UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, and	)	
	)	
SEBASTIAN FUENTES,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 1:20-cv-852-LM
	)	
U.S. CUSTOMS AND BORDER PROTECTION,	)	
	)	
U.S. BORDER PATROL,	)	
	)	
ROBERT N. GARCIA, Chief Patrol Agent of Swanton Sector of U.S. Border Patrol, and	)	
	)	
RICHARD J. FORTUNATO, Acting Chief Patrol Agent of Swanton Sector of U.S. Border Patrol,	)	
	)	
Defendants.	)	

THE PLAINTIFFS' OBJECTION TO
THE OFFICIAL DEFENDANTS' MOTION TO DISMISS
THE AMENDED COMPLAINT (DOC. NO. 73)

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Plaintiffs Jesse Drewniak and Sebastian Fuentes hereby object to the March 22, 2022 Motion to Dismiss the December 7, 2021 Amended Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) filed by Defendants U.S. Customs and Border Protection, U.S. Border Patrol, and Robert N. Garcia and Richard J. Fortunato in their capacities as Chief Patrol Agents of the Swanton Sector of U.S. Border Patrol. *See* Doc. No. 73.

INTRODUCTION

On April 8, 2021, this Court denied the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 20), rejecting the Defendants' argument that Plaintiff Jesse Drewniak lacked standing as this stage. *See Drewniak v. United States Customs & Border Prot.*, 554 F. Supp. 3d 348 (D.N.H. 2021) (Doc. No. 49). After the Plaintiffs filed an Amended Complaint to add a new plaintiff—Sebastian Fuentes[1]—the Defendants filed another Motion to Dismiss re-asserting their standing arguments. *See* Defs.' Mot. to Dismiss at pp. 8-16, Argument A. For the same reasons in this Court's April 8, 2021 decision, this renewed Motion to Dismiss should be denied.

First, as in their initial Motion to Dismiss, the Defendants' second Motion challenges the sufficiency of the Plaintiffs' standing allegations and so is governed by the normal Rule 12(b)(6) standard: this Court must credit the Plaintiffs' well-pleaded standing allegations as true. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). However, the Defendants' Motion relies heavily on extrinsic evidence in the form of declarations from Chief Patrol Agent Robert N.

[1] In addition to adding a second Plaintiff, the Amended Complaint discloses in footnote 21 on page 27 that there have been some changes in Plaintiff Jesse Drewniak's travel plans since the filing of his original August 11, 2020 Complaint, particularly in the wake of the COVID-19 pandemic, additional work responsibilities, and a family medical emergency. The Amended Complaint also made two technical changes: it (i) adds Richard J. Fortunato as a Defendant in his official capacity given his role as Acting Chief Border Patrol Agent for the Swanton Sector, and (ii) formally deletes Jeremy Forkey, a Supervising U.S. Border Patrol Agent, as a named defendant per the parties' prior stipulation of dismissal. *See also* Doc. No. 23 (Nov. 23, 2020 Stipulation of Dismissal as to Jeremy Forkey).

Garcia (Doc. No. 73-2) and Deputy Chief Patrol Agent Richard J. Fortunato (Doc. No. 73-3). Plaintiffs have not had the opportunity to fully test these declarations in discovery. Document discovery is not complete, and depositions have not yet occurred. The Defendants' reliance on untested declarations only highlights how dismissal on standing grounds would be premature. The Defendants can raise any challenges to the Plaintiffs' standing after the development of a full record. *See infra* Section I.A.

Second, the Defendants' new declarations rely on facts and assertions that post-date the August 11, 2020 Complaint to argue that, because Border Patrol currently does not have any planned checkpoints, standing does not exist. But the Defendants' reliance on subsequent events demonstrates that this is a question of mootness, not standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000) (To have standing, a plaintiff must have a "personal interest … at the commencement of the litigation."); *Becker v. FEC*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) ("[W]hile it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, *and under the rubric of mootness thereafter*.") (emphasis added). To demonstrate that this case is moot, the Defendants have the "heavy burden" of showing that "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189. The Defendants avoid this heightened mootness standard—a standard that cannot be met given the Defendants' refusal to disavow their checkpoint practices. *See infra* Section I.B.1.

Third, even if this Court evaluates the Defendants' Motion under standing principles, the Defendants' March 22, 2022 Motion to Dismiss suffers from the same defects as their original Motion to Dismiss where they expressly preserve their right to conduct these checkpoints at any

time and at any location in New Hampshire. While the Defendants state that no checkpoints are currently planned, they declare that "[t]he location and operation of any future immigration checkpoint within the Swanton Sector is subject to change based on a variety of factors to include, among others, logistics, law enforcement needs, and staffing/budgetary considerations." *See* Garcia Decl. ¶ 34. The Defendants do not explain "the reason that no checkpoints are currently planned," do not state that "the agency has abandoned the use of checkpoints as an enforcement tool," and do not state that the "agency lacks sufficient resources to conduct checkpoints." *See Drewniak*, 554 F. Supp. 3d at 364. The Defendants could state under oath that they will not conduct checkpoints in New Hampshire for the next several years, but they have declined to do so. Furthermore, like Chief Agent Garcia's prior declaration, his current declaration "supports the notion that [the Plaintiffs'] detention resulted from an official practice or policy" given his admissions concerning Border Patrol's orchestration of these checkpoints. *Id.* at 364-65; *see* Garcia Decl. ¶¶ 22, 27, 28. This should cinch the matter, allowing this case to proceed. *See infra* Section I.B.1.

Fourth, both Plaintiffs have adequately alleged a realistic risk that they will be ensnared in a future Border Patrol checkpoint. As this Court concluded in its original decision, Plaintiff Jesse Drewniak had standing at the commencement of this litigation on August 11, 2020. That should end the matter at this stage, as standing is assessed "at the commencement of the litigation." *See Friends of the Earth, Inc.*, 528 U.S. at 189; *see also Becker*, 230 F.3d at 386 n.3. In any event, even if this Court were to re-assess standing based on Mr. Drewniak's changed circumstances, he has sufficiently alleged standing based on his continued travel through the Woodstock checkpoint location for recreation. *See* Drewniak Decl. ¶ 3 (attached at *Exhibit A*); *see also infra* Section I.B.2.a. Similarly, Plaintiff Sebastian Fuentes lives just one town southeast of Woodstock and

frequently travels in the location where the Woodstock checkpoints have occurred. *See* Am. Compl. ¶¶ 10, 110. Given this Court's prior decision, this is more than sufficient to plead standing. Moreover, as Mr. Fuentes explains in his declaration, "if Border Patrol conducts future checkpoints, [he] will continue to document these checkpoints and record Border Patrol activity, just as [he] did during the August 21, 2018 and June 9, 2019 Checkpoints." *See* Fuentes Decl. ¶ 5 (attached at *Exhibit B*); *see also infra* Section I.B.2.b.

Finally, the Defendants use Plaintiffs' December 7, 2021 Amended Complaint to raise four new arguments that they could have raised in their original November 13, 2020 Motion to Dismiss. *See* Defs.' Mot. to Dismiss at pp. 16-36, Arguments B-E. These new arguments should be rejected at the pleadings stage, as they improperly rewrite the Plaintiffs' Fourth Amendment claim as a claim under the Administrative Procedure Act and prematurely address the scope of the relief requested. *See Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 U.S. Dist. LEXIS 185112 (D.N.H. Nov. 8, 2017) ("[A]t this stage of the case it is premature to consider the remedies that may be imposed. If [the plaintiffs] prevail[], [the defendant] will have ample opportunity to present evidence of an appropriate remedy."); *see infra* Sections II-V.

The Defendants' second bite at the apple is no more successful than its first. Their second Motion to Dismiss Plaintiffs' Fourth Amendment claim should be denied.

ARGUMENT

I. The Plaintiffs Have Sufficiently Pleaded Standing.

The Defendants' primary argument is that the Plaintiffs' asserted future injuries are conjectural and not imminent and, therefore, Article III standing does not exist as pleaded in the Amended Complaint. *See* Defs.' Mot. to Dismiss at pp. 8-16, Argument A. This argument fails for the same reasons that it failed in the Defendants' original November 13, 2020 Motion to

Dismiss.

A. The Defendants' Standing Objection is Premature.

To establish Article III standing, a plaintiff must show: (i) an "injury in fact" that is "concrete and particularized" and "actual or imminent," not "conjectural" or "hypothetical"; (ii) a "causal connection" between the injury and the defendant's conduct; and (iii) a likelihood that a favorable decision will "redress[]" the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To seek an injunction, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). This requires either a "'substantial risk' that the harm will occur" or a threat that is "certainly impending." *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Here, the Defendants do not appear to contest past injury or causality.[2] Instead, the Defendants' standing challenge principally is focused on the first prong—namely, the question of whether the Plaintiffs' alleged injuries are "actual or imminent" insofar as they are "certainly impending" or at "substantial risk" of reoccurring. *See* Defs.' Mot. at p. 9.

As the First Circuit has held, a defendant can challenge jurisdiction under Rule 12(b)(1) in one of two ways—either by challenging the sufficiency of a plaintiff's jurisdictional allegations or by controverting the accuracy of those jurisdictional facts:

> The first way is to mount a challenge which accepts the plaintiff's version of jurisdictionally-significant facts as true and addresses their sufficiency, thus requiring the court to assess whether the plaintiff has propounded an adequate basis for subject-matter jurisdiction. In performing this task, the court must credit the plaintiff's well-pleaded factual allegations (usually taken from the complaint, but sometimes augmented by an explanatory affidavit or other repository of uncontested facts), draw all reasonable inferences from them in her favor, and dispose of the challenge accordingly. For ease in classification, we shall call this type of challenge a "sufficiency challenge."

[2] The Defendants appear to contest redressability in the context of their concerns with the Plaintiffs' proposed injunction. *See* Defs.' Mot. at pp. 15, 27-35. The Plaintiffs address these arguments in Section IV *infra*.

> The second way to engage the gears of Rule 12(b)(1) is by controverting the accuracy (rather than the sufficiency) of the jurisdictional facts asserted by the plaintiff and proffering materials of evidentiary quality in support of that position. Unlike, say, a motion for summary judgment under Federal Rule of Civil Procedure 56(c), this type of challenge under Federal Rule of Civil Procedure 12(b)(1)—which we shall call a "factual challenge"—permits (indeed, demands) differential factfinding. Thus, the plaintiff's jurisdictional averments are entitled to no presumptive weight; the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties. In conducting this inquiry, the court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction.

Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363-64 (1st Cir. 2001) (internal citations omitted).

Here, while suggesting that they are presenting an accuracy challenge, *see* Defs.' Mot. at p. 7, the Defendants' Motion actually challenges the sufficiency of the Plaintiffs' standing allegations—particularly the sufficiency of the Plaintiffs' claim that they are likely to be ensnared in future checkpoints. *See* Defs.' Mot. at p. 9 (arguing that the "Amended Complaint's allegations satisfy neither of those formulations" for standing "in light of the attenuated chain of inferences necessary to find harm here"). Accordingly, this Court "must credit the plaintiff's well-pleaded factual allegations[,] … draw all reasonable inferences from them in the plaintiff's favor, and dispose of the challenge accordingly." *Valentin*, 254 F.3d at 363.

This standard for adjudicating a jurisdictional sufficiency challenge is the same as the standard applied on a Rule 12(b)(6) motion to dismiss. *See Sevigny v. United States*, No. 13-cv-401-PB, 2014 DNH 157, 2014 U.S. Dist. LEXIS 98600, at *7 (D.N.H. July 21, 2014). Under this standard, a plaintiff must make factual allegations sufficient to "state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility requirement "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of illegal conduct. *Twombly*, 550 U.S. at 556; *see also Sepúlveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010). Moreover, because this standard of review in a sufficiency challenge is tantamount to the

standard of review that exists under Rule 12(b)(6), this Court cannot consider the declarations of Chief Patrol Agent Robert N. Garcia (Doc. No. 73-2) and Deputy Chief Patrol Agent Richard J. Fortunato (Doc. No. 73-3). *See, e.g.*, *Piascik-Lambeth v. Textron Auto. Co.*, No. 00-258-JD, 2000 DNH 264, 2000 U.S. Dist. LEXIS 20884, at *2-3 (D.N.H. Dec. 22, 2020) (when considering a motion to dismiss under Rule 12(b)(6), "extrinsic materials submitted by the parties are not considered in deciding the motion").

But even if this Court construes the Defendants' Motion to Dismiss as an accuracy challenge to standing—and, thus, considers extrinsic evidence—the declarations produced by the Defendants only highlight why dismissal at this pleadings stage would be premature. For example, the Defendants—just as they did in their first November 13, 2020 Motion to Dismiss—rely on factual assertions in declarations that have not been fully tested through deposition discovery, including the following:

(i) "The [Beecher Falls Station] operation 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." *See* Garcia Decl. ¶ 20. But no further information is provided in the declaration on the nature of the review, what was considered, and how it was conducted. Further discovery is necessary not only on these operations orders, but also on discussions related to them.[3]

(ii) After September 2017, the State Police informed the Defendants that the State Police would only respond to "requests for assistance at immigration checkpoints on a case-by-case basis" (including "potential violations of state law") and would no longer be "continuously present for the duration of the operation unlike the 2017 checkpoints." *See id.* ¶¶ 25-26. But there is little explanation of what this "case-

[3] The Defendants have produced operations orders in discovery. Prior operations orders establishing the Woodstock checkpoints in 2017, 2018, and 2019 are attached at *Exhibits C, D, and E*. (The Defendants have also produced less redacted versions of these orders under a Protective Order). Depositions have not yet been conducted on these orders. For example, the operations orders have little assessment of how many people in total the checkpoints are likely to detain, the historical efficacy of the checkpoints in that area relative to their purported justification in addressing the smuggling and transportation of undocumented persons leading from the Canadian border, and how many undocumented individuals are likely to be detained who have crossed the Canadian border (which, it turns out, was likely few, if any).

by-case" approach to state police involvement means and how it was (and will be) implemented in future checkpoints.

(iii) "To date [as of March 14, 2022], the Swanton Sector Border Patrol has no planned immigration checkpoints in the State of New Hampshire scheduled for fiscal year 2022 [which ends on September 30, 2022]." *See id.* ¶ 32. But the declaration also states—without any elaboration—that "[t]he location and operation of any future immigration checkpoint within Swanton Sector is subject to change based on a variety of factors," *see id.* ¶ 34—contentions that not only show the prospect of these checkpoints recurring, but also have not been probed at deposition.

In sum, to dismiss this action based on these factual assertions (and others) would be unfair where the Plaintiffs have not had the opportunity to fully probe the Defendants' likelihood to set up checkpoints in the future. *See Miller v. United States*, 530 F. Supp. 611, 616 n.3 (E.D. Pa. 1982) ("I also note that fundamental fairness requires that the non-moving party be afforded the opportunity to conduct discovery so that he can, if possible, meet his burden of establishing jurisdiction. Since no such opportunity was afforded plaintiff in the instant case, I have limited my inquiry solely to the question of whether lack of jurisdiction is apparent from the pleadings alone.") (internal citations omitted). For these reasons, in cases challenging law enforcement practices, courts have often denied motions to dismiss injunctive claims, in part, because of the early stage of proceedings, i.e., before discovery.[4]

B. There is a Realistic Risk That the Plaintiffs' Harm Will Reoccur.

The Plaintiffs have standing to seek prospective injunctive relief based on allegations that (i) the defendant adopted an unlawful policy or practice, and (ii) there is a "realistic risk" the

[4] *See, e.g.*, *McBride v. Cahoone*, 820 F. Supp. 2d 623, 633 (E.D. Pa. 2011) (stating that "we cannot conclude at this nascent stage of the proceedings that [plaintiff] lacks standing"); *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1142 (N.D. Cal. 2000) ("Plaintiffs are entitled to discovery to attempt to establish an evidentiary basis for their claims for injunctive relief. After discovery, the Official Defendants may attack Plaintiffs' entitlement to injunctive relief by a motion for summary judgment.") (internal citation omitted); *see also Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 U.S. Dist. LEXIS 78783, at *37 (D. Mass. May 9, 2018) (noting that a specific contention raised by plaintiffs "may be borne out by discovery," and denying government's claim that plaintiffs had insufficiently alleged standing at the pleadings stage).

plaintiff will be exposed to it. *See Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (holding that "a realistic risk of future exposure to the challenged policy" is sufficient to establish standing). As explained in more detail below, the Plaintiffs have adequately alleged a "realistic risk" that they will be exposed again to Border Patrol's challenged policy of conducting immigration checkpoints in New Hampshire. *See, e.g.,* Am. Compl. ¶¶ 10, 110.

1. The Defendants Have Adopted the Challenged Policies and Practices.

This Court has already concluded that "CBP and Garcia fail[ed] to persuasively contest Drewniak's allegation that they have a practice or policy of conducting checkpoints in that area." *Drewniak*, 554 F. Supp. at 364. Nothing in the Defendants' new declarations should cause this Court to reach a different conclusion.

At the outset, the Defendants' standing argument relies heavily on the expiration of "the pertinent agency orders" authorizing the checkpoints, including the current lack of any applicable agency order approving a checkpoint until the end of fiscal year 2022 (or until September 30, 2022). *See* Garcia Decl. ¶ 33 (no operations orders exist for fiscal year 2022); Defs.' Mot. at pp. 1 (claiming that "the critical characteristics of the checkpoints … have also changed … since the encounters in 2017 through 2019"), 14 ("state police practice has changed"). In other words, the Defendants appear to seek dismissal based on alleged circumstances—which have not yet been explored by deposition—that post-date the filing of the original August 11, 2020 Complaint. However, as to Mr. Drewniak's claim, his standing should be evaluated "at the time the action commences" (here, as of August 11, 2020), and this Court cannot consider events after the filing of his original Complaint. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000). As to Mr. Drewniak, events following the filing of his original August 11, 2020 Complaint are only relevant under the doctrine of mootness. *See Becker v. FEC*, 230 F.3d

381, 386 n.3 (1st Cir. 2000) ("[W]hile it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter."); *McFalls v. Purdue*, No. 3:16-cv-2116-SI, 2018 U.S. Dist. LEXIS 20979, at *38 (D. Or. Feb. 8, 2018) ("As discussed earlier, [basing standing on facts as they exist at the time of the second amended complaint] is not the proper analysis. Standing is determined based on the facts that existed when the action was commenced."); *Freeman v. City of Keene*, 561 F. Supp. 3d 22, 35 (D.N.H. 2021) ("the court cannot consider factual developments subsequent to the amended complaint's filing when assessing standing") (McCafferty, C.J.). This Court has already (correctly) concluded that Mr. Drewniak had standing at the time he filed his original Complaint.[5]

In essence, the Defendants' claim is one of mootness: they assert that any alleged injury is no longer imminent given that they changed their practices after the filing of the original Complaint by not having a current operations order in place authorizing a checkpoint. However, it is axiomatic that a "defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc.*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289, 291 (1982)). This case may only become moot if the Defendants can meet their "heavy burden" of showing that "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not

[5] As discussed in more detail below, *see infra* Section I.B.2.b, the Plaintiffs do not object to Mr. Fuentes's standing allegations being evaluated at the time the Amended Complaint was filed on December 7, 2021. *See Saleh v. Fed. Bureau of Prisons*, No. 05-cv-02467-PAB-KLM, 2009 U.S. Dist. LEXIS 89962, at *17 (D. Colo. Sep. 29, 2009) ("standing is determined at the time the relevant claim is raised or party is joined"); *see also Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir. 2004) (quoting *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991)) ("A careful reading of *County of Riverside* demonstrates that the second amended complaint was important not because it was the operative pleading, but because it was that complaint which named 'three additional plaintiffs' who were 'still in custody' at the time the complaint was filed, and who were the plaintiffs found to have standing by the Court …. Therefore, the operative complaint is the one adding [the plaintiff] to the action, and the operative date is May 25, 2000 ….").

reasonably be expected to recur," *see id.*—a burden that cannot be met because, as noted below, they refuse to disclaim or disavow their authority to conduct checkpoints at their own leisure. *See also N.H. Lottery Comm'n v. Barr*, 2021 U.S. App. LEXIS 1526, at *54 (1st Cir. N.H., Jan. 20, 2021) (claim not moot where "[t]he government refuses to disavow prosecuting state lotteries and their vendors for the conduct they currently engage in"). The Defendants' reliance on standing principles seeks an end run around this heavy burden under mootness principles.

But even if this Court evaluates the Defendants' argument using standing principles, this is not a case where the harmful conduct is too speculative. Injured parties can show future injury when, as is the case here, "[t]he offending policy remains firmly in place." *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 306 (1st Cir. 2003). For example, courts recognize injunctive standing to challenge police policies and practices. *See, e.g., Mack v. Suffolk County*, 191 F.R.D. 16, 21 (D. Mass. 2000) (strip searches); *Petrello v. City of Manchester*, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793, at *65 (D.N.H. Sep. 7, 2017) (granting injunction against a police department's practice of enforcing RSA 644:2, II(c) against passive panhandlers who do not step into the road or otherwise physically obstruct traffic). This case is unlike *Lyons*, where the plaintiff did not allege that the government "ordered or authorized" the challenged policy or practice. 461 U.S. at 106–07 & n.7. Here—like *Dudley* and unlike *Lyons*—the Defendants have specifically (and admittedly) ordered and authorized the challenged checkpoints in New Hampshire and, in doing so, have established a policy of seizing thousands of individuals without probable cause or a warrant. *See* Am. Compl. ¶ 40 ("CBP and Border Patrol have a practice and custom of conducting unconstitutional Border Patrol checkpoints in northern New England"), ¶ 122 (noting that Border Patrol "has detained thousands of individuals without a warrant or reasonable suspicion of criminal activity"); Garcia Decl. ¶¶ 22, 27, 28 (describing authorization of checkpoints). Many courts have

distinguished *Lyons* on this basis.[6] Indeed, this Court has already held that the Defendants' "assertion of the checkpoints' strategic import in carrying out [Border Patrol's] duties ... supports the notion that the August 2017 checkpoint was erected pursuant to an official practice or policy." *Drewniak*, 554 F. Supp. 3d at 364-65; *see* Garcia Decl. ¶¶ 4-6. Similarly, the existence of prior operations orders establishing the checkpoints in 2017, 2018, and 2019—which are attached at *Exhibits C, D, and E* for the Woodstock Checkpoint—confirms this policy. *See Drewniak*, 554 F. Supp. 3d at 365 ("The official approval of CBP and Garcia's 'operational plan' to conduct traffic checkpoints in New Hampshire further supports Drewniak's theory of standing.").

Past enforcement further supports standing. "[T]he frequency of alleged injuries inflicted by the practices at issue … creates a likelihood of future injury sufficient to address any standing concerns." *Floyd v. City of New York*, 283 F.R.D. 153, 170 (S.D.N.Y. 2012). Here, the checkpoints that ensnared the Plaintiffs were not isolated incidents, but rather were part of a pervasive pattern and practice, with ten checkpoints conducted since 2017. In total, Border Patrol has conducted checkpoints at this Woodstock location on seven occasions: (i) August 25-27, 2017; (ii) September 26-28, 2017; (iii) May 27-29, 2018 Memorial Day Weekend; (iv) June 15-17, 2018

[6] *See, e.g.*, *McBride*, 820 F. Supp. 2d at 633 ("the *Lyons* Court rested its decision largely on the fact that City policy did not authorize police officers to use illegal chokeholds"); *Smith v. City of Chi.*, 143 F. Supp. 3d 741, 752 (N.D. Ill. 2015) ("In addition, Plaintiffs have alleged ongoing constitutional violations pursuant to an unconstitutional policy or practice in tandem with allegations that CPD officers repeatedly subjected them to unconstitutional stops and frisks, which leads to the reasonable inference of the likelihood that CPD officers will unlawfully stop and frisk Plaintiffs in the future."); *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 979-80 (D. Ariz. 2011) ("In *Lyons* itself, the court wrote that a victim of police misconduct could seek an injunction if he could show that department officials 'ordered or authorized police officers to act in such manner.' MCSO affirmatively alleges that its officers are authorized to stop individuals based only on reasonable suspicion or probable cause that a person is not authorized to be in the United States. This assertion establishes the standing of all named Plaintiffs to seek injunctive relief."); *Rodriguez*, 89 F. Supp. 2d at 1142 (noting that "Plaintiffs allege a pattern and practice of illegal law enforcement activity," whereas the *Lyons* complaint "did not assert that there was a pattern and practice of applying choke holds without provocation"); *Nat'l Cong. for Puerto Rican Rights by Perez v. City of N.Y.*, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999) ("Here defendants' policy, evidenced by a pervasive pattern of unconstitutional stops and frisks, has allegedly affected tens of thousands of New York City residents, most of whom have been black and Latino men. Courts have not been hesitant to grant standing to sue for injunctive relief where numerous constitutional violations have resulted from a policy of unconstitutional practices by law enforcement officers.") (internal citations omitted).

Father's Day Weekend; (v) August 21-23, 2018; (vi) September 25-27, 2018; and (vii) June 8-9, 2019 during Laconia Motorcycle Week. *See* Am. Compl. ¶ 51. On September 3-6, 2019, Border Patrol also set up a checkpoint on I-89 in Lebanon, near Dartmouth College—a location nearly 100 miles from the Canadian border. *Id.* ¶ 51 n.10; Garcia Decl. ¶ 28. The Defendants also held two one-day checkpoints in Columbia, New Hampshire on April 7, 2019 and May 27, 2019. *See* Am. Compl. ¶ 51 n.10; Garcia Decl. ¶ 28. As one court has succinctly noted: "[A plaintiff's] alleged future injury does not depend upon defendants' future illegal conduct untethered to a pattern of past practice, … but rather upon recurring conduct authorized by official policies." *Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 U.S. Dist. LEXIS 78783, at *31-32 (D. Mass. May 9, 2018) (internal citation omitted). Such recurring conduct on the part of the Defendants supports standing in this case.[7]

The Defendants argue that there is no impending harm because, after the September 2017 Checkpoint, the state police no longer continuously remain at the scene of checkpoints to investigate, charge, and prosecute state drug laws. They suggest that this change was because "the ACLU of New Hampshire challenged state prosecutions of individuals found in possession of marijuana at the immigration checkpoint." *See* Garcia Decl. ¶ 24; *see also* Defs.' Mot. to Dismiss at p. 14.[8] This misunderstands the harm alleged in the Plaintiffs' Amended Complaint. The harm alleged is not the harm of being prosecuted for a state drug offense by state officials. Rather, the

[7] This case is distinguishable from *Freeman v. City of Keene*, 561 F. Supp. 3d 22 (D.N.H. 2021) (McCafferty, C.J.), where standing did not exist, in part, because the plaintiffs "had not identified a history of past enforcement, either as to themselves or any other persons." *Id.* at 33.

[8] Chief Agent Garcia states that this change in practice followed the ACLU of New Hampshire's involvement in the Plymouth District Court matter, at which time New Hampshire State Police leadership met with Beecher Falls Station and Swanton Sector Management. *See* Garcia Decl. ¶ 24. Discovery is necessary to learn what was discussed at this meeting, including how practices may have been altered. Documents produced by the Defendants to date suggest that this meeting may have occurred on May 25, 2018—two days before the May 27-29, 2018 Memorial Day Weekend Checkpoint.

harm is being subjected to a warrantless seizure by Border Patrol officials during a checkpoint that is an unjustified intrusion on civil liberties. This harm falls on *everyone* who is ensnared in these checkpoints regardless of whether the person is ultimately prosecuted for a state law drug offense. This harm affects thousands of individuals. Records indicate that 8,830 vehicles were detained in Woodstock on June 9, 2019, and 1,426 vehicles were detained in Columbia on May 27, 2019.[9] And the evidence will demonstrate that the checkpoints were set up for the primary purpose of drug interdiction.[10] As the Defendants concede, these checkpoints *all* occurred in the same manner as the August 2017 Checkpoint insofar as Border Patrol agents inspect each vehicle with a canine that is tasked with searching for drugs. *See* Am. Compl. ¶ 51; Garcia Decl. ¶ 15 (describing canine-sniff practices). If the canine alerts, then the vehicle is sent to a secondary inspection area. *Id.* Significantly, if contraband is allegedly found, that contraband is seized *even if there was no subsequent confiscation, prosecution, or involvement by state or local official*. For example, during and following the May 27-29, 2018 Memorial Day Weekend checkpoint in Woodstock, Border Patrol exclusively seized this alleged contraband. *See* Am. Compl. ¶¶ 43, 51; *see also* ¶¶ 52-53 (noting Border Patrol's seizure of small amounts of drugs during May 26-28, 2018 Memorial Day Weekend Checkpoint and June 15-17, 2018 Father's Day Weekend Checkpoint, likely

[9] For example, the unjustified nature of this injury is demonstrated by the Defendants' interrogatory responses where they acknowledged that they do not maintain any data regarding (i) "non-productive" alerts by canines at checkpoints, (ii) the number of times at checkpoints canines have searched the interior of vehicles, (iii) the number of people who have been stopped for primary inspection at checkpoints and the average length of such a primary inspection (though data apparently exists for the Woodstock checkpoint occurring on June 9, 2019, with 8,830 vehicles detained, and the May 27, 2019 Columbia checkpoint, with 1,426 vehicles detained), and (iv) the number of people who have been stopped for secondary inspection at checkpoints and the average length of such secondary inspection.

[10] For example, prior to the September 2017 Checkpoint, the Patrol Agent in Charge of the Beecher Falls Border Patrol Station wrote in a September 19, 2017 email (apparently to state officials) that, based on an attachment indicating historical checkpoint state arrests for drugs in New Hampshire from 2008 to 2012, "[t]he hope here is that your [New Hampshire] AG may be able to establish some precedence [sic] in order to stand up to any challenges in the future, i.e., 'fruits of the poisonous tree doctrine.'" Indeed, this data from 2008 to 2012 also indicates how prior checkpoints, like those from 2017 to 2019, were used for drug enforcement. And the Defendants freely admit that it was they who "requested the assistance and presence of state and local law enforcement in advance of the [2017] checkpoints to investigate any potential violations of state law identified by Border Patrol personnel." *See* Garcia Decl. ¶ 21.

through use of canines); Fortunato Decl. ¶¶ 7-8.[11]

The Defendants also admit that, following the September 16, 2017 change in New Hampshire's marijuana laws at RSA 318-B:2-c—and presumably after the Plymouth Circuit Court's May 1, 2018 decision effectively limiting state court drug prosecutions arising out of the checkpoints—Border Patrol may now "seize and destroy the marijuana, rather than turn it over to state or local officers" because "marijuana remains unlawful under federal law." *See* Mot. to Dismiss at p. 14; Fortunato Decl. ¶¶ 7-8. This does not help the Defendants. Again, the injury in Plaintiffs' Amended Complaint is not having contraband seized, but rather being subjected to a warrantless seizure of one's person by federal officials as part of an unjustified checkpoint motivated by drug interdiction. This harm befalls everyone ensnared even if drugs are not seized. Moreover, the Defendants' admission that Border Patrol repeatedly seized marijuana after the September 2017 Checkpoint only highlights the drug interdiction purpose of the checkpoints, as well as the fact that Border Patrol conducts these alleged "drug" confiscations without any federal charges or due process. *See* Am. Compl. ¶¶ 52, 53 (noting Border Patrol drug seizures during May 27-29, 2018 Memorial Day Checkpoint and June 15-17, 2018 Father's Day Weekend Checkpoint).

Significantly, the Defendants' March 22, 2022 declarations submitted with their second Motion to Dismiss—like Chief Agent Garcia's declaration submitted on November 13, 2020 (Doc No. 20-2)—are artfully crafted to preserve their ability to conduct checkpoints <u>*at any time*</u>. *See*

[11] The "After Action Report" for the August 21-23, 2018 Woodstock Checkpoint disclosed by the Defendants in discovery indicates 11 seizures of marijuana for a total weight of 0.697 pounds (or 317.05 grams), one seizure of 28.35 grams of hashish, one seizure of 184.6 grams hashish oil in glass jars, as well as the seizure of ten marijuana pipes, one butane torch, and three scales. The "After Action Report" for the June 8-9, 2019 Laconia Motorcycle Week Checkpoint disclosed by the Defendants also indicates six marijuana and paraphernalia seizures. Similarly, the April 7, 2019 Columbia Checkpoint led to five personal use marijuana seizures totaling 55 grams. The May 27, 2019 Columbia Checkpoint led to nine personal use marijuana and one psychedelic mushroom seizures. According to these reports, the September 3-6, 2019 Lebanon Checkpoint also led to "[m]ultiple personal use drug seizures."

Drewniak, 554 F. Supp. at 364 (noting that standing was sufficiently pleaded, in part, because the Defendants do not explain "the reason that no checkpoints are currently planned," do not state that "the agency has abandoned the use of checkpoints as an enforcement tool," and do not state that the "agency lacks sufficient resources to conduct checkpoints …."). While the Defendants assert that "the pertinent agency orders … have expired," *see* Defs.' Mot. at p. 14, what is missing from the Defendants' declarations is any testimony definitively disclaiming Border Patrol's willingness or ability to reissue an operations order authorizing a checkpoint in the near future at any time. The Defendants' carefully worded declarations suggest that Border Patrol can change its mind based on "logistics, law enforcement needs, and staffing/budgetary considerations." *Compare* Second Garcia Decl. ¶¶ 32-34 (stating that "[t]he location and operation of any future immigration checkpoint within the Swanton Sector is subject to change based on a variety of factors to include, among others, logistics, law enforcement needs, and staffing/budgetary considerations") (Doc. No. 73-2) and Fortunato Decl. ¶ 9 (Doc. No. 73-3) (same) *with* First Garcia Decl. ¶ 12 (stating that the "re-initiation of immigration checkpoints is contingent upon operational needs, manpower, and budgetary considerations") (Doc No. 20-2).

Unlike in *Freeman* and *Case*, this is not a case where an ordinance or executive order has expired or been repealed, thereby depriving an agency of the authority to undertake the challenged actions. *See Freeman*, 561 F. Supp. 3d at 35 (noting that expiration of challenged emergency orders and ordinance created a mootness concern); *Case v. Ivey*, 542 F. Supp. 3d 1245, 1264 (M.D. Ala. 2021) (holding that redressability was not satisfied where, at the time of the complaint, "the provisions of Defendants' orders that closed certain businesses in Alabama and directed individuals to stay at home except for enumerated essential activities were no longer in effect"). To the contrary, the Defendants explicitly retain the authority to conduct checkpoints at any

moment, and nothing prevents the Defendants from issuing an operations order tomorrow authorizing a checkpoint, including in the middle of a fiscal year. Moreover, this is not a case challenging Border Patrol's operations orders, but rather its policy and practice of routinely conducting checkpoints as demonstrated by its own declarations. Further, neither Chief Agent Garcia nor Deputy Agent Fortunato explain how such "logistics, law enforcement needs, and staffing/budgetary considerations" have changed to account for the lack of checkpoints since 2019. Even the Defendants' representations that there are no checkpoints planned is limited to those that could occur before September 30, 2022. *See* Garcia Decl. ¶ 32.

2. The Plaintiffs Have Adequately Alleged a Realistic Risk That They Will Be Exposed to the Challenged Policy and Practice.

Standing to seek prospective relief rests on a plaintiff's "realistic risk of future exposure to the challenged policy." *Berner*, 129 F.3d at 24 (lawyer had standing to challenge a judge's policy, though the lawyer might have had future cases assigned to 15 other judges). The Plaintiffs need not prove that they "inevitably will suffer" future injury. *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978). Further, "past injury [is] probative of likely future injury." *See Suhre v. Haywood Cty.*, 131 F.3d 1083, 1088 (4th Cir. 1997); *see also Alasaad* 2018 U.S. Dist. LEXIS 78783, at *32-33 ("Plaintiffs' subjection to prior searches further bolsters their allegations of likely future searches.").

a. Mr. Drewniak Has Alleged a Realistic Risk of Future Harm.

Based on the allegations in the original August 11, 2020 Complaint, this Court disagreed with the Defendants' contention "that Drewniak's complaint alleges nothing more than a vague intent to travel on I-93 in Woodstock at some point in the future." *Drewniak*, 554 F. Supp. 3d at

363. The Defendants now argue that, based on footnote 21 of the Amended Complaint,[12] "there is no longer a real and immediate threat that [Drewniak] will suffer a future injury." Defs.' Mot. at p. 10. The Defendants are incorrect.

First, as noted above, Mr. Drewniak's standing at the pleadings stage is to be assessed based on his original August 11, 2020 Complaint filed at the commencement of his case, not based on the December 7, 2021 Amended Complaint. As the First Circuit has explained, "while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, *such interest is to be assessed under the rubric of standing at the commencement of the case*, and under the rubric of mootness thereafter." *Becker v. FEC*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (emphasis added); *see also Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 48 (1st Cir. 2006) ("Whether subsequent events have dissipated the plaintiff's interest is assessed through the prism of mootness."); *Friends of the Earth, Inc.*, 528 U.S. at 180 (noting that "we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation"). Many courts have held that this rule applies even if there is a subsequent amended complaint. *See, e.g., McFalls*, 2018 U.S. Dist. LEXIS 20979, at *24, 38 (citing cases, and rejecting argument that facts alleged in second amended complaint were operative as to standing; concluding that this "is not the proper analysis" because "[s]tanding is determined based on the facts that existed when the action was commenced"); *Inland Empire - Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 U.S. Dist. LEXIS 242686, at *28-29 (C.D. Cal. Apr. 19, 2018) ("[C]ourts have determined that Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action,

[12] Footnote 21 explains: "These [original] allegations were accurate as of the filing of the original complaint on August 11, 2020. However, as of today's date [December 7, 2021] in light of COVID-19, additional work responsibilities, and a family medical emergency, Plaintiff Mr. Drewniak travels to the White Mountains with less frequency than he once did or anticipated … when this case was first filed. While the future is beyond prediction, Drewniak ideally intends to resume his prior frequent transit to the North Country once his life's circumstances again allow."

even in a case where defendants challenge [a plaintiff's] standing, based on the facts as they exist as of the filing of an amended complaint."); *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1203 n.3 (Fed. Cir. 2005) ("The initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended."); *Saleh v. Fed. Bureau of Prisons*, No. 05-cv-02467-PAB-KLM, 2009 U.S. Dist. LEXIS 89962, at *17 (D. Colo. Sep. 29, 2009) ("An amended complaint does not 'bring' an action; the original complaint does. Moreover, once a claim is asserted, the court's power to continue to entertain that claim is better thought of as an issue of mootness, not standing.") (internal citations omitted).[13] This rule should come as no surprise because, as is common in life, people's plans change and are not always static—a reality that is especially prevalent of plaintiffs in constitutional litigation that can take years to resolve. Here, this Court has already concluded that standing existed for Mr. Drewniak at the time of the commencement of the action on August 11, 2020. This should end the standing inquiry as to Mr. Drewniak at the pleading stage. And the Defendants have not attempted to meet their heavy burden to show that Mr. Drewniak's claims have become moot. *See Friends of the Earth, Inc*., 528 U.S. at 189 (case becomes moot if intervening events "make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur").

Second, even if this Court were to go beyond the original August 11, 2020 Complaint and reassess Mr. Drewniak's standing based on his disclosure in the Amended Complaint, standing has been sufficiently alleged. Even with the decreased frequency of his anticipated travel, Mr. Drewniak has a realistic risk of future exposure to the Defendants' challenged checkpoint practices because Mr. Drewniak still travels in the location of the Woodstock checkpoint for recreation. He

[13] *But see In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000) ("[I]n cases where a plaintiff has filed an amended complaint, federal courts must resolve questions of subject matter jurisdiction by examining the face of the amended complaint.")

likely will go to the area "at least 2 to 3 times during the Summer and Fall of 2022, with the possibility of other trips occurring on shorter notice because of friends' different schedules and because these trips can sometimes be scheduled spontaneously." *See* Drewniak Decl. ¶ 3 (attached at *Exhibit A*). One of these trips is to Maine, and he "plan[s] on taking the long way back home to Hudson to explore the White Mountain like [he] frequently [does], at which time [he] will travel I-93 South in the area of the Woodstock Checkpoint." *Id.*; *see also, e.g., Berner*, 129 F.3d at 24 (standing to challenge judge's policy exists where "Berner is a member of the Maine bar and a full-time practicing lawyer who regularly handles litigation"); *Alasaad*, 2018 U.S. Dist. LEXIS 78783, at *34 (holding that plaintiffs' allegations that they regularly travel outside the U.S. for work, visit friends and family, engage in vacation and tourism, and will continue to do so in the future were sufficient to allege actual or imminent injury to challenge provide standing to challenge ICE's practice of searching electronic devices at ports of entry and, in some instances, confiscating the devices being searched); *Ibrahim v. DHS*, 669 F.3d 983, 993–94 (9th Cir. 2012) (plaintiff sufficiently pleaded standing to challenge border screening policies). Mr. Drewniak's allegations go far beyond "nebulous 'some day' intentions," nor are they "vague or indefinite." *See Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 326 (1st Cir. 2009); *see also Wilwal v. Nielsen*, 346 F. Supp. 3d 1290, 1302 (D. Minn. 2018) ("The Court also concludes that Plaintiffs' allegations of future harm are sufficiently concrete despite omitting specific plan or dates of future travel. Courts do not require plaintiffs to engage in international travel when they have experienced difficulties at the border and reasonably expect the same difficulties when returning to the United States from future travel."); *Hernandez v. Cremer*, 913 F.2d 230, 234 (5th Cir. 1990) (finding "a reasonable expectation that [the plaintiff] will exercise his right to travel," even though the plaintiff did not want to risk being denied entry to the United States a second time").

Given Mr. Drewniak's plans for frequent travel through the precise location of the Defendants' Woodstock checkpoints, this case is not on par with *Laufer v. Acheson Hotels, LLC*, where the plaintiff "apparently has not made a single reservation" and thus was not "imminently about to embark on a trip from Florida to Maine." No. 2:20-cv-00344-GZS, 2021 U.S. Dist. LEXIS 93703, at *14-15 (D. Me. May 18, 2021). Similarly, this case is unlike *Laufer v. Looper*, where the plaintiff's plans were on "indefinite hold." No. 20-cv-02475-NYW, 2021 U.S. Dist. LEXIS 223215, at *13 (D. Colo. Jan. 27, 2021).

b. Mr. Fuentes Has Alleged a Realistic Risk of Future Harm.

The standing of Plaintiff Sebastian Fuentes is not a hard question.[14] Mr. Fuentes lives one town southeast of Woodstock—"just over five driving miles from where the checkpoint occurred." Am. Compl. ¶ 110. Thus, at the time the Amended Complaint was filed on December 7, 2021, Mr. Fuentes drove "in the precise location of the Woodstock checkpoints virtually every day." *Id.*

Mr. Fuentes's passage through the checkpoint area on I-93 South has become somewhat less frequent in recent months, though he continues to travel through this area. In April 2022, he left his position at the Mountain View Grand Resort and Spa and, in May 2022, he became the Movement Politics Director for the organization *Rights and Democracy New Hampshire*. As a result, while he no longer passes the checkpoint area "virtually every day" when coming from his prior place of employment, he continues to pass this checkpoint area about two times per week, especially when he travels back to his home in Thornton after picking up his daughter from school. Fuentes Decl. ¶ 4 (attached at *Exhibit B*). Even with this change in circumstance, Mr. Fuentes's frequent travel through the Woodstock checkpoint area places this case on all fours with this

[14] As noted above, the Plaintiffs do not dispute that Mr. Fuentes's standing allegations can be evaluated at the time the Amended Complaint was filed on December 7, 2021. *See Saleh*, 2009 U.S. Dist. LEXIS 89962, at *17.

Court's prior decision. *See Drewniak*, 554 F. Supp. 3d at 363 ("The court does not agree that Drewniak's complaint alleges nothing more than a vague intent to travel on I-93 in Woodstock at some point in the future."). Moreover, as an independent basis for standing, Mr. Fuentes explains in his declaration that, "if Border Patrol conducts future checkpoints, [he] will continue to document these checkpoints and record Border Patrol activity, just as [he] did during the August 21, 2018 and June 9, 2019 Checkpoints." Fuentes Decl. ¶ 5. For all these reasons, Mr. Fuentes is on a collision course with these checkpoints. *See Berner*, 129 F.3d at 24 ("To cinch matters, the parties remain philosophically on a collision course.").

The Defendants' next objection is that Mr. Fuentes "was not subject to criminal investigation or prosecution" and "does not allege that he [experienced] or was harmed by any of the characteristics or conditions that gave rise to, for example, the alleged arrest and subsequent prosecution of Drewniak." Defs.' Mot. at pp. 1, 11. Again, this objection misses the point of this case. The injury suffered by the Plaintiffs is not the likelihood of being criminally prosecuted for drugs following an encounter with a checkpoint, but rather the likelihood of being seized without a warrant or probable cause in a checkpoint that is motivated by drug interdiction. This is an injury that every motorist ensnared faces and is independent of whether the motorist is subsequently cited for drug possession. *See* Am. Compl. ¶ 7 ("Mr. Drewniak suffered harm from the invasion of his constitutional rights during this lengthy warrantless seizure."), ¶ 27 ("warrantless and suspicionless stops at checkpoints for the general purpose of crime control violate the Fourth Amendment to the United States Constitution"), ¶ 109 ("These checkpoints harmed Mr. Fuentes by invading his right to freedom of movement."), ¶ 113 ("It is clearly established law that a warrantless checkpoint for the primary purpose of drug interdiction violates the Fourth Amendment."). Mr. Fuentes experienced this harm on three separate occasions during the Fall of

2017, again during the August 21, 2018 Checkpoint, and against during the June 9, 2019 Checkpoint. *See id.* ¶¶ 107-108. The Defendants do not dispute that they seized Mr. Fuentes without a warrant during three checkpoints. And, during each checkpoint, Border Patrol subjected travelers to canine-sniffs purporting to search for drugs. *See id.* ¶¶ 43, 49, 51 (alleging usage of drug-sniffing canines of persons stopped for *all* Woodstock checkpoints impacting all motorists seized, which would include Mr. Fuentes's and Mr. Drewniak's experience); Garcia Decl. ¶ 15 (describing canine-sniff practices). All motorists passing through the checkpoints, including Mr. Fuentes, were exposed to this harm.

The Defendants' contention that Mr. Fuentes has improperly "manufactured standing" by deciding to enter the August 21, 2018 and June 9, 2019 Checkpoints to "video his experience" is without basis. The Supreme Court recently dispensed with such an argument, explaining that the mere fact "[t]hat appellees chose to subject themselves to [the challenged] provisions does not change the fact that they are subject to them." *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022). As in *FEC*, Mr. Fuentes's "injuries are directly inflicted by" the Defendants' checkpoint practices that he now challenges. *Id.* Moreover, during these checkpoints, Mr. Fuentes's intent—unlike *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013)—was *not* to manufacture standing to be a plaintiff in a lawsuit, but rather to record Border Patrol and its activities. *See* Am. Compl. ¶ 110. Mr. Fuentes has a right to travel on roadways for whatever reason, including to document government behavior. It should go without saying that Mr. Fuentes should not be penalized for invoking his First Amendment rights to record Border Patrol's conduct in performing the checkpoints—a right that can only be exercised by going through the checkpoint itself. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (recognizing right to record law enforcement in

public).[15]

II. The Plaintiffs Are Not Asserting Third-Party Standing, But Rather Are Asserting Injuries That They Directly Suffered.

The Defendants argue that the Plaintiffs have not demonstrated third-party standing. *See* Defs.' Mot. to Dismiss, at pp. 16-22, Argument B. This is a red herring. The Plaintiffs are not asserting third-party standing in this case. *See Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (addressing criteria for third-party standing). Rather, the Plaintiffs' challenge is about the harm that they suffered as a result of the checkpoints—a harm shared by thousands of others in the form of intrusive and warrantless seizures. *See Hajro v. United States Citizenship & Immigration Servs*., 811 F.3d 1086, 1105 (9th Cir. 2016) ("*Kowalski* implicates third party standing, and Mayock alleges a personal injury in his capacity as a requester under FOIA.").

As explained above in Section I, the Plaintiffs have sufficiently alleged injury in fact at the pleadings stage. Standing in this case is not premised on injuries exclusive to third parties, but rather on injuries that the Plaintiffs themselves have suffered during checkpoints and are likely to suffer in the future absent an injunction. For example, all motorists at the Woodstock checkpoints—including Mr. Fuentes and Mr. Drewniak—were stopped by Border Patrol without a warrant and subjected to a canine-sniff searching for drugs. *See* Am. Compl. ¶¶ 43, 49, 51 (alleging usage of drug-sniffing canines of persons stopped for <u>all</u> Woodstock checkpoints impacting all motorists seized, which would include Mr. Fuentes's and Mr. Drewniak's experience). Defendants concede this use of canines in all checkpoints. *See* Garcia Decl. ¶ 15. This harm exists regardless of whether an individual is later criminally charged with a drug offense. Mr. Fuentes, in particular, was stopped at the checkpoints on three separate occasions, likely

[15] The Defendants' reliance on *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) is not on point because, in that case, the defendant State did not "inflict[] any injury upon the plaintiff States." *Id.* at 664.

including the very August 2017 checkpoint that the Plymouth Circuit Court concluded violated the Fourth Amendment, in part, because "there was no evidence that any of the individuals arrested for immigration violations had crossed the Canadian border." *See* Am. Compl. ¶¶ 89-93 (describing Circuit Court order), ¶ 107 (noting Mr. Fuentes' likely August 2017 Checkpoint experience). Mr. Fuentes and Mr. Drewniak personally suffered this concrete injury. They are not relying on the experiences of third parties.

As multiple courts have explained, the fact that this concrete injury may have been widely shared by thousands of other motorists does not deprive a federal court of jurisdiction. *See FEC v. Akins*, 524 U.S. 11, 24 (1998) ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"; finding standing where a voter suffered the same alleged harm as all other voters) (quoting *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-450 (1989)); *Levine v. Johanns*, Nos. C 05-04764 MHP, C 05-05346 MHP, 2006 U.S. Dist. LEXIS 63667, at *15, 17 (N.D. Cal. Sep. 5, 2006) ("But so long as the plaintiff's interest is separate from a concern for faithful execution of the law, the injury may be concrete even though it is widely shared."). In other words, so long as a plaintiff meets the criteria of *Lujan* and *Lyons*—which the Plaintiffs do here—then a plaintiff has standing to seek prospective injunctive relief as to the challenged policy, even if that injunction could impact the implementation of the challenged policy as to other individuals. Indeed, in *City of Indianapolis v. Edmond* itself, Indianapolis motorists successfully filed a lawsuit seeking injunctive relief against an Indianapolis checkpoint designed to find drugs. 531 U.S. 32, 36 (2000). This case is no different.

III. The Defendants' Constitutional Avoidance Argument Fails Because the Defendants Cannot Transform the Plaintiffs' Fourth Amendment Count Into an APA Count.

The Defendants seize on two pages of the Amended Complaint referencing 8 U.S.C. § 1357(a)(3) (*see* Am. Compl. at pp. 7-8) to demand that the Plaintiffs' Fourth Amendment cause of action be rewritten into a cause of action that the Defendants believe Plaintiffs *should* have, but did not, bring—namely, a cause of action under the Administrative Procedure Act ("APA") claiming that the Defendants exceeded their statutory authority under 8 U.S.C. § 1357(a)(3). *See* Defs.' Mot. to Dismiss at pp. 22-27, Argument C. This judicial rewrite is required, the Defendants argue, because "the constitutional avoidance doctrine" imposes a "fundamental duty to decide the case on narrower grounds," *id.* at 4—even where, as here, the Defendants concede that the Plaintiffs raised exclusively constitutional injuries and invoked no "alternative cause of action through which the Court could decide [a] statutory contention," *id.* at 25. In short, the Defendants contend that the Plaintiffs are forbidden from vindicating their constitutional rights so long as they *could have* raised a statutory claim instead.[16] This argument is baseless.

Nothing requires the Plaintiffs—or this Court—to transform a Fourth Amendment complaint into an APA challenge. Constitutional avoidance simply describes the uncontroversial principle that where a party has *argued* "some other ground upon which the case may be disposed of"—for example "a question of statutory construction or general law"—courts should "not pass upon [the] constitutional question" unless necessary. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see* C.A. Wright & A.R. Miller, 13A Federal

[16] In another case, Border Patrol appears to have raised the opposite argument in contending that a separate APA claim should be dismissed because the plaintiffs had also brought a Fourth Amendment claim. *See Sanchez v. United States Office of Border Patrol*, No. 12-5378 BHS, 2012 U.S. Dist. LEXIS 121467, at *14 (W.D. Wash. Aug. 27, 2012) ("[Defendants] argue that because the first claim ('Violation of the Fourth Amendment') and the second claim ('Violation of 8 U.S.C. § 1357') are the same claim, and in fact ask for the same relief, the second claim should be dismissed.").

Practice and Procedure § 3531.3 (3d ed., Apr. 2021 update) (describing Justice Brandeis's opinion in *Ashwander* as "[t]he classic statement of principles for avoiding unnecessary constitutional decisions"). It is a rule of decision developed by the Court "for its *own* governance," *Ashwander*, 297 U.S. at 346 (emphasis added), not an affirmative obligation for plaintiffs when drafting their own pleadings. To the contrary, a plaintiff remains "both the author and the master of its complaint," and retains the freedom to choose "which causes of action to bring"—and which to reject. *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 93 (1st Cir. 2008).

The Defendants' version of constitutional-avoidance-as-pleading-requirement finds no support in caselaw. Instead, the decisions chiefly cited by the Defendants present typical—and uncontroversial—scenarios where the plaintiff *chose* to raise both statutory and constitutional claims, and the Court opted to rely on the former.[17] In *Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150 (1st Cir. 2021), for example, the plaintiffs challenged Social Security Administration rules under both the APA and the equal-protection and due-process clauses of the Constitution. *Id.* at 157. Because the Court found the rules arbitrary and capricious and determined that "the relief available under the APA adequately addresse[d] M & N's remedial requests" under their constitutional claims, the First Circuit unsurprisingly rested its ruling on APA grounds alone. *Id.* at 178–79. So too in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), where the plaintiffs "consistently relied on both statutory and constitutional claims," *id.* at 582, as did the

[17] The additional authority in this section of the Defendants' Motion is even less applicable. In *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), for example, the Supreme Court simply rejected calls from "certain judges, scholars, and *amici curiae*" to overrule the *Central Hudson* test and fashion a new First Amendment framework for commercial speech, instead relying on existing constitutional rules to decide the case, *id.* at 184. *United States v. Raines*, 362 U.S. 17 (1960), concerned a trial judge in Georgia who went out of his way to rule a portion of the Civil Rights Act of 1957 "unconstitutional in all its applications," *id.* at 20—a ploy described by Justice Frankfurter as the "reverse [of] the duty of courts to apply a statute so as to save it," *id.* at 28 (Frankfurter, J., joining). And the cited portion of *E. Bridge, LLC v. Chao*, 320 F.3d 84 (1st Cir. 2003), addressed a straightforward attempt to circumvent administrative exhaustion requirements by bringing a Fourth Amendment complaint directly to federal court. None of these cases corroborates the Defendants' novel theory that plaintiffs must plead statutory counts before bringing constitutional claims.

plaintiffs in *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19 (D.D.C. 2018), who pursued "a number of administrative and constitutional grounds" in their challenge, *id.* at 25.

These cases showcase hornbook constitutional avoidance: a plaintiff pleads and presses a statutory claim that affords full relief, and the court addresses that statutory count before turning to additional constitutional grounds. But none of these decisions suggest that a plaintiff is *required* to raise a statutory claim before pursuing a constitutional theory of their case. And none supports the Defendants' insistence that the Court take on the role of constitutional copy editor, scouring the facts section of a constitutional complaint for references to the U.S. Code and reaching for its own red pen at the first whiff of an alternative statutory hook.

In any event, even if there was a rule that a plaintiff must pursue statutory causes of action before constitutional ones (again, none exists), that would not help the Defendants. That is because the Plaintiffs' constitutional arguments would remain even under an APA challenge. While the Defendants are correct that the APA's cause of action is statutory, *see* 5 U.S.C. § 702, the scope of a court's merits review under the APA is dictated by a separate provision, 5 U.S.C. § 706. And that section makes clear that constitutional injuries like those alleged here are distinct claims from the sort of statutory-violation theories urged by the Defendants in their brief. *Compare* 5 U.S.C. § 706(2)(B) (authorizing a court to "set aside" agency action "contrary to constitutional right") *with* 5 U.S.C. § 706(2)(A), (C) (addressing agency action that is "arbitrary, capricious, an abuse of discretion" or "in excess of statutory jurisdiction, authority, or limitations"). The Plaintiffs have pleaded violations of the Constitution because the Defendants violated their constitutional rights; if they had filed an APA challenge, that challenge would rely on 5 U.S.C. § 706(2)(B) and would present similar, if not identical, Fourth Amendment questions on the merits. Forcing the Plaintiffs to invoke an APA cause of action would therefore avoid nothing.

The Defendants also suggest that the Plaintiffs' constitutional injuries would be better framed as simple arbitrary-and-capricious or *ultra vires* challenges, and that their individual Fourth Amendment claims are interchangeable with a "narrower, statutory" question of whether the disputed checkpoints went beyond CBP and Border Patrol's authority. *See* Defs.' Mot. at p. 26. But that argument is foreclosed by Supreme Court precedent on which the Defendants themselves rely. In urging the Court to "refocus" the complaint as one about whether the disputed checkpoints were beyond the scope of 8 U.S.C. § 1357, the Defendants point to *Dalton v. Specter*, 511 U.S. 462 (1994). But the Defendants get that case backwards: *Dalton* simply says that although certain *ultra vires* action may implicate the separation-of-powers doctrine, not every executive action taken without statutory authorization is necessarily a constitutional claim. In doing so, the Court expressly *rejected* the Defendants' view that individual constitutional injuries are fungible with claims that an agency acted *ultra vires*—going out of its way to "distinguish[] between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Dalton*, 511 U.S. at 472. Indeed, the Court specifically highlighted the Fourth Amendment as the kind of "constitutional prohibition" that differs from the sort of *ultra vires* claim urged by the Defendants here. *See id.* (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 650–52 (1963), and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396–97 (1971)).

In sum, the Plaintiffs allege violations of their Fourth Amendment rights and validly rely on the Constitution for relief. Nothing in the constitutional avoidance canon requires them to forgo that choice simply because their complaint references 8 U.S.C. § 1357(a)(3) in its facts section. And nothing requires this Court to "refocus" or rewrite the Plaintiffs' well-pleaded complaint as an APA challenge, reformulating their theory of the case to suit the Defendants' pleading preference.

IV. The Defendants' Claim That the Plaintiffs Are Not Entitled to the Particular Injunction Demanded is Premature at the Pleadings Stage, and Fails on the Merits Because the Proposed Injunction is Tailored to the Alleged Constitutional Violations.

The Defendants erroneously contend that, "[e]ven 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." *See* Defs.' Mot. to Dismiss at pp. 27-35, Argument D. But the Defendants' argument about the precise scope of the relief warranted is premature at the motion-to-dismiss stage. In any event, the Plaintiffs' proposed injunction is well-tailored to the alleged violations at issue.

First, the Defendants' concerns about the scope of the injunction are premature in the context of a motion to dismiss, which is focused on the facial plausibility of the ***claims*** alleged—not the relief requested. *See Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 U.S. Dist. LEXIS 185112 (D.N.H. Nov. 8, 2017) ("[A]t this stage of the case it is premature to consider the remedies that may be imposed. If [the plaintiffs] prevail[], [the defendant] will have ample opportunity to present evidence of an appropriate remedy.") (quoting *Gorecki v. Hobby Lobby Stores, Inc*., No. CV 17-1131-JFW(SKx), 2017 U.S. Dist. LEXIS 109123, at *17 (C.D. Cal. June 15, 2017)); *G.K. v. Sununu*, No. 1:21-cv-00004-PB (June 8, 2021 oral order) (Doc. No. 42, at p. 3:20-4:7) (stating that defendants "claim that the relief the plaintiffs are seeking are not within the Court's power to grant," and—as to that argument—holding the following: "I'm going to deny the motions to dismiss on those grounds without prejudice to the defendant's rights to raise those arguments at a later point in the proceedings" because "I agree with the plaintiffs that those arguments are premature and really not best addressed on the present motion. So I'm denying those from the bench without prejudice. We'll take them up as necessary at a later stage of the

proceedings.").[18] Here, the Plaintiffs have not formally moved for a preliminary or permanent injunction. Discovery is far from complete, and evidence has not been marshalled for or against an injunction and its appropriate scope.[19] The Defendants are free to raise any concerns that they may have as to relief requested when the question of injunctive relief is squarely presented to this Court after the development of a full record.[20]

Second, even if this Court were to preliminarily consider the Defendants' concerns about the scope of any proposed injunction, the proposed injunction is tailored to the alleged constitutional violations in this case. For example, the Defendants complain that "the geographic scope of the injunction demanded is unacceptably broad" because it seeks relief as to "checkpoints in New Hampshire," and not "the particular checkpoints they traveled in Woodstock." *See* Defs.' Mot. to Dismiss at p. 28. But the Defendants' position takes a myopic view of the allegations in the Amended Complaint. The Plaintiffs' allegations implicate Border Patrol's checkpoint practices in northern New England and seek relief in New Hampshire consistent with this Court's

[18] Courts outside New Hampshire have frequently reached the same conclusion. *See, e.g., S.E.C. v. Tambone*, 802 F.Supp.3d 299, 205-206 (D. Mass. 2011) (in context of motion for summary judgment, "[t]he Court finds, therefore, that precluding the S.E.C. from seeking a preliminary injunction at this state is premature" because "[d]iscovery is in process"); *Fauley v. Wash. Mut. Bank, F.A.*, 2014 U.S. Dist. LEXIS 38460, *20-25 (D. Ore. February 19, 2014) (a request for a permanent injunction is not a "claim for relief" susceptible to a motion to dismiss for failure to state a claim); *Kiluk v. Select Portfolio Servicing, Inc.*, No. 11-10731-FDS, 2011 U.S. Dist. LEXIS 155999, *2 n.2 (D. Mass. Dec. 19, 2011) ("Although defendant has sought a motion to dismiss as to all four counts, it is clearly premature to determine the form of relief to which plaintiff is entitled before adjudicating the merits of plaintiffs [sic] claims."); *American Council of Learned Socies. v. MacMillan, Inc.*, No. 96 Civ. 4103 (JFK), 1996 U.S. Dist. LEXIS 18145, *10-12 (S.D.N.Y. Dec. 6, 1996) ("This Court finds that Defendant's arguments to dismiss the preliminary injunction claims, prior to a full briefing on the preliminary injunction motion and an evidentiary hearing, are premature in this case."); *Kennedy v. Cape Siesta Motel, LLC*, No. 6:18-cv-1992-Orl-40DCI, 2019 U.S. Dist. LEXIS 68275, at *6 (M.D. Fla. Apr. 23, 2019) ("Defendants' challenge to the precise language and scope of a potential injunction in this case is premature.").

[19] The First Circuit has explained that the familiar four-part test is used to evaluate injunctions: 1) whether the movant has suffered an irreparable injury, 2) whether there are adequate remedies at law to compensate the movant, 3) the balance of relevant hardships between the parties, and 3) the effect of the ruling on the public interest. *See Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.,* 622 F.3d 36, 40-41 (1st Cir. 2010).

[20] The Defendants also mistakenly claim that the availability of remedies under the APA in the form of an agency remand "obviates the need to consider any other extraordinary equitable relief." *See* Defs.' Mot. to Dismiss at p. 28. This argument fails for the same reasons stated in Section III *supra*.

jurisdiction. The checkpoints in Woodstock are merely illustrative of these broader practices, and this lawsuit is not limited to a checkpoint in a single town in New Hampshire, which Border Patrol could simply move to another location in response to a court order. *See* Am. Compl. ¶ 117 ("Plaintiffs are entitled to declaratory and injunctive relief. CBP and Border Patrol have a practice and/or custom of conducting unconstitutional Border Patrol checkpoints *in northern New England*, including in Woodstock, New Hampshire approximately 90 driving miles from the Canadian border.") (emphasis added). Border Patrol's use of checkpoints in New Hampshire also have not been limited to Woodstock. From September 3-6, 2019, Border Patrol set up a checkpoint on I-89 in Lebanon, near Dartmouth College—a location nearly 100 miles from the Canadian border. *See* Am. Compl. p. 17 n. 10; Garcia Decl. ¶ 28. Border Patrol also held two one-day checkpoints in Columbia, New Hampshire on April 7, 2019 and May 27, 2019. *See* Am. Compl. p. 17 n. 10; Garcia Decl. ¶ 28. The Plaintiffs suffered the same injury as those ensnared in the Lebanon and Columbia checkpoints, and there is no evidence that Border Patrol conducts checkpoints outside Woodstock any differently than those it conducted in Woodstock. The injury and intrusion are the same.

The Defendants' concern about the "temporal scope of the injunction" and the prospect of "continuing judicial supervision of USBP checkpoint operations into the indefinite future" are similarly to no avail. *See* Defs.' Mot. to Dismiss at pp. 29-30. Here, the Defendants have made clear their position that these checkpoints can occur at any time in the future. At most, the Defendants are willing to say only that there are currently no planned immigration checkpoints before September 30, 2022 in light of current operations orders. *See* Garcia Decl. ¶¶ 32-33; *see also* Fortunato Decl. ¶ 10. But again—and tellingly—the Defendants have made no definitive promise that they will cease checkpoints for any specified time period and, instead, have expressly

preserved their right to conduct these checkpoints at any time "based upon a variety of factors." *See* Garcia Decl. ¶ 34. The Defendants' ambiguous representations about their willingness to conduct intrusive checkpoints at any time in New Hampshire only highlight the need for indefinite, prospective injunctive relief.[21]

Third, the Defendants contend that "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." *See* Defs.' Mot. to Dismiss at pp. 31-33. This argument should be rejected. There is no statute ***mandating*** that Border Patrol conduct interior checkpoints in New Hampshire. And even if there was, Border Patrol would still be constrained by the Fourth Amendment. The Defendants further complain that the proposed injunction barring "unconstitutional Border Patrol checkpoints" lacks "guidance about what operations they could conduct," and would require "laborious additional proceedings in this Court" to determine where the line is that differentiates unconstitutional and constitutional conduct. *Id.* at p. 32. But this argument only highlights the premature nature of the Defendants' effort to dismiss the Plaintiffs' claim for injunctive relief. These very proceedings will determine the appropriate scope of injunctive relief after the completion of full and open discovery.

The Defendants' final argument that "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 secure" fails for similar reasons. *See* Defs.' Mot. to Dismiss at pp. 33-35. It is for the parties to develop a factual record concerning

[21] The Defendants assert that "the injunction demanded impermissibly seeks relief or claims and parties not before the Court." *See* Defs.' Mot. to Dismiss at p. 30. Not so. Here, as explained in Section II, standing is not premised on injuries to third parties, but rather on injuries that the Plaintiffs themselves have suffered during checkpoints and are likely to suffer in the future absent an injunction.

the conduct of checkpoints in northern New England. Once that record is developed, this Court can adjudicate their constitutionality. The dismissal of the Plaintiffs' request for injunctive relief before the development of this factual record would be premature.

As alleged in the Amended Complaint—and unlike *Rahman v. Chertoff*, 530 F.3d 622 (7th Cir. 2008) where the specific circumstances of each harmed individual varied—key facts that make these checkpoints unconstitutional are common to ***all*** the checkpoints in question. These common features include, for example, the seizure of every motorist, the use of drug-sniffing canines in primary inspection areas, the confiscation of drugs, the motivation of Border Patrol, and the failure of Border Patrol to show that anyone seized crossed the Canadian border. *See* Am. Compl. ¶ 51 ("Border Patrol conducted these five checkpoints using canines in the same manner as they conducted the August and September 2017 checkpoints."); *see also* Garcia Decl. ¶ 15 (describing use of drug-sniffing canines in checkpoints). There is nothing inappropriate about an injunction that enjoins these specific challenged practices that will be established with reasonable detail through discovery.

The availability of injunctive relief here is essential. The Defendants suggest that the Plaintiffs should rely on individual damages suits, as opposed to injunctive relief. *See* Defs.' Mot. at p. 34 (citing *Rahman*'s statement that improper arrests "are best handled by individual suits for damages"). But the Defendants, themselves, have successfully argued that such damages suits arising out of the checkpoints are inconsistent with *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See Drewniak*, 554 F. Supp. 3d at 353-62 ("Here, a principled application of this analysis leads to the conclusion that Drewniak may not pursue his constitutional claim against Qualter in an implied action for damages."); *see also Egbert v. Boule*, No. 21-147, 2022 U.S. LEXIS 2829, at *17 (U.S. Sup. Ct. June 8, 2022) (holding that the Court of Appeals erred

when it created a cause of action for a bed-and-breakfast owner's Fourth Amendment excessive-force claim under *Bivens*, in part, because "Congress is better positioned to create remedies in the border-security context"); *id.* at *32 (Gorsuch, J., concurring) (suggesting that the Court has effectively overruled *Bivens* and should explicitly say so because, "if the only question is whether a court is 'better equipped' than Congress to weigh the value of a new cause of action, surely the right answer will always be no"); *Chairez v. United States Immigration & Naturalization Service*, 790 F.2d 544, 548 (6th Cir. 1986) (holding that Section 1357 does not create implied private right of action, permitting non-citizens deprived of procedural protections of statute and regulations to sue INS officials for damages).

Nor is an exclusionary rule order in a criminal case sufficient to provide adequate relief. *See* Defs.' Mot. at p. 34 (citing *Rahman*'s statement that such questions are best handled "potentially through the exclusionary rule"). This is especially the case here where the Defendants appear unwilling to fully modify their practices (e.g., use of drug-sniffing canines, continued drug confiscations without state or federal criminal charges, etc.) even after the Plymouth Circuit Court's May 1, 2018 exclusionary ruling that the August 2017 Checkpoint violated the Fourth Amendment, in part, because "there was no evidence that any of the individuals arrested for immigration violations had crossed the Canadian border." *See McCarthy* Order Ex. A to Am. Compl. (Doc. No. 64-1), *New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888, at p. 11 (2nd Cir. Dist. Div. Plymouth, Grafton, May 1, 2018); *see also* Am. Compl. ¶ 90. After this May 1, 2018 decision, the Defendants proceeded to conduct eight checkpoints in New Hampshire (five of which were in Woodstock). The Defendants also admit that, since the September 2017 Checkpoint, they confiscate "personal use" amounts of marijuana in enforcing federal criminal law—but without bringing any federal charges or providing any due process—thereby depriving

the federal courts of the opportunity to review the propriety of these checkpoints in individual federal cases. *See* Fortunato Decl. ¶ 7; *see also* Am. Compl. ¶¶ 52, 53.[22] Further, the Defendants' contention that "courts can assess the alleged violation of the Fourth Amendment" in criminal cases, *see* Defs.' Mot. at p. 33, ignores the fact that individuals are harmed by the warrantless seizures arising out of these checkpoints even if there is no subsequent criminal prosecution. In fact, most of the individuals harmed in these checkpoints through these warrantless seizures—like Plaintiff Sebastian Fuentes—are never charged with a state or federal crime.

This case is no different from *Edmond* where the parties stipulated to the facts of how the checkpoint program worked, and the Supreme Court ruled that, as stipulated, the program was unconstitutional and should be enjoined. *See* Orin S. Kerr, The Limits of Fourth Amendment Injunctions, 7 J. on Telecomm. & High Tech. L. 127, 131 (2009) (acknowledging that "[t]he basic idea, both in the drug testing and the road block cases, is that the fact-sensitivity of Fourth Amendment law does not prohibit injunctive relief *so long as the facts can be either stipulated or found at trial or otherwise established with reasonable detail*" where "[t]he court can take the facts of an existing or proposed program and treat it as a past set of facts rather than a current or future one," and then "rule on whether these sets of facts are within the Fourth Amendment or beyond it") (emphasis added). This case should proceed in the same fashion.

V. The Defendants' Claim That a Declaration Regarding Past Conduct Would Serve No Useful Purpose is Premature at the Pleadings Stage, and Fails on the Merits Because the Proposed Declaration is Responsive to the Allegations Presented in the Amended Complaint.

The Defendants' argument that a declaration concerning past conduct would serve no useful purpose is misplaced. *See* Defs.' Mot. to Dismiss at pp. 35-36, Argument E. This Court

[22] *See supra* note 11 (documenting marijuana drug seizures by Border Patrol after the September 2017 Woodstock Checkpoint).

retains "substantial discretion in deciding whether to grant declaratory relief," and the declaratory relief sought here is well within this Court's broad discretion. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 39 (1st Cir. 2006) (quoting *Ernst & Young v. Depositors Econ. Protection Corp.*, 45 F.3d 530, 534 (1st Cir. 1995)).

First, for the same reasons explained above in Section IV, this argument is premature. This Court need not address the question of declaratory relief now, but instead can exercise its discretion in addressing such relief when a formal dispositive motion is presented after the close of discovery.[23]

Second, a declaration is appropriate in this case because such relief is responsive to the allegations presented in the Amended Complaint and would affect the Defendants' future conduct in conducting checkpoints. It is true that the First Circuit has urged district court judges to exercise caution in deciding difficult constitutional questions through declaratory relief, and that declarations should neither be "remote [nor] speculative" nor "simply … proclaim liability for a past act." *See El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 494 (1st Cir. 1992); *Ysais v. State of New Mexico*, 373 Fed. App'x 863, 866 (10th Cir. 2010); *see also Katz v. McVeigh*, 931 F. Supp. 2d 311, 336 (D.N.H. 2013) ("issuance of a declaratory judgment deeming past conduct illegal is … not permissible as it would be merely advisory"). But a declaration is appropriate "in anticipation of some future conduct," *see Ysais*, 373 Fed. App'x at 866, and where it would be "responsive to

[23] Indeed, several of the cases cited by the Defendants address the propriety of a declaration *after* a record had been completed. *See Diaz-Fonseca*, 451 F.3d at 40 ("Defendants' core objection is that these declarations, in denouncing the whole system of special education, go beyond the bounds of the complaint *and the evidence* in this case. We agree.") (emphasis added); *Pagliaroni v. Mastic Home Exteriors, Inc.*, 310 F. Supp. 3d 274, 294 (D. Mass. 2018) (concluding that a declaration was inappropriate at the summary judgment stage of litigation because "Plaintiffs do not identify any benefit to Plaintiffs' legal rights or influence on Defendants' obligations stemming from these declarations"). One First Circuit case cited by Defendants acknowledges that "[t]he availability of declaratory relief, in turn, might depend on matters not revealed by the present record." *Brown v. State of Rhode Island*, 511 F. App'x 4, 6 (1st Cir. 2013).

the pleadings and issues presented," *see Diaz-Fonseca*, 451 F.3d at 42 (quoting *St. Paul Fire & Marine Ins. Co. v. Lawson Bros. Iron Works*, 428 F.2d 929, 931 (10th Cir. 1970)). For example, as the First Circuit recently explained: "In Declaratory Judgment Act cases where jurisdiction is exercised based on a threat of future injury," as here, "the potential injury is typically legal liability on a set of already defined facts, so that the Act merely 'defin[es] procedure' to enable judicial resolution of a case or controversy that might otherwise be adjudicated at a different time or in a slightly different form." *N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38, 54 (1st Cir. 2021) (quoting *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 916 F.3d 98, 112 (1st Cir. 2019) (alteration in original)).

Here, a declaration is appropriate because jurisdiction in this case is based on a threat of future injury, not an isolated, past incident. The August 2017 Checkpoint was not a one-off event, but rather was part of a routine and broader practice of behavior by the Defendants. The August 2017 Checkpoint was conducted in the same manner as the nine subsequent checkpoints in New Hampshire where canines were used. *See* Am. Compl. ¶ 51 ("Border Patrol conducted these five checkpoints using canines in the same manner as they conducted the August and September 2017 checkpoints."); *see also* Garcia Decl. ¶ 15 (describing use of drug-sniffing canines in checkpoints). And there is no promise from the Defendants that this practice will abate in the future, including the Defendants' use of drug-sniffing canines. To the contrary, the Defendants have preserved their right to conduct these checkpoints at any time "based upon a variety of factors." *See* Garcia Decl. ¶ 34; Fortunato Decl. ¶ 9. Accordingly, a declaration as to the August 2017 Checkpoint would not be advisory, but instead would "serve as practical guidance in putting the controversy to rest." *Warner v. Frontier Ins. Co.*, 288 F. Supp. 2d 127, 130 (D.N.H. 2003). Thus, declaratory relief from a federal court would have a direct impact on the future invasive checkpoint practices that the Defendants have routinely employed on New Hampshire roadways—practices that the

Defendants have refused to disclaim.

Third and finally, the Defendants are incorrect that a declaration is unnecessary 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." *See* Defs.' Mot. at pp. 35-36. The Defendants have not fully complied with the Plymouth Circuit Court's May 1, 2018 Fourth Amendment decision—a decision by which the Defendants were not bound as formal parties. *See N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 157 (D.N.H. 2019) ("Declaratory judgments do not bind non-parties."), *affirmed by, in part, vacated by, in part*, 986 F.3d 38, 54 (1st Cir. 2021). After this May 1, 2018 decision was issued, the Defendants continued to conduct checkpoints in Woodstock in the same manner using canines *on five separate occasions* in 2018 (May 27-29 Memorial Day Weekend, June 15-17 Father's Day Weekend, August 21-23, and September 25-27) and 2019 (June 8-9 during Laconia Motorcycle Week). *See* Am. Compl. ¶ 51; *see also* Garcia Decl. ¶ 15 (describing use of drug-sniffing canines in checkpoints).[24] The Defendants cannot claim that a declaration is unnecessary given the Plymouth Circuit Court's May 1, 2018 decision when the Defendants themselves have refused to alter many of their practices as a result of this decision, including their use of canines.

This is not a case "when a state court has matters well in hand," thereby justifying "withholding federal declaratory relief premised on constitutional grounds" in order to "maintain and facilitate federalism." *El Dia, Inc*, 963 F.2d at 497; *see also Metropolitan Property & Liability Ins. Co. v. Kirkwood*, 729 F.2d 61, 64 (1st Cir. 1984) ("the reasons for granting a [declaratory]

[24] It is true that, after the May 1, 2018 Plymouth Circuit Court order, state and local officials reduced their collaboration with Border Patrol insofar as these state and local officials did not charge individuals in state court for possessing small amounts of drugs that were allegedly uncovered during the checkpoints through the use of Border Patrol's canines. But the practices of the federal officials remained materially unchanged. Again, even after the May 1, 2018 order, Border Patrol used the same canines to sniff vehicles for drugs and, in fact, they continued to seize and discard drugs, though individuals were not charged in state or federal court.

judgment are stronger where … the alternative appears neither simple nor totally adequate"); *S. Bos. Allied War Veterans Council v. City of Bos.*, 875 F. Supp. 891, 906 (D. Mass. 1995) ("in contrast to *El Dia*, this is a case where the present lack of an effective alternative forum and the significant risk of irreparable harm to the Veterans' First Amendment rights make it appropriate for this court to retain jurisdiction"). The Defendants' refusal to change their practices after a state court criminal case in which they were not parties confirms that they must be subject to declaratory relief issued by an Article III court.

CONCLUSION

Judicial review is vital because *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), does not create a blank check for Border Patrol to conduct interior checkpoints anywhere in the United States. *See Jasinski v. Adams*, 781 F.2d 843, 849 (11th Cir. 1986) (per curiam) ("Plaintiff alleges that the checkpoint was merely a 'dragnet' to catch illegal aliens travelling in south Florida, regardless of their point of entry. If true, these allegations could constitute an abuse of administrative discretion and might establish defendant Mongiello's liability.") (internal citations omitted). Rather, such checkpoints are only consistent with the Fourth Amendment if (i) they are limited to a "brief detention of travelers" during which the vehicle's occupants are subjected to a "brief question or two" about their citizenship status, and (ii) Border Patrol can show that their effectiveness at minimizing illegal entry from the Canadian border outweighs the degree of intrusion on individual rights. *See, e.g.*, *Martinez-Fuerte*, 428 U.S. at 554, 558. If this Court were to agree with the Defendants' narrow views of standing and equitable relief, judicial review of Border Patrol's checkpoint authority would effectively be unavailable.

This Court should deny the Defendants' second Motion to Dismiss.

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Respectfully submitted,

Jesse Drewniak and Sebastian Fuentes,

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation, the American Civil Liberties Union of Maine Foundation, and the ACLU Foundation of Vermont,

/s/ Gilles Bissonnette
Gilles R. Bissonnette (N.H. Bar. No. 265393)
SangYeob Kim (N.H. Bar No. 266657)
Henry R. Klementowicz (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
Tel. 603.224.5591
gilles@aclu-nh.org
sangyeob@aclu-nh.org
henry@aclu-nh.org

/s/ Carol Garvan
Carol Garvan (N.H. Bar. No. 21304)
Zachary L. Heiden*
American Civil Liberties Union of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
Tel. 207.619.8687
cgarvan@aclumaine.org
heiden@aclumaine.org

/s/ Lia Ernst
Lia Ernst*
Harrison Stark*
James Diaz*
ACLU Foundation of Vermont
90 Main Street
Montpelier, VT 05602
Tel. 802.223.6304
lernst@acluvt.org
hstark@acluvt.org
jdiaz@acluvt.org

Scott H. Harris (N.H. Bar No. 6840)
Steven Dutton (N.H. Bar No. 17101)
Jeremy Walker (N.H. Bar No. 12170)
McLane Middleton
900 Elm Street
Manchester, NH 03101
Tel. 603.628-1459
Scott.harris@mclane.com
Steven.Dutton@mclane.com
Jeremy.Walker@mclane.com

Albert E. Scherr (N.H. Bar No. 2268)
Professor of Law
University of New Hampshire School of Law
2 White Street
Concord, NH 03301
Tel. 603.513.5144
Albert.Scherr@law.unh.edu

Mark Sisti (N.H. Bar No. 2357)
Sisti Law Offices
387 Dover Road
Chichester, NH 03258
Tel. 603.224.4220
msisti@sistilawoffices.com

*Admitted *pro hac vice*

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