UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

OFFICIAL CAPACITY DEFENDANTS' MEMORANDUM
IN REPLY TO PLAINTIFF'S OPPOSITION TO THEIR MOTION TO DISMISS

Two years and three hundred and fifty days after his only encounter with Border Patrol agents at a temporary checkpoint near Woodstock, New Hampshire, Jesse Drewniak filed this lawsuit seeking to enjoin Customs and Border Protection (CBP), Border Patrol and the Chief Patrol Agent from operating "unconstitutional Border Patrol checkpoints in New Hampshire for the purpose of drug interdiction" and from operating Border Patrol checkpoints on I-93 in Woodstock that "seize individuals without a warrant or suspicion." Document Number (DN) 1 at 30. Despite his waiting nearly three years to file this case, Mr. Drewniak claims "there is an imminent threat that [he] will be subjected to such checkpoints again in the future." *Id.* at 28. As of this writing, he still has not come upon another border checkpoint. This case raises the fundamental question whether a threat can be imminent or impending for standing purposes when it has not materialized after three and a half years, when the challenged government

activity – temporary checkpoints in the Woodstock area- ceased almost two years ago, and when any recurrence is dependent on numerous contingencies. DN 20 -2, at 4.[1]

Much of Mr. Drewniak's complaint is a scattershot indictment of CBP's checkpoint practices, taking aim at such legally settled features as the allowable distance from the border for interior checkpoints or the use of dual purpose canines – those trained and certified to detect drugs and humans - for free air sniffs of vehicles while passengers are briefly questioned about citizenship status.[2] His complaint also throws in irrelevant and unproven media reports of CBP misconduct in other states. DN 1 at 9, n.2; *id* at 18, n.16. After eleven introductory pages, the complaint makes the dramatic allegation that "CBP and Border Patrol have a practice and custom of conducting unconstitutional Border Patrol checkpoints in northern New England." *Id*. at 12. This sweeping legal conclusion is backed by few specific facts about how Border Patrol conducted its checkpoints in 2018 and 2019, apart from noting that Border Patrol used canines "in the same manner [as in 2017]," seized drugs, and made immigration arrests. *Id.* at 15-16. The complaint includes no factual allegations about the two checkpoints that Border Patrol conducted in Columbia, New Hampshire in 2019, or about that year's Lebanon checkpoint,

[1] In his objection, the plaintiff argues that the Court should not consider Chief Garcia's declaration on the ground that the official defendants' motion is a "facial" challenge to the plaintiff's standing to sue for injunctive relief. To the contrary, the Court should consider the declaration because it is offered as a factual challenge to the complaint's allegations that CBP checkpoints are regularly occurring or common events and that the plaintiff has an "imminent," or "certainly impending" risk of future exposure to the challenged conduct, which is not "conjectural" or "hypothetical." The declaration shows that no future checkpoints are currently planned and that any future checkpoints depend on many contingencies. "[I]f we have been presented with 'facts beyond the four corners' of the pleading that are relevant to the question of standing, we may consider them." *Corbett v. Transportation Security Administration*, 930 F.3d 1225, 1228 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 900 (2020).

[2] For CBP's authority to conduct interior checkpoints with 100 air miles of an external boundary of the United States, *see* 8 U.S.C. § 1357; 8 C.F.R. § 287.1(a)(2); *United States v. Gabriel*, 405 F. Supp. 2d 50, 57 (D. Me. 2005). For canine sniffs, *see, for example*, *United States v. Tello*, 924 F.3d 782, 787 (5th Cir.), *cert. denied*, 140 S Ct. 172 (2019).

except to mention its distance from the border. *Id.* at 16, n.8. These sparse facts provide little substance to support broad conclusions about unconstitutional "practices and customs in northern New England."

At other times, Mr. Drewniak narrows the scope of his allegations against CBP, explaining it is "the specific circumstances of the temporary interior checkpoint in Woodstock [that] render it unconstitutional." DN 1 at 9. And he has already backed away from some of his allegations about the specific circumstances of the August 2017 Woodstock checkpoint. Since filing, he has voluntarily dismissed one of the named individual capacity defendants, who was never present at the checkpoint. DN 23. He has also further qualified his accusations about the remaining individual capacity defendant, Mark Qualter. The complaint made the allegation – "on information and belief" – that during the secondary inspection of the car Drewniak was traveling in, Agent Qualter made an obscenity punctuated outburst, demanding to know where drugs were hidden. DN 1 at 21. Drewniak now says that the outburst was made "a Border Patrol Agent, *likely* Agent Qualter," an allegation that should not be granted any presumption of truth for purposes of this motion.[3] DN 30 at 5 (italics supplied).

But it is when the complaint focuses on the August 2017 Woodstock checkpoint that the issues come into sharper relief. When Mr. Drewniak and his companions arrived at that checkpoint and were questioned about their citizenship, Agent Qualter's canine alerted and their car was sent to secondary inspection. DN 1 at 19, 20. Agent Qualter seized a personal use quantity of hash oil from Mr. Drewniak and turned it over to an officer from Woodstock. *Id.* at

[3] What is puzzling about this allegation, which Drewniak plainly includes to show that the purpose of that checkpoint was drug enforcement, is that it was never raised during Drewniak's suppression hearing in state court, when the stakes were highest for him. DN 33-1.

21- 22. Mr. Drewniak was charged in state court with a violation for possession of the hash oil. *Id*. at 22.

At a suppression hearing, the judge considered whether the evidence Border Patrol seized at the checkpoint could be used to prosecute Drewniak and others, since state law considers free air dog sniffs to be searches that require reasonable suspicion. DN 1-1 at 5-6. The judge treated the case as one of first impression, since there was no controlling New Hampshire Supreme Court case on point. *Id.* at 10. At the same time, the judge observed, "Ignoring for a moment the primary purpose of the checkpoints, this court recognizes that if the defendants in these cases were tried in federal court on federal charges . . . the evidence seized by the CBP officers would be admissible." *Id.* at 5.

The judge concluded that the New Hampshire Constitution prohibited the admissibility of the seized drugs. DN 1-1 at 13. But he also concluded that the August and September 2017 checkpoints ran afoul of the federal constitution, based on his finding that the checkpoints were for the primary purpose of drug enforcement. *Id.* at 12. This finding was based largely on two points – that CBP had arranged in advance for Woodstock officers to be present at the checkpoints and to take custody of controlled substances, and that Border Patrol agents used canines that were trained to detect drugs (as well as people). *Id.* at 11-13.

The judge's decision thoroughly surveyed New Hampshire constitutional law, but he came up short on federal law. He did not analyze, for example, the many federal decisions that support a secondary purpose of narcotics enforcement at border checkpoints, including the use of drug detecting dogs, or that permit CBP to collaborate with state or local law enforcement departments. *See Tello*, 924 F.3d at 787 ("Border Patrol agents may conduct a canine sniff to search for drugs or concealed aliens at immigration checkpoints so long as the sniff does not

lengthen the stop beyond the time necessary to verify the immigration status of a vehicles passengers.") (citing *United States v. Ventura*, 447 F.3d 375, 378 (5th Cir. 2006); *United States v. Forbes,* 528 F.3d 1273, 1277 (10th Cir. 2008) ("At the border, canine inspections are permissible even in the absence of individualized suspicion and even without the consent of the vehicle's driver or occupants."); *United States v. Taylor*, 934 F.2d 218, 221 (9th Cir. 1991) (concluding that a dog sniff at an immigration checkpoint "did not exceed the boundaries of reasonableness"); *United States v. Thomas*, 726 F.3d 1086, 1096 (9th Cir. 2013) (holding that a canine alert to a vehicle produces probable cause to search the interior of that vehicle); *United States v. Brown*, CR 16-01423, 2017 WL 6403069 (D. Ariz. Oct. 4, 2017), *rep. and rec. adopted,* 2017 WL 6381424 (Dec. 14, 2017); *United States v. Ruiz-Hernandez*, CR 16-511, 2017 WL 1047236, at *10 (D. Ariz. Mar. 17, 2017) (a secondary purpose of drug interdiction or the use of a cross-trained canine at an immigration checkpoint does not make the immigration checkpoint unlawful or transform the checkpoint into a general crime control device), *aff'd,* 751 F. App'x 1022 (9th Cir. 2019); *United States v. Barajas-Chavez*, 236 F. Supp. 2d 1279 (D.N.M. 2002) (upholding roadblock conducted by state police and INS agents); *United States v. Gabriel*, 405 F. Supp. 2d 50 (D. Me. 2005) (drug interdiction at secondary inspection area of checkpoint located 70 miles from nearest port of entry).

As the state court proceedings show, a central issue in Mr. Drewniak's case has always been the extent to which CBP and state law enforcement should be able to cooperate during checkpoints. Even if the state court ruling had been correct, Mr. Drewniak not shown a "pervasive practice" or an "offending policy" that is firmly in place. He says nothing about the post-2017 checkpoints but the unremarkable fact that the Border Patrol used canines, seized drugs, and arrested individuals for immigration offenses. DN 1 at 15-16. He does not put forth

the legal conclusion that these later checkpoints were for the primary purpose of drug enforcement, much less support such a conclusion with facts.

Operational aspects of the checkpoints changed early on. As of September 2017, New Hampshire State Police notified CBP that they would not provide direct support to U.S. Border Patrol immigration checkpoints – they would only provide assistance in response to a request from U.S. Border Patrol for officer safety concerns, exigent circumstances, and/or potential violations of state law. DN 20-2 at 3. Likewise, during the 2018 and 2019 CBP checkpoints, state and local law enforcement assisted CBP only in the same limited circumstances. *Id.* at 3, 4. If, as the state court judge thought, the key facts about the August and September 2017 checkpoints concerned the degree of coordination between CBP and the local police department, leading him to find – wrongly, the defendants believe – that the primary purpose of the checkpoints was general law enforcement or narcotics control, those key facts had changed by the end of September 2017.

All this is far different from the objectional "firmly in place policies" described in *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997) (state court judge admittedly had a standing policy of prohibiting political buttons or pins in his courtroom); *Dudley v. Hannaford*, 333 F.3d 299, 308 (1st Cir. 2003) (supermarket had a standing policy of refusing to sell alcoholic beverages to persons who appeared intoxicated, disadvantaging certain disabled persons). It is worth pointing out that these two cases are factually distinguishable from Drewniak's on other grounds. The plaintiff in *Berner* was a Maine trial lawyer, who could be expected to regularly appear in Judge Delahanty's court and risk exposure to his political speech prohibition, as there were only 16 superior court justices in Maine at that time. 129 F.3d at 24. Dudley was a resident of the same town where the supermarket operated and held fast to the policy which he said discriminated

against him. 333 F.3d at 306. In both cases there was a temporal factor – the challenged policies were current – and a geographic factor - the plaintiffs were local. Neither factor applies in Mr. Drewniak's case, since the challenged policy is not current, and he lives approximately 90 miles from Woodstock.

The facts of this case are also readily distinguishable from the "regular enforcement" described in *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012). There the court emphasized, "It is indisputable that the NYPD has an enormous stop and frisk program. There were 2.8 million documented stops between 2004 and 2009. Those stops were made pursuant to a policy that is designed, implemented, and monitored by the NYPD's administration." The court noted that there were approximately 1200 stops every day conducted by police officers in the city. Significantly, in *Floyd*, the city challenged the Article III standing of three of the four plaintiffs who were not residents of New York and whose stop and frisk incidents had occurred in years past. The district court found that the fourth plaintiff, Ourlicht, the only plaintiff who was a resident of New York, had Article III standing (conferring standing on the other plaintiffs, as well). The court explained:

> *First,* unlike Lyons, who alleged only one past instance of unconstitutional police behavior, Ourlicht was stopped by NYPD officers three times in 2008 and once again in 2010, after this lawsuit was filed. The possibility of recurring injury ceases to be speculative when actual repeated incidents are documented. *Second,* unlike the plaintiffs in *Lyons* and *Shain v. Ellison,* Ourlicht's risk of future injury does not depend on his being arrested for unlawful conduct and so he cannot avoid that injury by following the law. The risk of injury is not based on a string of unlikely contingencies: according to his sworn affidavit, Ourlicht was stopped and frisked while going about his daily life—walking down the sidewalk, sitting on a bench, getting into a car.

Floyd, 283 F.R.D. at 169-70.

In contrast to the plaintiff in *Floyd*, who had four stop and frisk encounters with police, Mr. Drewniak has had only one encounter with CBP border checkpoints. In addition, the CBP

checkpoints at Woodstock do not occur on the same scale or frequency as the checkpoints in *Floyd.*

The last Woodstock checkpoint took place 20 months ago, and the last anywhere in the state was 17 months ago, long before this lawsuit was filed. No future checkpoint is on the horizon. This is not the sort of enforcement moratorium described in cases cited by Drewniak, such as *Petrello v. City of Manchester,* 16-cv-008*,* 2017 WL 3972477, at *5 (D.N.H. Sept. 7, 2017) (enforcement of anti-panhandling ordinance ceased only after suit was filed), or like that in *NH Lottery Commission v. Barr*, 386 F. Supp. 3d 132 (D.N.H. 2019), *aff'd in part, vacated on other grounds*, ___ F.3d ___ , 2021 WL 191771 (1st Cir. Jan. 20, 2021), in which the plaintiffs faced the prospect of prosecution after the expiration of a short grace period. In fact, the judge in the latter case went out of his way to point out that *post-filing* moratoriums on enforcement are given close scrutiny: "In a case such as this, where the defendant argues that its actions after a complaint is filed eliminate the threatened injury upon which the plaintiffs' claim to standing is based, the defendant bears the 'heavy burden' of persuading the court that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 143.

Finally, apart from the fact that there has not been a checkpoint in Woodstock for nearly two years, and none planned, Mr. Drewniak has not alleged any concrete and specific plans that would bring him into contact with a checkpoint in the Woodstock area. Although he states that he travels through Woodstock 50 to 60 times a year, he does not allege that he resides or works in the Woodstock area, attends school, or has family there. He travels to the White Mountains for recreation or leisure, presumably when it suits his schedule and inclinations.

Mr. Drewniak's situation is different from that of the plaintiffs in *Alasaad v. Nielsen*, 419 F. Supp. 3d 142 (D. Mass 2019), *appeals filed*, 20-1077 (1st Cir. Jan. 28, 2020) and 20-1081 (1st

Cir. Jan. 29, 2021). There, the plaintiffs challenged a CBP policy of searching electronic devices at certain border crossings, but mostly at international airports. In considering the issue of standing, the district court described the plaintiffs' concrete and specific travel plans: one plaintiff had eight definite trips planned, several plaintiffs had work or family commitments that required international travel; another plaintiff lived in Canada and studied in Boston. *Id*. at 152. The court also found that five of the plaintiffs had devices searched more than once and two had devices searched after suit was filed. *Id*. The court also noted that electronic searches are stored in an agency data base and that a traveler who has had a device searched in the past has a greater chance of having the same done in the future. *Id*. at 153.

Mr. Drewniak's personal circumstances are far closer to a case that the Eleventh Circuit recently decided, involving a frequent traveler's Fourth Amendment challenge to certain TSA practices. *Corbett*, 930 F.3d at 1225. In that case, Corbett took on TSA's use of advanced imaging technology and its policy denying certain passengers the right to opt out. His case for Article III standing was that he had flown no less than 150,000 miles on 100 domestic flights from 2013 to 2015, and that because he flies at least 50 times a year for both business and personal reasons, "[he] will have at least 50 more opportunities to be randomly selected in 2016." *Id*. at 1235. As a frequent flyer who intends to continue flying frequently, he argued that it is likely that he will be randomly chosen for screening by advanced imaging in the future. *Id* at 1236.

The Eleventh Circuit disagreed with Mr. Corbett. Applying the "substantial likelihood of future harm" standard, the circuit court held that he did not have standing. "We recognize there is a chance that he might be selected in the future, based on the random selection process, but that is not enough under the case law to show a substantial likelihood of future injury that is 'real

and immediate,' 'actual and imminent,' and not 'conjectural' or 'hypothetical.'" 930 F.3d at 1236. In support of this conclusion, the circuit court pointed to TSA evidence that its enhanced screening policy using advanced imaging does not affect "the vast majority" of airline passengers. *Id*. The odds of something not happening the vast majority of the time weighed against standing. *Id.*

Similarly, CBP's border checkpoints at Woodstock do not happen "the vast majority of the time." In the years since 2017, the peak year for checkpoints at Woodstock was 2018, when there were four three-day checkpoints, representing just over three percent of the days in the year.[4] In 2019, there was one three-day checkpoint at Woodstock, representing a fraction of one percent of the days in the year. In 2020, there was none. As with Mr. Corbett, who flies as often as Mr. Drewniak travels to the White Mountains, Mr. Drewniak does not face a "substantial likelihood" of future injury. Because he has not demonstrated the likelihood of future injury, even if had been subject to an offending policy, as he alleges, he still lacks standing to claim injunctive relief.

For these reasons, the plaintiff does not have Article III standing to pursue his claim for injunctive relief and the Court should dismiss this claim for lack of subject matter jurisdiction.

[4] Due to a clerical error, Chief Patrol Agent Garcia omitted a June 2018 checkpoint from his declaration, DN 20-2. The government apologizes for this error.

Respectfully submitted,

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