotics. *Id*.

Only certain vehicles and individuals, however, will be selected to undergo a more thorough secondary inspection. Garcia Dec. at 2. A referral of a vehicle for secondary inspection generally occurs when agents seek to conduct a full immigration inspection or for a potential violation of some other law (*i.e.*, customs, narcotics, or other criminal violations). *Id.* During a secondary inspection, agents have the authority to: (a) ask questions; (b) request to inspect immigration documents; (c) make plain view observations; (d) request consent to search a person or a vehicle; (e) perform exterior canine sniffs of a vehicle; (f) press down on trunk; and/or (g) tap exterior fuel tanks; and (h) take other actions to confirm or exclude violations of law. *Id*. at 2-3.

From 2012 through 2016, no immigration checkpoint activities were conducted by USBP in the New Hampshire area due to the lack of manpower and budgetary restrictions. Garcia Dec. at 3. In 2017, the Beecher Falls Border Patrol Station, responsible for patrolling Vermont and New Hampshire as part of the "Swanton Sector," resumed the use of immigration checkpoints after receiving the funding necessary to create and operate the checkpoints.[2] *Id.*

[2] Swanton Sector is an area of responsibility that encompasses 24,000 square miles and includes all of the state of Vermont, six counties in the state of New York, and Coos, Grafton, and Carroll Counties in New Hampshire.

The Beecher Falls Border Patrol Station drafted an operations order for authorization to conduct the 2017 immigration checkpoints. Garcia Dec. at 3. Prior to taking effect, the operations order underwent legal sufficiency review by the Office of the Assistant Chief Counsel, Boston, and was reviewed and approved by both Swanton Sector management and USBP Headquarters. *Id*.

In 2017, USBP ran two temporary checkpoints near Woodstock, New Hampshire, three in 2018, and one in 2019. Garcia Dec. at 3-4. As explained below, USBP also operated checkpoints in other locations during 2018 and 2019, *id.*, but the Complaint does not allege that these have any bearing on the plaintiff's claim.

In 2020, USBP has not operated temporary checkpoints anywhere in New Hampshire. Garcia Dec. at 4. According to Chief Patrol Agent Garcia, "[t]he re-initiation of immigration checkpoints is contingent upon operational need, manpower, and budgetary considerations." *Id*.

C. Inspection of the Plaintiff

On August 26, 2017, the plaintiff Jesse Drewniak was a passenger in a vehicle traveling along Interstate Highway 93 (I-93) South in Woodstock, New Hampshire. DN 1 at 19. While traveling along I-93, the vehicle entered a temporary immigration checkpoint operated by Border Patrol agents from the Beecher Falls Border Patrol Station ("the Checkpoint"). *Id.* As the vehicle entered the pre-primary area of the Checkpoint, Supervisory Border Patrol Agent (SBPA) Mark A. Qualter used his USBP trained dual detection canine Marian to conduct a free-air sniff of the vehicle.[3] *Id* at 20. The free-air sniff resulted in a positive alert by Marian. *Id*.

[3] Although the Complaint alleges that Border Patrol Agent (BPA) Jeremy Forkey also participated in this inspection, DN 1 at 20, both BPA Forkey and SBPA Qualter have executed declarations explaining that Forkey was not at the Woodstock checkpoint on August 26, 2017, but was assigned to the Beecher Falls Border Patrol Station to fill out reports and enter data about seizures, based on information sent to him by BPAs at the checkpoint. *See* Declarations of

As a result, the vehicle was referred to the secondary inspection area of the Checkpoint to further investigate the cause of the canine alert. *Id.*

In the secondary inspection area of the Checkpoint, a canine search of the vehicle resulted in the discovery of two (2) grams of hash oil (marijuana) and a "hash pipe" belonging to the plaintiff. DN 1 at 21-22. Possession of marijuana violates both Federal law under the Controlled Substances Act and New Hampshire state drug possession laws.[4] These items were seized by the Beecher Falls Station and turned over to the Woodstock Police Department at the Checkpoint. *Id* at 22. The Woodstock Police Department issued Plaintiff a citation for possession of marijuana in violation of New Hampshire state law. *Id.* A Form I-44, Border Patrol Report of Apprehension or Seizure, was completed following the seizure at the Beecher Falls Station by BPA Jeremy Forkey, who was responsible for processing all of the necessary administrative paperwork associated with arrests and apprehensions at the Checkpoint. Declaration of BPA Jeremy Forkey, DNs 19-4, 19-5. BPA Forkey was not physically present at the checkpoint and did not participate in any inspections involving the plaintiff. *Id.*

II. ARGUMENT

A. Legal Standard For Rule 12(b)(1) Motions

On a Rule 12(b)(1) motion to dismiss, a court is not limited to the allegations of the complaint, but may consider materials outside of the pleadings. *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (stating that on a motion to dismiss for lack of jurisdiction, a court "may

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BPA Jeremy Forkey, DN 19-4, and SBPA Mark Qualter, DN 19-5. The sole basis for the allegations made against Forkey appears to be the inclusion of his name in the report detailing the inspection of the plaintiff. DN 1 at 3.

[4] As of September 2017, the punishment for possession of small amounts of marijuana and hashish is a violation punishable by a fine. A violator cannot be subject to arrest, however. See NH RSA 318-B:2-c.

inquire by affidavits or otherwise, into the facts as they exist"). Thus, the court may consider exhibits on a challenge to the court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), without converting the motion into a motion for summary judgment under Fed. R. Civ. P. 56. *See Gonzalez v. United States*, 284 F.3d 281, 287-88 (1st Cir. 2002). *See generally* 2 James Wm. Moore et al., *Moore's Federal Practice* ¶ 12.30[4], at 12-39 to 12-41 (3d ed. 1999).

Because jurisdictional issues, whether they involve questions of law or fact, are for the Court to decide, the standard of decision for a factual motion to dismiss for lack of subject matter jurisdiction is much different from the standard for a summary judgment motion under Rule 56 or for a motion to dismiss under Rule 12(b)(6).

> [T]he trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction its very power to hear the case there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Mortensen v. First Federal Savings & Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1977). *See also Valentín v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (stating that on a factual Rule 12(b)(1) motion, "jurisdictional averments 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").[5]

[5] In some circumstances, courts have converted motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) into motions for summary judgment under Fed. R. Civ. P. 56, when resolution of the jurisdictional question is intertwined with the merits of the case and materials outside of the pleadings have been submitted. The jurisdictional question is not intertwined with the merits, because the Court can decide whether the plaintiff has standing without reaching the question of whether CBP's temporary border checkpoints violate the Fourth Amendment.

B. The Plaintiff Has Failed To Establish Article III Standing For His Claims For Injunctive And Declaratory Relief

Jurisdiction is a threshold issue, and the separation of powers doctrine requires a federal court to determine whether it has jurisdiction at the outset, rather than defer the issue until trial. The plaintiff does not have Article III standing for his claim for injunctive and declaratory relief, and as a consequence these claims should be dismissed. His claim of alleged future harm is not "certainly impending," but is conjectural or hypothetical. The Court, therefore, does not have subject matter jurisdiction over these claims.

"[F]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *United States v. Coloian*, 480 F.3d 47, 50 (1st Cir. 2007) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506 (1869)). When the court's jurisdiction is challenged, as it is here, "the burden lies with the plaintiff[s], as the part[ies] invoking the court's jurisdiction, to establish that it extends to [their] claims." *Peterson v. United States*, 774 F. Supp. 2d 418, 421 (2011) (citing *Kokkonen*, 511 U.S. at 377).

Article III of the Constitution limits federal courts' jurisdiction to actual "Cases" or "Controversies." As the Supreme Court has explained, "no principal is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

The law of Article III standing, which is built on separation of powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. *Summers v. Earth Island Institute*, 555 U.S. 488, 492-93 (2009). In line with these principles, "[the] standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

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. These "constitutional requirements apply with equal force in every case." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011).

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), which in this case was August 11, 2020. DN 1. 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.

The purpose of the requirement that the plaintiff establish that he will sustain an "imminen[t]" and non-conjectural "future injury" is "to ensure that the alleged injury is not too speculative for Article III purposes" by requiring proof that "the injury is '*certainly* impending.'" *Defenders of Wildlife,* 504 U.S. at 565 n.2. Proof of an imminent and concrete injury is also necessary to provide "the essential dimension of [factual] specificity" to a case, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974), and assure that legal questions "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). An injury cannot be "imminent" if it is based on "speculati[on] that [government] officials will" take harmful actions, because such conjecture gives "no assurance that the asserted injury is …'certainly impending.'" *DaimlerChrysler Corp.*, 547 U.S. at 344-45. The Supreme Court has "said many times" that such "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Ibid.*

The Court in *Summers*, for instance, required proof of an "imminent future injury" by plaintiffs seeking an injunction to halt the Forest Service's use of regulations authorizing it to take certain land-management actions without public notice or an opportunity for comment or appeal. 555 U.S. at 492-95. The plaintiffs attempted to challenge the regulations as an unlawful grant of authority, but *Summers* held that they failed to establish their standing because they could not identify an actual "application of the [challenged] regulations that threatens imminent and concrete harm." *Id.* at 494-95. The Court reasoned that it would "fly in the face of Article

Ill's injury-in-fact requirement" to permit such an untethered challenge to a "regulation in the abstract." *Id.* at 494. At the same time, the Court also concluded that the requisite "injury in fact" could not be established by a "statistical probability" of a future injury, *id.* at 497-99, and determined that a "*realistic* threat" of future harm does not satisfy "the requirement of 'imminent' harm," *id.* at 499-500.

The First Circuit considers the "ripeness" of a claim as part of this standing analysis. Ripeness, another aspect of a federal court's authority to hear a case ("justiciability"), "has roots in both the Article III case or controversy requirement and in prudential considerations." *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013) (quoting *Mangual v. Rotger–Sabat*, 317 F.3d 45, 59 (1st Cir. 2003)). According to the Supreme Court, a claim is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). "[T]he facts alleged, under all the circumstances, [must] show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of" the judicial relief sought. *Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey*, 844 F.3d 318, 326 (1st Cir. 2016) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)).

C. Plaintiff's Asserted Future Injuries Are Conjectural And *Not* Imminent Or Certainly *Impending*.

The plaintiff alleges that USBP checkpoints "regularly occur on I-93 South," and "are particularly common in the summer." DN 1 at 27. However, temporary border checkpoints are far less common than the Complaint suggests, especially in the Woodstock area. In the years between 2012 and 2017, there were no CBP checkpoints in New Hampshire, at all. Garcia Dec.

at 3. In 2017, CBP set up two temporary checkpoints in New Hampshire, both on I-93 South, near Woodstock, New Hampshire (August 25-27 and September 26-28, 2017). *Id*. In 2018, CBP had three temporary checkpoints in New Hampshire, all on I-93 South, near Woodstock (May 27-29, 2018; August 21-23, 2018; September 25-27, 2018). *Id.* at 3 -4. 2019 saw only one temporary checkpoint at Woodstock (June 8-9, 2019). *Id.* at 4. That year, CBP also held two one-day checkpoints in Columbia, New Hampshire, which lies approximately 15 miles south of the Canadian border (April 7 and May 27, 2019). *Id*. Finally, CBP held a checkpoint on I-89 in Lebanon (September 3-6, 2019). There have been no CBP checkpoints anywhere in New Hampshire in 2020. *Id*. Thus, in the last 24 months, there has been only one two-day checkpoint in Woodstock. CBP does not presently have plans for temporary checkpoints anywhere in New Hampshire. *Id*. Future checkpoints in the state would be contingent on many factors, including operational needs, manpower, and budgetary considerations. *Id*.

Since his arrest at the August 2017 checkpoint, the plaintiff has not encountered a single CBP checkpoint anywhere in New Hampshire, although he claims to make the 200 mile round-trip between his home in Hudson, New Hampshire and the White Mountains, by way of Woodstock, 50 times or more a year (for a total of 10,000 miles annually, for recreation). DN 1 at 26. This could be because the plaintiff has overestimated the frequency of his trips to the White Mountains, or because the Woodstock checkpoints are rare, or for both reasons.

The Complaint does not even mention the other 2019 checkpoint locations, in Columbia and Lebanon, let alone raise "particularized" concerns about them. Where these other locations are concerned, the plaintiff alleges no facts that distinguish his future risk of being stopped at a temporary border checkpoint from that of the general public. Such a generalized grievance is inappropriate for adjudication. *See Defs. of Wildlife*, 504 U.S. at 573-74 ("A plaintiff raising

only a generally available grievance about government . . . does not state an Article III case or controversy."); *Conservation Law Found. of New England, Inc. v. Reilly*, 950 F.2d 38, 41 (1st Cir. 1991) (holding that injury based on "increased threat to public health and natural resources" was insufficient, and "has to be more particularized"). He has no standing with regard to these other checkpoints.

The plaintiff has not alleged any specific plans or dates for future travel, when a stop at a temporary checkpoint might occur. Ordinarily, vague or indefinite travel plans do not satisfy Article III standing requirements. In *Defenders of Wildlife*, the Court held that a vague "intent[]" to travel, resulting in possible future injury "is simply not enough." 504 U.S. at 564. That is, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.*; *see also Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 326 (1st Cir. 2009) (affirming dismissal where only "nebulous 'some day' intentions" were alleged). Here, the plaintiff has alleged nothing more than a vague intent to travel to the White Mountains in the future. Such speculative allegations again fall far short of the "requirement of imminent injury." *See Summers*, 555 U.S. at 496.

But, suppose the plaintiff clears this hurdle because the court considers his declared intention to continue to visit the White Mountains (via Woodstock) for recreation to be sufficiently definite. Even then, we are still wandering in a universe of conjecture and hypothesis. USBP does not currently have plans for future temporary border checkpoints anywhere in New Hampshire. At present, nobody knows *when* USBP will conduct temporary checkpoints in New Hampshire. As the recent history of New Hampshire demonstrates, many years can go by between USBP checkpoint programs. Nobody knows *where* USBP would

operate checkpoints in the future. Nobody knows *what* kind of involvement, if any, state or local law enforcement might have with those checkpoints. In fact, in September 2017, the New Hampshire State Police announced that they would not provide support at USBP checkpoints absent officer safety concerns, exigent circumstances, or in response to a specific request for assistance in potential violations of state law. Garcia Dec., ¶ 10. Since then, state and local law enforcement agencies have not provided support at any temporary border checkpoints in New Hampshire. *Id*. That is a material difference from the checkpoint at which Mr. Drewniak was searched, since the allegation that the checkpoints' primary and unconstitutional purpose is narcotics or general law enforcement hinges in large part on of the level of cooperation between and state or local law enforcement authorities. DN 1, ¶¶ 41-46; DN 1-1, at 12, 13.

The manifold uncertainties about future checkpoints in the Swanton Sector go directly to the ripeness aspect of Article III standing. As the Sixth Circuit has noted, prospective relief for Fourth Amendment violations, is exceptional:

> Concerns about the premature resolution of legal disputes have particular resonance in the context of Fourth Amendment disputes. In determining the "reasonableness" of searches under the Fourth Amendment and the legitimacy of citizens' expectations of privacy, courts typically look at the "totality of the circumstances," *Samson v. California*, 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) (internal quotation marks omitted), reaching case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping, pronouncements of law, *see O'Connor v. Ortega*, 480 U.S. 709, 718, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). Courts thus generally review such challenges in two discrete, *post-enforcement* settings: (1) a motion to suppress in a criminal case or (2) a damages claim under § 1983 or under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), against the officers who conducted the search. In both settings, the reviewing court looks at the claim in the context of an actual, not a hypothetical, search and in the context of a developed factual record of the reasons for and the nature of the search. A pre-enforcement challenge to future [] searches, by contrast, provides no such factual context. The Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and

> accordingly it generally should be applied after those circumstances unfold, not before.

Warshak v. United States, 532 F.3d 521, 528 (6th Cir. 2008).

Finally, as previously noted, the plaintiff had a single encounter with a border checkpoint over three years ago. Under controlling Supreme Court precedent, a *prior* claim of illegal conduct does not confer Article III standing on a plaintiff who is seeking injunctive relief from alleged *future* harm. *Lyons*, 461 U.S. at 102-03. To the contrary, the Supreme Court has "repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) (citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id*. As the First Circuit recently explained, "[s]peculation" that a government actor "might in the future take some other and additional action detrimental to" plaintiffs, is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Reddy v. Foster*, 845 F.3d 493, 503 (1st Cir. 2017) (citation omitted). If this standing test, for which the plaintiff bears the burden, is not satisfied, then the Court does not have subject matter jurisdiction over the claim. Here, the plaintiff does not satisfy the Article III standing test, precisely because the alleged future harm is not "certainly impending," but is purely conjectural and hypothetical.

III. CONCLUSION

For these reasons, the Court does not have subject matter jurisdiction over the plaintiff's Count II claims for injunctive and declaratory relief and it should dismiss them.

Respectfully submitted,

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