APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-10059

United States Court of Appeals
Fifth Circuit
FILED
June 19, 2023
Lyle W. Cayce Clerk

GEORGE ANIBOWEI,

Plaintiff—Appellant,

versus

MARK A. MORGAN, *Acting Commissioner of U.S. Customs and Border, Protection, in his official capacity*; MERRICK GARLAND, *U.S. Attorney General*; ALEJANDRO MAYORKAS, *Secretary, U.S. Department of Homeland Security*; TAE D. JOHNSON, *Acting Director, U.S. Immigration and Customs Enforcement*; DAVID PEKOSKE, *in his official capacity as Administrator of* THE TRANSPORTATION SECURITY ADMINISTRATION; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRANSPORTATION SECURITY ADMINISTRATION,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-3495

Before RICHMAN, *Chief Judge*, and KING and ENGELHARDT, *Circuit Judges*.

PRISCILLA RICHMAN, *Chief Judge*:

George Anibowei alleges that government agents searched his cell phone at the border without a warrant on at least five occasions, and that agents copied data from his cell phone at least once. Anibowei sued the U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), the Transportation Security Administration (TSA), and the respective heads of each entity in their official capacity (collectively, the government), challenging the searches, as well as ICE and CBP policies regarding border searches of electronic devices. In the district court, Anibowei filed a motion seeking, among other relief, a preliminary injunction preventing the government from searching his cell phone at the border without a warrant. The district court denied the preliminary injunction. Because Anibowei failed to demonstrate a substantial threat he will suffer irreparable injury if the injunction is not granted, we affirm.

I

George Anibowei is a naturalized citizen of the United States and an attorney in Texas. As an attorney, Anibowei primarily represents immigrants in removal proceedings adverse to DHS. In October 2016, Anibowei was traveling back to the United States from abroad. Upon landing in Dallas, ICE agents, along with DHS investigators, searched Anibowei's cell phone and copied data from the phone. The agents did not have a warrant for the search. Anibowei believes that the government continues to retain his data.

In the years following the incident, Anibowei alleges that border agents searched his cell phone without a warrant at least four additional times. During these searches, Anibowei witnessed border agents view his text messages and other communications, and claims that it is possible agents viewed his email. Anibowei does not explicitly assert that border agents copied data from his cell phone during the additional four searches. However, he claims that it is "virtually certain that [border agents] viewed and copied privileged communications between Mr. Anibowei and his clients" at least once.

Anibowei first brought suit against the government defendants in 2016. Acting pro se, Anibowei argued that the October 2016 search and continued retention of his data violated the First and Fourth Amendments. The district court granted a motion to dismiss and gave Anibowei leave to replead his claims. Following the dismissal, Anibowei retained counsel and filed a verified second amended complaint. In his complaint, Anibowei challenges the October 2016 search and the four additional searches. Anibowei also challenges ICE and CBP policies that govern searches of electronic devices at the border. Both policies authorize warrantless cell phone searches, including searching and retaining the digital contents of a cell phone.[1] Anibowei argues that the policies and searches are unconstitutional because the Fourth Amendment requires the government to obtain a warrant before searching a cell phone at the border, or in the

[1] *See generally* Customs and Border Control Directive No. 3340-049A (Jan. 4, 2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf; Immigration and Customs Enforcement Directive No. 7-6.1 (Aug. 18, 2009), https://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf.

alternative, because the Fourth Amendment at least requires reasonable suspicion.

Anibowei filed a motion seeking either partial summary judgment or a preliminary injunction. Anibowei argued that the district court should grant summary judgment and vacate the ICE and CBP policies because the policies authorize cell phone searches at the border without a warrant supported by probable cause, or without reasonable suspicion. In the alternative, Anibowei sought a preliminary injunction to prevent the government from enforcing the ICE and CBP policies against him, and to force the government to return or destroy the data copied from his cell phone.

Anibowei filed the motion for summary judgment or preliminary injunction prior to the government's deadline to respond to Anibowei's second amended complaint. Accordingly, as the district court noted, the government "had no obligation (or opportunity) to deny the allegations of the second amended complaint." The district court noted the "somewhat unusual procedural posture" of the case, acknowledging that typically a plaintiff would develop the record prior to moving for a preliminary injunction or summary judgment. Instead, "only a thin record (i.e., the second amended complaint) [was] developed" for Anibowei's motion.

The district court denied Anibowei's motion for summary judgment or preliminary injunction. First, the court denied summary judgment because "no decision of the Supreme Court or of the Fifth Circuit imposes" a probable cause or warrant requirement for border searches. The district court "decline[d] to reach the question whether the [ICE and CBP policies] are unconstitutional . . . on the ground that they permit the search and seizure of cell phone data at the border without

reasonable suspicion," because the court concluded that Anibowei's counsel "eschewed reliance on a reasonable suspicion-based argument" at oral argument.

The district court also concluded that Anibowei failed to establish that he was entitled to a preliminary injunction. The court reasoned that, even if it "accept[ed] the allegations of the second amended complaint as evidence, the evidence is insufficient to satisfy all four of the essential elements for obtaining a preliminary injunction." Accordingly, the district court denied the motion for a preliminary injunction.

Following the district court's order, the government filed an answer to Anibowei's second amended complaint. In that answer, the government admitted that border agents searched Anibowei's cell phone without a warrant during the October 2016 search. Anibowei then filed this appeal.

II

We first address Anibowei's motion for preliminary injunction. "The decision to grant or deny a preliminary injunction lies within the discretion of the district court and may be reversed on appeal only by a showing of abuse of discretion."[2] "[A] preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion."[3] The movant must establish four elements:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff

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[2] *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984).

[3] *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

> outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.[4]

"Each element of the injunction analysis typically involves questions of fact and of law."[5] We review a district court's factual findings for clear error.[6] "The court's conclusions of law, however, 'are subject to broad review and will be reversed if incorrect.'"[7]

We conclude that Anibowei failed to establish a substantial threat that he will suffer irreparable injury if an injunction is not granted. A plaintiff seeking a preliminary injunction must "demonstrate that irreparable injury is likely in the absence of an injunction."[8] Irreparable injury is "harm for which there is no adequate remedy at law."[9] "[I]t is not necessary to demonstrate that harm is inevitable and irreparable[;] [t]he plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm."[10]

Anibowei argues that he "faces two distinct irreparable harms." First, he argues that "he is suffering ongoing irreparable injury because his private

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[4] *Id.* at 572.

[5] *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (citing *Apple Barrel*, 730 F.2d at 386).

[6] *Apple Barrel*, 730 F.2d at 386 (citing Fed. R. Civ. P. 52(a)).

[7] *Id.* (quoting *Commonwealth Life Ins. Co. v. Neal*, 669 F.2d 300, 304 (5th Cir. 1982)).

[8] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

[9] *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013).

[10] *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986) (footnotes omitted).

information and his confidential attorney-client communications are currently in the government's possession as the result of an unconstitutional search and seizure." Second, Anibowei argues that he faces "irreparable injury each time he travels internationally by being subject to warrantless searches of his cell phone." Anibowei's evidence, consisting solely of his verified second amended complaint, is insufficient to demonstrate that either alleged harm justifies a preliminary injunction.

A

Anibowei has not offered sufficient evidence to establish that the government's alleged retention of his data causes him irreparable injury. Anibowei argues that he is suffering ongoing irreparable harm because "during its warrantless October 2016 search of his cell phone the [g]overnment copied and retained highly sensitive personal information from Mr. Anibowei's cell phone, including *attorney-client privileged* information." The government admits "that an advanced search was performed of Anibowei's cell phone on one occasion, and that information from Anibowei's cell phone was downloaded and eventually retained as a result of the advanced search." Still, Anibowei fails to establish that the government's retention of his information constitutes irreparable harm.

Government retention of unlawfully seized property is not sufficient, standing alone, to establish irreparable injury. In a related context, Federal Rule of Criminal Procedure 41(g) provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."[11] In addition to showing that the property was

[11] FED. R. CRIM. P. 41(g).

seized unlawfully, this court requires "a substantial showing of irreparable harm" before a court can order the suppression of seized evidence.[12] The irreparable-harm requirement would be rendered meaningless if retention of unlawfully seized property was per se an irreparable injury. To establish irreparable injury, Anibowei cannot solely rely on the fact that the government retained his information. Instead, Anibowei must specifically show how the government's retention of his seized information causes him harm.

To that end, Anibowei argues that the government's retention of attorney–client privileged information causes "serious harm to him personally and to his clients." However, even if the retention of attorney–client privileged information constitutes irreparable harm, Anibowei's scant and circumstantial evidence is insufficient to establish that the government copied and retained attorney–client privileged information from his cell phone.

This court's decision in *United States v. Search of Law Office, Residence & Storage Unit Alan Brown*[13] is instructive. In *Brown*, the federal government seized documents from an attorney's law offices.[14] The attorney requested that the court order the seized property returned under Federal Rule of Criminal Procedure 41(e), the predecessor to Rule 41(g), alleging that the documents were illegally seized.[15] The district court concluded that the attorney was entitled to all of the seized property and the government should not be

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[12] *United States v. Search of L. Off., Residence & Storage Unit Alan Brown*, 341 F.3d 404, 413-14 (5th Cir. 2003).

[13] 341 F.3d 404 (5th Cir. 2003).

[14] *Id.* at 407.

[15] *Id.*

allowed to retain copies or make any use of the evidence.[16] In order to establish that he was irreparably harmed by the government's retention of the documents, the attorney argued that the government seized attorney–client privileged documents.[17] This court noted that the government had given the attorney "constant access to the records since their seizure."[18] Despite this access, the attorney failed to "ma[k]e any effort to identify specific privileged documents in the hands of the government or provide a legal basis for asserting a particular privilege."[19] Nor did the attorney "indicate the amount of privileged documents the government" seized.[20] Instead, this court concluded that the attorney's argument "consisted of vague allegations that the government viewed extensive amounts of privileged information during the search of his law office and after the documents' seizure."[21] Without "proof substantiating these assertions," this court held that the attorney's claims were insufficient "to prove irreparable injury warranting the drastic relief granted by the district court."[22]

Anibowei's allegations are similarly insufficient. Anibowei's allegations are conclusory. He generally argues that because the government copied some information from his work phone during the October 2016 search, "it is virtually certain that [border agents] viewed and copied privileged" information. Anibowei's phone was returned to him after the October 2016 search. Anibowei

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[16] *Id.* at 408.

[17] *Id.* at 414.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

has knowledge and access to the information that could have been copied by the government. As the government correctly observes, "[i]f there was some specific information present, the copying of which resulted in irreparable harm, Anibowei could have provided evidence to the district court of what this information was and how its copying and retention by the government specifically harmed him." Anibowei has not done so. Without any evidence regarding what information was seized from Anibowei's cell phone, or evidence addressing whether the allegedly seized information is subject to attorney–client privilege, Anibowei cannot establish that he is suffering irreparable injury due to the government's retention of information from his cell phone.

B

Anibowei's evidence is similarly insufficient to establish that he is likely to suffer irreparable injury in the form of an unlawful search of his cell phone at the border in the future. Anibowei argues that he faces "irreparable injury each time he travels internationally by being subject to warrantless searches of his cell phone." He contends that his constitutional rights will likely be violated in the future "[b]ecause government agents have searched him nearly every time he has traveled internationally since 2017."

Anibowei's argument is reliant on his contention that a warrantless search of a cell phone at the border is unconstitutional. This circuit has never recognized a warrant requirement for any border search.[23] Nevertheless, assuming arguendo that a warrantless search of Anibowei's cell phone at the border would

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[23] *United States v. Molina-Isidoro*, 884 F.3d 287, 294 (5th Cir. 2018) (Costa, J., specially concurring).

violate his constitutional rights, the district court did not abuse its discretion in determining that Anibowei's evidence is insufficient to establish it is likely that he will be subject to a warrantless search in the future.

Anibowei has demonstrated that the ICE and CBP policies authorize warrantless searches. Further, the allegations in Anibowei's verified complaint are evidence of a pattern of warrantless searches of Anibowei's cell phone. However, Anibowei has no additional evidence to establish that he will be stopped by border agents in the future and that the agents will search his cell phone without a warrant. Given that the only evidence before the district court was Anibowei's verified complaint, the district court did not abuse its discretion in determining that Anibowei failed to demonstrate it was likely he would suffer future violations of his Fourth Amendment rights.

This court affirms the denial of a preliminary injunction if "the movant has failed sufficiently to establish *any one* of the four criteria."[24] Because Anibowei failed to demonstrate that it is likely he would suffer irreparable injury absent an injunction, we affirm the district court's denial of the preliminary injunction. Accordingly, we need not separately address whether Anibowei established the other criteria.

III

In addition to challenging the denial of a preliminary injunction, Anibowei asks this court to review the district court's denial of summary judgment. Although Anibowei's

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[24] *Black Fire Fighters Ass'n of Dall. v. City of Dall.*, 905 F.2d 63, 65 (5th Cir. 1990) (per curiam).

notice of appeal includes the summary judgment issue,[25] this court does not automatically have jurisdiction over that issue. Unlike the denial of a preliminary injunction, the denial of a summary judgment motion is not an appealable interlocutory order.[26] Instead, this court has "discretion to exercise pendent [appellate] jurisdiction."[27] As this court has explained,

> Beyond the limited right to an interlocutory appeal, the ability to enjoy pendent appellate jurisdiction is carefully circumscribed. The Supreme Court has recognized two exceptions to the bar on court-created interlocutory appeals: (1) If the pendent decision is "inextricably intertwined" with the decision over which the appellate court otherwise has jurisdiction, pendent appellate jurisdiction may lie, or (2) if "review of the former decision [is] necessary to ensure meaningful review of the latter."[28]

Anibowei argues that this court should exercise pendent appellate jurisdiction because the preliminary injunction and summary judgment rulings concern the same merits question—namely, "whether a warrant is generally required for border agents to search an individual's cell phone." However, this court does not have pendent appellate jurisdiction over a denial of summary judgment merely "[b]ecause the summary judgment

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[25] *See Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 565 (5th Cir. 2003) (holding that a notice appealing from an order included issues resolved in the order that were not expressly referenced in the notice of appeal).

[26] *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009) (citing *Meza v. Livingston*, 537 F.3d 364, 366 (5th Cir. 2008)).

[27] *Finch*, 333 F.3d at 565.

[28] *Escobar v. Montee*, 895 F.3d 387, 391 (5th Cir. 2018) (alteration in original) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995)).

ruling, like the preliminary injunction test for success on the merits, turns on the [same legal issue]."[29]

In *Byrum v. Landreth*,[30] this court considered whether it had pendent appellate jurisdiction over a motion for summary judgment when a motion for preliminary injunction was also before the court.[31] Although the summary judgment motion involved the same underlying merits issue as the preliminary injunction, the court declined to exercise pendent appellate jurisdiction.[32] The court reasoned that exercising pendent appellate jurisdiction was inappropriate because the court was able to "review[] the injunctive order without reaching a dispositive ruling on the [shared merits] claim."[33]

Because we can review the district court's denial of preliminary injunction without reaching a dispositive ruling on Anibowei's underlying Fourth Amendment claim, this court does not have pendent appellate jurisdiction over the district court's denial of summary judgment.

* * *

For these reasons, the district court's denial of Anibowei's motion for preliminary injunction is AFFIRMED.

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[29] *Byrum*, 566 F.3d at 450.

[30] 566 F.3d 442 (5th Cir. 2009).

[31] *Id.* at 449.

[32] *Id.* at 449-51.

[33] *Id.* at 450.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE ANIBOWEI,	§	
Plaintiff,	§	
	§	Civil Action No.
VS.	§	3:16-CV-3495-D
CHAD WOLF, et al.,	§	
	§	
Defendants,	§	

MEMORANDUM OPINION
AND ORDER

This is an action by plaintiff George Anibowei ("Anibowei"), a United States citizen and licensed attorney who maintains an office in Dallas, challenging three agency directives related to border searches and seizures of his cell phones. Anibowei moves for partial summary judgment, or, alternatively, for a preliminary injunction. The court has considered the briefing, including an *amicus* brief, and has heard oral argument. Concluding that Anibowei has in part failed to establish that he is entitled to partial summary judgment and that the record otherwise is not yet sufficiently developed for Anibowei to demonstrate that he is entitled to alternative relief in the form of a preliminary injunction, the court denies the motion.

I

Anibowei brings this action for vacatur of unlawful agency policies and declaratory and injunctive relief

against various federal departments and agencies and individual department and agency heads.[1] He alleges violations of the First and Fourth Amendments and of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A) and (B), stemming from searches and seizures of his cell phones conducted at Dallas-Fort Worth International Airport ("DFW Airport") when he entered the United States from foreign countries.[2] Anibowei challenges one directive of defendant U.S. Immigration and Customs Enforcement ("ICE") and two directives of defendant U.S. Customs and Border Protection ("CBP") that he complains are unconstitutional and violate the APA because they authorize such searches and seizures without probable cause and a search warrant.

These three directives (collectively, "Directives") are at issue: The first is ICE Directive No. 7-6.1, Border Searches of Electronic Devices (2009) ("2009 ICE Directive"), promulgated in 2009, which "provides legal guidance and establishes policy and procedures . . . with regard to border search authority to search, detain, seize, retain, and share information contained in electronic devices possessed by individuals at the border." 2009 ICE Directive at ¶ 1.1. The 2009 ICE directive provides, in pertinent part, that "ICE Special Agents acting under border search authority may search, detain, seize, retain, and share electronic devices, or information contained therein, *with or without individualized suspicion*,

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[1] Under Fed R. Civ. P. 25(d), various individual defendants have been replaced during the course of this litigation and their successors "automatically substituted" as parties.

[2] Considering the limited scope of this memorandum opinion and order, the court can succinctly recount the pertinent background facts and procedural history.

consistent with the guidelines and applicable laws[.]" *Id.* at ¶ 6.1 (emphasis added).

The second is CBP Directive No. 3340-049, Border Search of Electronic Devices Containing Information (2009) ("2009 CBP Directive"), also adopted in 2009. The 2009 CBP Directive authorizes CBP officers, in the course of a border search, to examine electronic devices and review and analyze the information encountered at the border "with or without individualized suspicion." *See id.* at ¶ 5.1.2 ("In the course of a border search, *with or without individualized suspicion*, an Officer may examine electronic devices and may review and analyze the information encountered at the border, subject to the requirements and limitations provided herein and applicable law." (emphasis added)).

The third is CBP Directive No. 3340-049A, Border Search of Electronic Devices (2018) ("2018 CBP Directive"), adopted in 2018. The 2018 CBP Directive supersedes CBP CBP Directive No. 3340-049 and authorizes two categories of searches. For the first category, "[w]ith or without suspicion," an officer may conduct a "basic search," during which the officer may examine an electronic device—including searching the information stored on the device—and may review and analyze information encountered at the border. *Id.* ¶¶ 5.1.2, 5.1.3. For the second category, an officer may conduct an "advanced search" "[i]n instances in which there is reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern, and with supervisory approval at the Grade 14 level or higher." *Id.* ¶ 5.1.4. An "advanced search" is "any search in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain

access to the device, but to review, copy, and/or analyze its contents." *Id.*

According to Anibowei's second amended complaint, Anibowei is a naturalized U.S. citizen and licensed attorney who maintains an office in Dallas. Before immigrating to the United States, he lived and practiced law in Nigeria.

Anibowei is a frequent traveler. He typically travels to Nigeria several times each year to visit family and friends, and is a frequent tourist in Europe, the Caribbean, and other African countries. From 2012 until 2015, Anibowei was a member of the Global Entry Trusted Traveler Program ("Global Entry") administered by CBP. In 2015, however, CBP revoked Anibowei's membership in the program for the stated reason that he "d[id] not meet the eligibility requirements for the [Global Entry] program." 2d Am. Compl. ¶ 95. Both before and after Anibowei's Global Entry membership was revoked, he was subjected to extensive secondary screening nearly every time he traveled.

On October 10, 2016 border agents at the DFW Airport seized Anibowei's cell phone as he was returning to the Dallas area after a short vacation to Canada. Acting without a warrant, and pursuant to the 2009 CBP Directive, the agents searched Anibowei's cell phone and copied the data on it. Anibowei believes that the agents are still in possession of the data they copied from his cell phone. As a result of that search, Anibowei stopped carrying his work phone with him on international trips.

Anibowei alleges that in the years since the October 2016 search, his personal cell phone has been searched without a warrant at least four more times by officers of the Department of Homeland Security. For example, on February 12, 2017, upon arrival at the DFW Airport

following a trip to Nigeria, Anibowei was put into secondary inspection where, *inter alia*, border agents performed a search of his cell phone in his presence. Anibowei believes that officers viewed his text messages and encrypted messages he sent and received through WhatsApp, and possibly viewed his email.

Anibowei seeks vacatur of the Directives and declaratory and injunctive relief based on alleged violations of the First and Fourth Amendments and the APA.

After Anibowei filed the instant motion for partial summary judgment, defendants filed an unopposed motion to stay deadline to respond to Anibowei's second amended complaint. The court granted the motion, and ordered that defendants' response to the second amended complaint is not due until 14 days after the court issues its order deciding Anibowei's motion for partial summary judgment.

II

Because Anibowei seeks partial summary judgment on claims on which he will bear the burden of proof at trial, he "must establish 'beyond peradventure all of the essential elements of the claim[s].'" *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F. Supp. 943, 962 (N.D. Tex. 1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)). This means that Anibowei must demonstrate that there are no genuine and material fact disputes and that he is entitled to summary judgment as a matter of law. *See Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 412 (5th Cir. 2003). "The court has noted that the 'beyond peradventure' standard is 'heavy.'" *Carolina Cas. Ins. Co. v. Sowell*, 603 F.Supp.2d 914, 923-24 (N.D. Tex. 2009) (Fitzwater, C.J.) (quoting *Cont'l Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 2007

WL 2403656, at *10 (N.D. Tex. Aug. 23, 2007) (Fitzwater, J.)).

To obtain a preliminary injunction, Anibowei must establish each of the following: (1) a substantial likelihood that he will prevail on the merits; (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to Anibowei outweighs the threatened harm the injunction may do to defendants; and (4) that granting the preliminary injunction will not disserve the public interest. *E.g.*, *Jones v. Bush*, 122 F.Supp.2d 713, 718 (N.D. Tex. 2000) (Fitzwater, J.), *aff'd*, 244 F.3d 134 (5th Cir. 2000) (per curiam) (unpublished table decision). "The decision whether to grant a preliminary injunction is within the discretion of the court, but it is an extraordinary remedy that should only be granted if the movant has clearly carried its burden." *John Crane Prod. Solutions, Inc. v. R2R & D, LLC,* 861 F.Supp.2d 792, 794 (N.D. Tex. 2012) (Fitzwater, C.J.) (citation omitted). "A preliminary injunction 'is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion.'" *Jones*, 122 F.Supp.2d at 718 (quoting *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989); *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). "The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line,* 760 F.2d 618, 621 (5th Cir. 1985) (citation omitted).

III

A

Anibowei's principal—if not exclusive—argument is that the Directives should be invalidated because they empower searches and seizures of cell phone data at the

border without probable cause and a search warrant. But no decision of the Supreme Court or of the Fifth Circuit imposes such requirements in the context of border searches. In particular, no court has extended the Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014), to a border search. And as the Fifth Circuit has recognized, "not a single court addressing border searches of computers since *Riley* has read it to require a warrant." *United States v. Molina-Isidoro*, 884 F.3d 287, 292 (5th Cir. 2018). Absent such authority, Anibowei has failed to demonstrate under the "heavy" beyond peradventure standard that he is entitled to partial summary judgment as a matter of law. Because at oral argument Anibowei's counsel eschewed reliance on a reasonable suspicion-based argument, the court declines to reach the question whether the Directives are unconstitutional or violate the APA on the ground that they permit the search and seizure of cell phone data at the border without reasonable suspicion.

B

Nor has Anibowei shown that he is entitled to a preliminary injunction, which is relief that he seeks in the alternative. The pertinent evidentiary record, which at this point consists only of Anibowei's second amended complaint, is insufficient for the court to conclude that Anibowei has satisfied each of the four essential elements for obtaining such relief.

At oral argument, Anibowei's counsel relied on the fact that the second amended complaint is verified to contend that it is competent evidence, not merely allegations. But because the parties agreed that defendants' obligation to file a responsive pleading would be deferred pending a ruling on the instant motion, defendants have had no obligation (or opportunity) to

deny the allegations of the second amended complaint. And even if the court overlooks this procedural imbalance and accepts the allegations of the second amended complaint as evidence, the evidence is insufficient to satisfy all four of the essential elements for obtaining a preliminary injunction. And the failure to meet even one of the four requirements results in the denial of a motion for a preliminary injunction. *E.g.*, *Medlin v. Palmer*, 874 F.2d 1085, 1091 (5th Cir. 1989) ("The failure of a movant to establish one of the above four elements will result in the denial of a motion for temporary injunction."); *Anderson v. Douglas & Lomason Co.*, 835 F.2d 128, 133 (5th Cir. 1988) ("if the movant does not succeed in carrying its burden on any one of the four prerequisites, a preliminary injunction may not issue").

Accordingly, the court denies Anibowei's motion for a partial summary judgment and his alternative request for a preliminary injunction.

IV

This case is before the court in a somewhat unusual procedural posture. In a typical case of this type, assuming that at least some of the plaintiff's claims survived a Fed. R. Civ. P. 12(b)(6) motion, a plaintiff like Anibowei would pursue development of the record (through his own evidence and/or discovery from defendants), move for a preliminary injunction, and perhaps later seek partial summary judgment on a more developed record. In this case, however, only a thin record (i.e., the second amended complaint) has been developed, defendants by agreement have not been obligated (or able) to deny Anibowei's allegations, and Anibowei has moved for a preliminary injunction only as an alternative form of relief, which was insufficient to trigger entry of a

scheduling and procedural order.[3] The court anticipates that this case will pivot hereafter to a more typical course.

* * *

For the reasons stated, Anibowei's motion for partial summary judgment or, in the alternative, for a preliminary injunction is denied.

SO ORDERED.

January 14, 2020.

Sidney A. Fitzwater

SIDNEY A. FITZWATER
SENIOR JUDGE

[3] In the typical case, when a plaintiff applies for a preliminary injunction, the court issues a scheduling and procedural order that enables it to decide the motion under Rule 43(c), i.e., on the papers, without an evidentiary hearing unless a controlling credibility question is presented. *See, e.g., Wireless Agents, L.L.C. v. Sony Ericsson Mobile Commc'ns AB*, 390 F.Supp.2d 532, 533 n.1 (N.D. Tex. 2005) (Fitzwater, J.) (addressing former Rule 43(e)), *aff'd*, 189 Fed. Appx. 965 (Fed. Cir. 2006). Here, however, the court did not implement this procedure or schedule because Anibowei seeks a preliminary injunction only in the alternative.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE ANIBOWEI, Plaintiff, VS. WILLIAM P. BARR, et al., Defendants,	§ § § § § § § §	Civil Action No. 3:16-CV-3495-D

MEMORANDUM OPINION
AND ORDER

In this civil rights action arising from alleged violations of the First and Fourth Amendments, the court referred to the United States Magistrate Judge the question whether plaintiff George Anibowei's ("Anibowei's") claims for prospective injunctive relief fall within the direct officer exception to the doctrine of sovereign immunity. The magistrate judge answered that they do not, and she recommended that the claims be dismissed with prejudice for lack of subject matter jurisdiction. After making an independent review of the record, the court agrees that the claims should be dismissed—but on a different rationale and with leave to replead.

I

A

Anibowei is a U.S. citizen and licensed attorney who maintains an office in Dallas.[1] Before immigrating to the United States, Anibowei was licensed to practice law in Nigeria. He was admitted to the Texas Bar in 2002.

From 2012 until 2015, Anibowei was a member of the Global Entry Trusted Traveler Program ("Global Entry") administered by U.S. Customs and Border Protection ("CBP"). In 2015 CBP revoked Anibowei's membership in the program for the stated reason that he "does not meet the program eligibility requirements." 1st Am. Compl. ¶ 18. Anibowei alleges that he does not know why he is now ineligible for Global Entry; he has not been convicted of any crime, he has no criminal charges pending against him, and he did not provide false or incomplete information on his application to the program. Both before and after Anibowei's Global Entry membership was revoked, CBP agents would routinely refer Anibowei for secondary inspection when he passed through customs at U.S. airports. On numerous occasions, CBP agents have detained Anibowei, questioned him, and searched his personal belongings. Anibowei suspects that the unusual rigor with which CBP screens him may indicate his inclusion on a "watch list" maintained by the Terrorist Screening Center ("TSC"), a component of the Federal Bureau of Investigation ("FBI").

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[1] The court takes the following facts from Anibowei's first amended complaint. Anibowei is proceeding *pro se* in this matter. Although the court's usual practice is to construe *pro se* pleadings liberally, "*pro se* litigants who are attorneys are not entitled to the flexible treatment granted other *pro se* litigants." *Cole v. Comm'r*, 637 F.3d 767, 773 (7th Cir. 2011).

The present lawsuit arises from two screening incidents in particular, both of which took place at the Dallas/Fort Worth International Airport ("DFW Airport"). The first occurred in October 2016, when Anibowei was returning from a short vacation to Canada. He had already been subjected to secondary inspection by Canadian border authorities when entering and exiting Canada, purportedly at the request of CBP. After Anibowei's return flight arrived at DFW Airport—while passengers were preparing to disembark—the flight crew told the passengers to return to their assigned seats, because officers from the Department of Homeland Security ("DHS") were there to remove a passenger. Anibowei was the passenger whom the officers removed. The officers, who were CBP agents,[2] led Anibowei to an interrogation room and instructed him to place the contents of his pockets, including his cell phone, on a table. One of the agents then took Anibowei's cell phone out of the room. When Anibowei asked why, the agents told him that they had detained his cell phone for "examination and copying." *Id.* ¶ 35. The agents questioned Anibowei for roughly two hours about his background, his personal life, and the purpose of his trip to Canada. At no point did the agents suggest that Anibowei had broken the law or that he had any illegal material on his cell phone. After questioning him, the agents returned his cell phone and again told him that it had been copied for examination.

In February 2017, after Anibowei filed the instant lawsuit, CBP agents again detained him for questioning as he passed through customs at DFW Airport. This time, Anibowei was returning from a trip to Nigeria. Although the agents did not copy his cell phone, they performed a

[2] The court takes judicial notice that CBP is a component of DHS. *See* 6 U.S.C. § 211(a).

manual search of his emails and text messages. They also questioned Anibowei for nearly three hours. Once again, they never suggested that Anibowei had committed a crime or that his cell phone contained any illegal content. Anibowei alleges that his cell phone contains personal and private information as well as confidential and privileged materials relating to his work on behalf of clients.

Anibowei asserts that the two searches of his cell phone were conducted in accordance with CBP and Immigration and Customs Enforcement ("ICE") policies. *See* U.S. Customs and Border Protection, CBP Directive No. 3340-049, Border Search of Electronic Devices Containing Information (2009); U.S. Immigration and Customs Enforcement, ICE Directive No. 7-6.1, Border Searches of Electronic Devices (2009). These policies permit government agents to search individuals' electronic devices at the border with or without individualized suspicion. *See* CBP Directive No. 3340-049 § 5.1.2; ICE Directive No. 7-6.1 § 6.1. Anibowei contends that the policies also permit CBP and ICE to retain any information relevant to immigration, customs, or other law enforcement matters, and to share that information with other agencies. He alleges on information and belief that the named defendants have retained and shared data copied from his cell phone.

B

Anibowei's first amended complaint asserts that the detention and search of his cell phone—and defendants' continued retention and sharing of his electronic data—violate the First and Fourth Amendments to the U.S. Constitution. He seeks relief in the form of a declaratory judgment that the relevant acts were unconstitutional; an injunction ordering defendants to return or destroy all information they copied from his cell phone; and an

injunction directing defendants to disclose whether Anibowei's data were shared with any other entities or individuals, and, if so, in what form and with whom. He sues a number of high-ranking executive officers in their official capacities only. Four of the named defendants are part of DHS: Secretary of Homeland Security Kristjen Nielsen; CBP Commissioner Kevin McAleenan; Transportation Security Administration Administrator David Pekoske; and ICE Acting Director Ronald Vitiello. The remaining four defendants are not associated with DHS, but instead are included in the lawsuit because of their connection with the TSC watch list: Attorney General William P. Barr; FBI Director Christopher Wray; TSC Director Charles Kable, IV; and National Counterterrorism Center Director Joseph Maguire.[3]

The government filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). It contended that Anibowei lacked constitutional and prudential standing to sue for past violations of his rights; that the searches of Anibowei's cell phone did not violate the Constitution; and that there was no connection between five of the named defendants and the allegedly unconstitutional search. The court referred the motion to the United States Magistrate Judge for a report and recommendation. The magistrate judge concluded that Anibowei was experiencing an ongoing injury due to defendants' continued retention of his electronic data, and therefore had standing. She also recommended that defendants' Rule 12(b)(6) motion be granted in part because Anibowei failed to state a claim

[3] The individual defendants named in this paragraph—including Attorney General William P. Barr, whose nomination was just confirmed today—automatically succeeded the defendants originally named in Anibowei's first amended complaint. *See* Fed. R. Civ. P. 25(d). The court will refer to all eight named defendants collectively as "defendants" or "the government."

under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Finally, the magistrate judge recommended *sua sponte* that Anibowei's Administrative Procedure Act ("APA") claim, to the extent he attempted to plead such a claim, be dismissed because the first amended complaint did not allege any final agency action. Following *de novo* review, the court adopted the magistrate judge's conclusion as to standing, but re-referred the motion to the magistrate judge so that she could consider an additional question: whether Anibowei can maintain his claims for injunctive relief under the direct officer exception to the doctrine of sovereign immunity. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949).

Following the re-referral, the magistrate judge issued the supplemental findings, conclusions, and recommendation that are now before the court. She concludes that the first amended complaint does not fall within the direct officer exception for two reasons. First, Anibowei does not specifically allege that the named defendants themselves took any action pursuant to an unconstitutional policy, or that they acted beyond their statutory powers. This finding can be understood as having two components: that Anibowei does not allege what, if any, actions the named defendants undertook themselves; and that Anibowei fails to allege that any particular policy or law is unconstitutional. Second, the magistrate judge noted that, to grant Anibowei the relief he requests, the court would have to issue an affirmative injunction. Such relief is supposedly precluded by footnote 11 of the *Larson* opinion. *See Larson*, 337 U.S. at

691 n.11.[4] Therefore, the magistrate judge recommends that the court dismiss Anibowei's injunctive-relief claims with prejudice for lack of subject matter jurisdiction. Anibowei objects to the magistrate judge's supplemental recommendation, and the government responds in support of it. The court now considers the magistrate judge's supplemental recommendation and her findings as to Anibowei's *Bivens* and APA claims, which the court has not yet adopted.

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[4] In addition to citing footnote 11, the magistrate judge suggests that "if the effect of the judgment would be to *restrain the government from acting*, or to compel it to act," then sovereign immunity bars the suit regardless whether Anibowei has sufficiently alleged that his case falls within one of the *Larson* exceptions. Supp. Rec. 8 (emphasis added) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (internal quotation marks omitted). But this reasoning is the reverse of the correct analysis—and is, moreover, inconsistent with *Larson* itself. *See Larson*, 337 U.S. at 690 (observing that "[a]ctions for . . . injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of" permissible lawsuits against government officials). When a federal official is sued, the court must first examine whether the lawsuit is actually against the United States, and the "general rule" of sovereign immunity applies. *See Ala. Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225-26 (5th Cir. 1976). A lawsuit is against the United States if, *inter alia*, the relief sought would constrain or compel the sovereign. *See id.* The court may then consider whether the suit falls within one of the *Larson* exceptions to the general rule of sovereign immunity. *See, e.g., id.* at 1226. Footnote 11, in turn, provides a further "exception to the exception" that applies if a judgment would require the government to undertake certain kinds of affirmative action. *Saine v. Hosp. Auth.*, 502 F.2d 1033, 1035 (5th Cir. 1974) (quoting *Zapata v. Smith*, 437 F.2d 1024, 1025 (5th Cir. 1971)). Because Anibowei is suing all defendants in their official capacities only, it is already established that the general rule of sovereign immunity applies, so the court will begin at the second step of the analysis: the applicability of the *Larson* exceptions. *See Danos v. Jones*, 652 F.3d 577, 581 (5th Cir. 2011).

II

The court first considers whether sovereign immunity deprives it of subject matter jurisdiction.

"A federal court has no subject matter jurisdiction over claims against the United States unless the government waives its sovereign immunity and consents to suit." *Danos v. Jones*, 652 F.3d 577, 581 (5th Cir. 2011) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)). Generally, "claims against officers of the United States in their official capacities are actually claims against the sovereign," and are therefore barred by sovereign immunity. *Id.* (citing *S. Sog, Inc. v. Roland*, 644 F.2d 376, 380 (5th Cir. Unit A May 1981)).

As the magistrate judge correctly observed, because sovereign immunity is a jurisdictional issue, it is properly addressed under the Rule 12(b)(1) standard. "Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). A Rule 12(b)(1) motion can mount either a facial or factual challenge. *See, e.g., Hunter v. Branch Banking & Tr. Co.*, 2013 WL 607151, at *2 (N.D. Tex. Feb. 19, 2013) (Fitzwater, C.J.) (citing *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. May 1981)). When a party makes a Rule 12(b)(1) motion without including evidence, the challenge to subject matter jurisdiction is facial. *Id.* The court assesses a facial challenge as it does a Rule 12(b)(6) motion in that it "looks only at the sufficiency of the allegations in the pleading and assumes them to be true. If the allegations are sufficient to allege jurisdiction, the court must deny the motion." *Id.* (citation omitted) (citing *Paterson*, 644 F.2d at 523). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Accordingly,

the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam) (citations omitted).

B

1

Direct officer suits seeking prospective injunctive relief are an exception to sovereign immunity. An individual can bring such a suit directly against a federal officer in two circumstances: (1) when the officer acts outside of the officer's delegated statutory power; and (2) if the officer's conduct, while statutorily authorized, offends a provision of the Constitution. *Larson*, 337 U.S. at 689-91 (citing *Phila. Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing, *inter alia*, *Ex parte Young*, 209 U.S. 123, 159-60 (1908))); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"). The latter is a "constitutional exception to the doctrine of sovereign immunity." *Larson*, 337 U.S. at 696; *accord* Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 895 (7th ed. 2015) ("Hart and Wechsler") ("[I]f the officer acted within the conferred statutory limits of the office, but his or her conduct allegedly offended a provision of the Constitution, then sovereign immunity will be lifted.") (internal quotation marks and citation omitted). Through this line of cases, individuals have "a right to sue directly under the [C]onstitution to enjoin . . . federal officials from violating [their] constitutional rights." *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979); *see also Unimex, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 594 F.2d 1060, 1061-62 (5th Cir. 1979) (per curiam) (examining whether official

capacity suit against federal officers may survive under constitutional exception to sovereign immunity); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 41 (1st Cir. 2002) ("[O]ur courts have long recognized that federal officers may be sued in their official capacity for prospective injunctive relief to prevent ongoing or future infringements of federal rights."); Erwin Chemerinski, Federal Jurisdiction § 9.2.2, at 676 (7th ed. 2016) ("[U]nconstitutional government actions can be halted by seeking an injunction against the individual officer responsible for executing the government's policy."); Hart and Wechsler, *supra* at 892 ("The principle that the Constitution creates a cause of action against governmental officials for injunctive relief . . . and that sovereign immunity erects no general bar to such relief . . . has also come to apply in suits challenging *federal* official action.").

The court acknowledges that there is some debate over whether, in suits against federal agency officials, the constitutional exception to sovereign immunity still survives after the 1976 amendments to the APA. *See, e.g., E.V. v. Robinson*, 906 F.3d 1082, 1092-93 (9th Cir. 2018); *Danos*, 652 F.3d at 582; *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985). The 1976 amendments "waived sovereign immunity for suits seeking nonmonetary relief through nonstatutory judicial review of agency action," and were intended to "do away with the *ultra vires* doctrine and other fictions surrounding sovereign immunity." *Geyen*, 775 F.2d at 1307 (citing Act of Oct. 21, 1976, Pub. L. No 94–574, § 1, 90 Stat. 2721, 2721 (codified at 5 U.S.C. § 702 (1982))). Most challenges to federal agency action are now brought via the APA, so the question whether *Larson* still applies to suits against federal agency officials "possesses limited current practical significance." Hart and Wechsler, *supra* at 892.

But because doing so does not affect the outcome of the present motion, the court will assume *arguendo* that the *Larson* exceptions have continuing vitality in suits challenging federal agency action. *Cf. Danos*, 652 F.3d at 582 ("Like the district court, we assume for the sake of analysis that the *Larson* exception to sovereign immunity may still apply in certain cases after the 1976 amendments to the Administrative Procedure Act[.]").[5]

2

As explained above, the magistrate judge offered two reasons for why Anibowei cannot maintain his claims under the direct officer exception to sovereign immunity. The court does not adopt these reasons; instead, it dismisses Anibowei's injunctive relief claims on an alternative basis.

The magistrate judge concluded that Anibowei's claims for injunctive relief must be dismissed because he does not allege what, if any, actions the named defendants themselves undertook, and because he fails to allege that any particular policy or law is unconstitutional. Anibowei objects that he does, in effect, allege that certain CBP and ICE policies are unconstitutional: he challenges the search of his cell phone and the subsequent retention and sharing of his data as unconstitutional, and he alleges that the CBP agents who searched his cell phone did so pursuant to the policies in question. The court agrees with this objection.

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[5] The court expresses no opinion on whether Anibowei's claims fall within § 702's waiver of sovereign immunity. The court *does* conclude that, to the extent Anibowei seeks review pursuant to the general provisions of the APA, his claim is barred by sovereign immunity, *see infra* § II(C), but this does not necessarily end the analysis under § 702, *see, e.g., Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 488-89 (5th Cir. 2014).

The Federal Rules of Civil Procedure were meant to do away with excessively-technical pleading requirements. *See Theriault v. Silber*, 579 F.2d 302, 303 (5th Cir. 1978) (per curiam) ("The modern view is that courts decide cases based on the merits of the issues and not from the pages of a writ book. This change is nowhere more evident than in the Rules of Civil Procedure[.]"). And although a plaintiff must allege enough facts "to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), the plaintiff is not required to specifically cite the statutory basis for the claim, so as long as he sufficiently establishes the factual predicate for claim, *Johnson v. City of Shelby*, ___ U.S. ___, 135 S. Ct. 346, 347 (2014) (per curiam) (concluding, under Rule 12(b)(6) standard, that civil rights plaintiff need not specifically cite 42 U.S.C. § 1983 in complaint as long as he sufficiently establishes factual predicate for claim). It is not difficult to draw the reasonable inference from Anibowei's first amended complaint that he maintains that the CBP and ICE policies in question violate the First and Fourth Amendments.

Although Anibowei does not effectively address the magistrate judge's conclusion that he failed to specify any particular actions undertaken by the named defendants, the court nonetheless declines to adopt this conclusion. In the context of a *Bivens* claim, it is in fact necessary for Anibowei to allege that the named defendants themselves, through their individual actions, violated his constitutional rights. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). But to overcome sovereign immunity in a suit for prospective injunctive relief, the plaintiff need only allege either "'some connection' or a 'special relationship'" between the named defendant and enforcement of the challenged policy. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (quoting *Ex parte Young*, 209 U.S. at 157); *see*

also Allstate Ins. Co. v. Abbott, 495 F.3d 151, 159 (5th Cir. 2007) ("[*Ex parte*] *Young* requires that '[i]n making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, . . . such officer must have some connection with the enforcement of the act, or else it is merely making . . . the state a party.'" (alterations in original) (emphasis removed) (quoting *Ex parte Young*, 209 U.S. at 157)); *Shah v. Univ. of Tex. Sw. Med. Sch.*, 129 F.Supp.3d 480, 497 n.11 (N.D. Tex. 2015) (Fitzwater, J.) (stating the same).[6]

Anibowei has not met this burden here. It is immaterial whether the correct standard is "some connection" or a "special relationship," because Anibowei has alleged no facts explaining what role the named defendants played, if any, in enforcing the ICE and CBP policies in question.[7] *Cf. Alexander v. Trump*, ___ Fed.

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[6] The requisite degree of connection between the named defendant and the challenged policy is unclear. In *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), a plurality of the Fifth Circuit stated that the named defendant must have the "particular duty" to enforce the law in question and "a demonstrated willingness to exercise that duty." *Id.* at 416. But, as a panel of the Fifth Circuit later pointed out, the portion of the *Okpalobi* opinion that commanded only a plurality is not binding precedent. *See K.P.*, 627 F.3d at 124. It thus remains an open question whether the named defendant need only have "some connection" with enforcement of the challenged law, or whether some higher standard applies. *See id.*

[7] While *K.P.*, *Allstate*, and *Okpalobi* involved challenges to state statutes, the present case involves a challenge to a federal agency policy. Nonetheless, these cases are applicable to the present circumstances. On at least one occasion the Fifth Circuit has held that a challenge to a state administrative *policy*—rather than a statute—could be brought on the basis of the direct officer exception against the officials responsible for promulgating and implementing the policy. *See Dunham v. Wainwright*, 713 Fed. Appx. 334, 335 (5th Cir.

Appx. ___, 2018 WL 4945300, at *5 (5th Cir. Oct. 11, 2018) (per curiam) ("Alexander's complaint fails to allege a connection between the Louisiana Governor and the local sheriff and police officers he accuses of having violated his rights."). The closest Anibowei comes to doing so is when explaining that he included the four non-DHS defendants in this suit because of their connection to the TSC watch list. But he does not appear to be challenging the constitutionality of terrorist watch lists. His injunctive relief claims against all defendants are therefore barred by sovereign immunity.

At this juncture, the court need not decide whether footnote 11 of *Larson* bars Anibowei's claims. The court will nonetheless outline the analysis to be conducted in applying footnote 11, which states:

2018) (per curiam). As to the state/federal distinction, the legal fiction underlying the direct officer exception functions the same way as applied to both state and federal defendants. In both instances, the assumption is that when an official acts in violation of the Constitution, he is acting *ultra vires* and can be enjoined as if he were acting as an individual. *Compare Larson*, 337 U.S. at 690, *with Ex parte Young*, 209 U.S. at 159-60. As the *Larson* Court observed, the direct officer exception to sovereign immunity "has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments . . . [a]nd it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred." *Larson*, 337 U.S. at 690-91(quoting *Stimson*, 223 U.S. at 620 (citing, *inter alia*, *Ex parte Young*, 209 U.S. at 159-60)); *see also* Hart & Wechsler, *supra* at 892 ("The principle . . . that sovereign immunity erects no general bar to [injunctive] relief . . . has also come to apply in suits challenging *federal* official action." (citing *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 183-84 (1938))). Because the direct officer exception is conceptually identical in both the state and federal contexts, there is no reason to conclude that a different standard of connection between the named defendant and the challenged policy applies when the defendant is employed by the federal government.

> [o]f course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Larson, 337 U.S. at 691 n.11 (citation omitted). The Fifth Circuit has interpreted this footnote narrowly.[8] In *Saine v. Hospital Authority*, 502 F.2d 1033 (5th Cir. 1974), the court concluded that "footnote 11 of Larson does not bar all actions seeking affirmative action by governmental officials." *Id.* at 1036. Rather, the footnote applies to two types of claims. First, it bars plaintiffs from seeking injunctions that would require the government to pay retrospective monetary relief. *See id.* (citing *Zapata v. Smith*, 437 F.2d 1024, 1025 (5th Cir. 1971)); *cf. Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (stating the same principle). Second, the footnote prohibits claims for affirmative injunctive relief where "the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm." *Saine*, 502 F.2d at 1037 (quoting *Washington v.*

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[8] At least one circuit has questioned whether footnote 11 remains good law. In *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008), Judge Griffith, writing for the panel, observed that the Supreme Court has failed to mention footnote 11 in recent sovereign immunity cases and in its various opinions authorizing affirmative injunctive relief against state officials. *Id.* at 752 (citing, *inter alia*, *Milliken v. Bradley*, 433 U.S. 267 (1977)). Judge Griffith noted that "any court that would rely on footnote 11 to bar an *Ex parte Young* suit would have to grapple with the issue of its possible obsolescence." *Id.* But this court will assume that footnote 11, as interpreted by the Fifth Circuit, remains good law—until either the Supreme Court or the Fifth Circuit holds otherwise.

Udall, 417 F.2d 1310, 1318 (9th Cir. 1969)). This test requires the court to engage in a "balancing analysis," weighing, on the one hand, the burden the relief would impose on the government, and, on the other hand, the harm that denying relief would inflict on the plaintiff. *See Doe v. Wooten*, 376 Fed. Appx. 883, 885 (11th Cir. 2010) (per curiam) (citing *Saine*, 502 F.2d at 1037); *see also, e.g.*, *Doe v. Wooten*, 2010 WL 2821795, at *3-5 (N.D. Ga. July 16, 2010) (applying balancing test).

The magistrate judge did not engage in this balancing analysis. Therefore, the court does not adopt her conclusion that footnote 11 bars Anibowei's claims for injunctive relief.

C

The magistrate judge *sua sponte* considered whether Anibowei has stated a claim under the APA, which effects a waiver of sovereign immunity. *See MacKenzie v. Castro*, 2017 WL 1021299, at *4 (N.D. Tex. Mar. 16, 2017) (Fitzwater, J.). She concluded that this court lacks subject matter jurisdiction over any APA claim because Anibowei fails to allege a final agency action. To the extent Anibowei attempts to state a claim for relief under the general provisions of the APA, the court agrees with and adopts the magistrate judge's conclusion.[9]

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[9] If Anibowei is eventually able to overcome sovereign immunity, he must still reckon with the question whether his constitutional claims are authorized by an affirmative cause of action. *See Alexander*, ___ Fed. Appx. at ___, 2018 WL 4945300, at *4 ("Although there have been a few notable exceptions, the federal courts, and this Circuit in particular, have been hesitant to find causes of action arising directly from the Constitution." (quoting *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382 (5th Cir. 1980))). It is possible that such authorization may be found in the inherent equitable powers of the federal courts. *See Armstrong v. Exceptional Child Ctr., Inc.*, ___

III

Finally, the court considers the magistrate judge's findings as to Anibowei's *Bivens* claims. It notes that Anibowei did not object to this portion of the magistrate judge's original recommendation. After an independent review, the court agrees with the magistrate judge's conclusion and adopts it. To the extent Anibowei attempts to state a claim under *Bivens*, this claim is dismissed because Anibowei has not sued the named defendants in their individual capacity, and he does not allege that they personally violated his constitutional rights.

IV

Although the court is dismissing Anibowei's claims, it will also grant him leave to replead. It is the practice of this court to afford litigants "at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable." *In re Am. Airlines, Inc., Privacy Litig.*, 370 F.Supp.2d 552, 567-68 (N.D. Tex. 2005) (Fitzwater, J.) (quoting *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002)). There is no indication that the defects in Anibowei's first amended complaint are incurable; it is conceivable that he could identify a specific agency action for the purposes of § 702's waiver of sovereign immunity, or could allege a connection between the named defendants and the enforcement of the policies Anibowei seeks to challenge under *Larson*. The court therefore grants Anibowei a period of 28 days from the

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U.S. ___, 135 S. Ct. 1378, 1384 (2015) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief . . . with respect to violations of federal law by federal officials."); *see also Porter*, 592 F.2d at 781 ("Porter would of course have a right to sue directly under the [C]onstitution to enjoin her supervisors and other federal officials from violating her constitutional rights.").

date this memorandum opinion and order is filed to file a second amended complaint.

In granting leave to replead, the court observes that the merits issue in this case—whether the Constitution prohibits the government from conducting suspicionless searches of individuals' electronic devices at the border—is an important one. And there is currently a circuit split. *Compare, e.g., United States v. Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018) (holding that no individualized suspicion is required), *with United States v. Kolsuz*, 890 F.3d 133, 137 (4th Cir. 2018) (concluding that agents must have at least reasonable suspicion), *and United States v. Cotterman*, 709 F.3d 952, 962 (9th Cir. 2013) (same). The Fifth Circuit has not yet chosen a side. *See United States v. Molina-Isidoro*, 884 F.3d 287, 289 (5th Cir. 2018) ("[Defendant] invites the court to announce general rules concerning the application of the government's historically broad border-search authority to modern technology for which the Supreme Court has recognized increased privacy interests. We decline the invitation to do so[.]" (citation omitted)). Before deciding this weighty question, the court seeks certainty concerning its own jurisdiction. *Cf. Peltier v. Assumption Par. Police Jury*, 638 F.2d 21, 22 (5th Cir. 1981) (recognizing that courts should "resolve federal constitutional claims only when a case cannot be decided on any other basis" (quoting *Finch v. Miss. State Med. Ass'n, Inc.*, 585 F.2d 765, 776 (5th Cir. 1978))). Thus the court will rigorously analyze the sovereign immunity question again after Anibowei files his second amended complaint.

* * *

For the foregoing reasons, the court adopts in part the magistrate judge's October 18, 2018 supplemental

findings, conclusions, and recommendation, and it dismisses Anibowei's claims, with leave to replead.

SO ORDERED.

February 14, 2019.

SIDNEY A. FITZWATER
SENIOR JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE ANIBOWEI, Plaintiff, VS. JEFFERSON B. SESSIONS, et al.,[1] Defendants,	§ § § § § § §	Civil Action No. 3:16-CV-3495-D

SUPPLEMENTAL FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Memorandum Opinion and Order* dated March 27, 2018 (doc. 26), this case was re-referred for recommendation concerning the plaintiff's claims for injunctive relief against the federal defendants in their official capacities. Based on the relevant filings and applicable law, the plaintiff's claims for injunctive relief should be **DISMISSED with prejudice**.

[1] Jefferson B. Sessions succeeded Loretta Lynch, Christopher Wray succeeded James Comey, Elaine Duke succeeded Jeh Johnson, Kevin K. McAleenan succeeded Gil Kerlikowske, David P. Pekoske succeeded Peter Neffenger, and Thomas D. Homan succeeded Sarah Saldana. Under Rule 25(d) of the Federal Rules of Civil Procedure, each successor "is automatically substituted as a party."

I. BACKGROUND[2]

On December 23, 2016, George Anibowei (Plaintiff) filed suit seeking, in part, injunctive relief under the Constitution for alleged violations of his First and Fourth Amendment rights during a border search on October 10, 2016. (doc. 1 at 1-3.)[3] He named the U.S. Attorney General, Director of the Federal Bureau of Investigation, Director of the Terrorist Screening Center, Director of the National Counterterrorism Center, Secretary of the Department of Homeland Security, Commissioner of the United States Customs and Border Protection Agency, Administrator of the United States Transportation Security Administration, and the Director of the United States Immigration and Customs Enforcement Agency (Defendants) in their official capacities only. (doc. 8 at 1, 4-5.)

Plaintiff alleges that he frequently flies internationally and has been referred for secondary inspection, detained, and questioned by United States Customs and Border Protection (CBP) agents on many occasions. (docs. 8 at 7-8; 17 at 8.) On October 10, 2016, he flew from Canada to the United States, and upon arrival at the Dallas/Fort Worth International Airport (DFW), CBP agents escorted him to an interrogation room. (docs. 8 at 2, 12; 17 at 9.) The agents detained and questioned him for approximately two hours and "seized and detained" his cell phone for "examination and copying." (doc. 8 at 2, 14.) They then returned Plaintiff's cell phone and released him without indicating "what information

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[2] The facts are more fully set out in the original Findings, Conclusions, and Recommendation. (*See* doc. 19.)

[3] Citations to the record refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

had been copied from his cell phone, what agencies or individuals would have access to any copies made, and whether any such copies would ultimately be destroyed or stored." (*Id.* at 14-15.) After filing suit, Plaintiff was again referred for secondary inspection, detained, and questioned by CBP agents while his cell phone, luggage, and carry-on bag were searched. (*Id.* at 15-16.) He seeks an order requiring Defendants (1) to return all information retrieved from his cell phone or, if the information cannot be returned, to expunge or destroy that information; and (2) to disclose whether the information obtained from his cell phone was disclosed to other agencies and, if so, what information was disclosed and in what form. (*Id.* at 2-3, 19-20.)

On December 15, 2017, it was recommended that Plaintiff's claims be dismissed. (*See* doc. 19.) After the parties objected to the recommendation, it was adopted in part, and the case was rereferred to address the merits of one objection concerning Plaintiff's claims for injunctive relief against Defendants in their official capacities. (*See* doc. 26 at 1, 3.)

II. RULE 12(b)(1)

Plaintiff's claim for injunctive relief against Defendants in their official capacities implicates sovereign immunity, which goes to subject-matter jurisdiction and is properly addressed under Rule 12(b)(1). *Garcia v. United States*, No. 3:14-CV-357-L, 2015 WL 1810451, at *2 (N.D. Tex. Apr. 20, 2015) (addressing sovereign immunity under Rule 12(b)(1)); *Maibie v. United States*, No. 3:07- CV-0858-D, 2008 WL 4488982, at *2–3 (N.D. Tex. Oct. 7, 2008) (Fitzwater, J.) (same).

Federal courts are courts of limited jurisdiction; without jurisdiction conferred by the Constitution and

statute, they lack the power to adjudicate claims. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). They "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). When a court dismisses for lack of subject matter jurisdiction, the dismissal "is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." *Id.*

A. Legal Standard

A district court may dismiss for lack of subject matter jurisdiction based on (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). A motion to dismiss based on the complaint alone presents a "facial attack" that requires the court to merely decide whether the allegations in the complaint, which are presumed to be true, sufficiently state a basis for subject matter jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1998). "If sufficient, those allegations alone provide jurisdiction." *Id.*

Here, Defendants' Rule 12(b)(1) motion to dismiss relies on Plaintiff's amended complaint, and therefore presents a facial attack that does not require resolution of matters outside the pleadings. *See Bridgewater v. Double Diamond–Delaware, Inc.*, 3:09-CV-1758-B, 2010 WL 1875617, at *5 (N.D. Tex. May 10, 2010); *Lester v. Lester*, No. 3:06-CV-1357-BH, 2009 WL 3573530, at *4 (N.D. Tex. Oct. 29, 2009).

B. Sovereign Immunity

As noted, Plaintiff sues Defendants in their official capacities only. (*See* doc. 8 at 1, 4-5.) Lawsuits against federal employees in their official capacities are treated as lawsuits against the United States. *See Ischy v. Miles*, 75 F. App'x 257, 258 (5th Cir. 2003) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). Suits against the United States are generally barred by sovereign immunity. *Id.* (citing *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999)). "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Since federal sovereign immunity is jurisdictional in nature, the consent or waiver must be unequivocally expressed. *Freeman v. United States*, 556 F.3d 326, 335 (5th Cir. 2009). The terms of the consent or waiver define the jurisdictional boundaries to entertain the suit. *Meyer*, 510 U.S. at 475. In general, the scope of a waiver of sovereign immunity is strictly construed "in favor of the sovereign." *Gomez–Perez v. Potter*, 553 U.S. 474, 491 (2008). Plaintiff has the burden to show an "unequivocal waiver of sovereign immunity." *St. Tammany Parish ex rel. Davis v. FEMA*, 556 F.3d 307, 315 (5th Cir. 2009).

The Supreme Court has held that suits seeking injunctive relief directly against individual officers in their official capacities may not be barred by sovereign immunity in certain circumstances, however. *See Larson v. Domestic & Foreign Exch. Corp.*, 337 U.S. 682, 689–91 (1949) (recognizing exceptions to sovereign immunity for suits seeking injunctive relief directly against federal officers in their official capacities); *see also Bell v. Hood*,

327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979) (stating that individuals "have a right to sue directly under the [C]onstitution to enjoin . . . federal officials from violating [their] constitutional rights."). "Such actions are based on the grant of general federal question jurisdiction under 28 U.S.C. § 1331 and the inherent equity powers of the federal courts." *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 41 (1st Cir. 2002).

An individual can bring suit "for specific relief against officers of the sovereign" in their official capacities in only two circumstances: (1) when the officer acts outside of his or her delegated statutory power; or (2) when the officer acts pursuant to a statute or order that "is claimed to be unconstitutional." *Larson*, 337 U.S. at 689–91, 701; *see also Simons v. Vinson*, 394 F.2d 732, 736 (5th Cir. 1968) (recognizing the two exceptions to sovereign immunity). The first is an "*ultra vires* exception to sovereign immunity," and the latter is a "constitutional exception to the doctrine of sovereign immunity." *Larson*, 337 U.S. at 696; *Danos v. Jones*, 652 F. 3d 577, 583 (5th Cir. 2011) (quoting *Larson*, 337 U.S. at 689) ("The *ultra vires* exception to sovereign immunity, . . . provides that 'where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'"). Relief can be granted in those cases because "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Larson*, 337 U.S. at 690. "[E]ven if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers," a suit will fail, as one against the sovereign, "if the relief

requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.* at 691 n.11 (citing *North Carolina v. Temple*, 134 U.S. 22, 26 (1890)).

In *Larson*, the plaintiff filed suit against a federal officer seeking injunctive relief against him in his official capacity, "and against 'his agents, assistants, deputies, and employees and all persons acting or assuming to act under their direction," to prevent the sale or delivery of coal. 337 U.S. at 684–86. The officer moved to dismiss the complaint on grounds "that the court did not have jurisdiction because the suit was one against the United States," and the district court agreed and dismissed the suit. *Id.* at 684–85, 689. After identifying the two ways that specific relief could be sought directly against a federal officer, the Supreme Court found that the case did not fall within either category because the plaintiff did not claim that the individuals from whom he was seeking injunctive relief "were acting unconstitutionally or pursuant to an unconstitutional grant of power." *Id.* at 691, 702–03. It concluded that the relief sought was against the sovereign, and affirmed the dismissal of the suit on that ground. *Id.* at 689.

Here, Plaintiff alleges that CBP and Immigration and Customs Enforcement (ICE) policies authorize border agents to detain electronic devices, "read and/or analyze the contents of such devices without any basis for suspicion of wrongdoing," and retain or share the information obtained from those devices. (doc. 8 at 16-17.) Under these policies, Defendants' agents allegedly "reviewed and copied the contents of his electronic devices," and retained and disclosed the information gathered from his devices to other government agencies in violation of his constitutional rights. (*Id.* at 17-19.)

Plaintiff does not allege any facts involving the named Defendants, however. (*See id.* at 2-18.) He only vaguely references them and states that he believes they have either retained, disclosed, or received the information obtained from his cell phone, and asks for injunctive relief requiring the return or destruction of that information, as well as disclosures about that information. (*Id.* at 12, 17-18.) He does not allege or plead facts showing that they committed any acts under an unconstitutional statute or order, or that they engaged in any conduct that was beyond their statutory authority.[4] *See Larson*, 337 U.S. at 689–91; *Smith*, 643 F. Supp. 2d at 1291–92; *see also Unimex, Inc. v. U.S. Dept. of Hous. & Urban Dev.*, 594 F.2d 1060, 1062 (5th Cir. 1979) (noting that the exceptions to sovereign immunity did not apply because the plaintiff did not contend "that the basis for either official's authority to act . . . [was] unconstitutional," or that either acted beyond the powers conferred on them by statute); *Adderley v. United States*, No. 5:17-CV-01431-HNJ, 2018 WL 3819722, at *6 (N.D. Ala. Aug. 10, 2018) (determining that the plaintiff did not plausibly plead that the federal officials engaged in acts beyond their authority or acted pursuant to an unconstitutional policy or statute); *Kodonsky v. United States*, No. 3:96-CV-2969-BC, 1997 WL 457516, at *9 (N.D. Tex. Aug. 5, 1997) (quoting *Larson*, 337 U.S. at 693) (noting that the plaintiff did "not allege any material facts to support the proposition that the individual defendants acted outside the scope of their authority or that, 'in committing that wrong, [were] not

[4] In order to successfully allege that an officer's actions were *ultra vires*, or beyond his statutory authority, "[t]he complaint must allege facts sufficient to establish that the officer was acting 'without any authority whatever,' or without any 'colorable basis for the exercise of authority.'" *Danos*, 652 F.3d at 583 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)).

exercising the powers delegated to him by the sovereign.'"). Accordingly, the exception to sovereign immunity for suits seeking injunctive relief directly against officers in their official capacities does not apply to permit Plaintiff to pursue his claims for injunctive relief against Defendants. *See Adderley*, 2018 WL 3819722, at *6–7 (finding that the plaintiff could not obtain injunctive relief where he did not satisfy the requirements of the exception).

Moreover, even if Plaintiff's amended complaint can be read to allege that Defendants engaged in acts beyond their statutory powers, or committed acts that were authorized by an unconstitutional statute or order, his requests for injunctive relief would require affirmative action by the sovereign. *See Larson*, 337 U.S. at 691 n.11; *see also Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Larson*, 337 U.S. at 704) ("The general rule is that a suit is against the sovereign . . . if the effect of the judgment would be 'to restrain the Government from acting or to compel it to act."); *Pavlov v. Parsons*, 574 F. Supp. 393, 397 (S.D. Tex. 1983) (citing cases) (restating the same). He asks that the Court order Defendants to return or destroy the information obtained from his cell phone, disclose whether that information was disclosed to other government agencies, and disclose what information, if any, was disclosed to other agencies. (*See* doc. 8 at 19-20.) These requests effectively seek relief from the United States, rather than from Defendants. *See Dugan*, 372 U.S. at 620–21 (finding that a suit for injunctive relief to "prevent the storing and diverting of water at [a] dam" was "in fact [a suit] against the United States"); *Larson*, 337 U.S. at 689 (agreeing that a request for relief was against the sovereign where "it was asked that the court order [the defendant], his agents, assistants, deputies and employees and all persons acting under their direction,

not to sell . . . [or] deliver [coal] to anyone other than the respondent."). Although Plaintiff's suit is directed at federal officials, based on the relief he seeks, it "is barred, not because it is a suit against [officers] of the Government, but because it is, in substance, a suit against the Government over which the [C]ourt, in the absence of consent, has no jurisdiction." *Larson*, 377 U.S. at 688; *see Dugan*, 372 U.S. at 620; *Robertson v. Johnson*, No. H-05-2190, 2006 WL 1118151, at *3 (S.D. Tex. Apr. 25, 2006) (citing *Larson*, 337 U.S. at 688) (finding that a suit against a federal officer in her official capacity was barred by sovereign immunity where the "suit [was] viewed as one against the United States.").

Because the exception does not apply and Plaintiff's claims for injunctive relief against Defendants are barred by sovereign immunity, they should be dismissed with prejudice. *Maibie*, 2008 WL 4488982, at *3 (dismissal with prejudice based on sovereign immunity is proper, "despite the fact that sovereign immunity deprives this court of subject matter jurisdiction"); *Florance v. Buchmeyer*, 500 F. Supp. 2d 618, 648 (N.D. Tex. 2007) (dismissing with prejudice claims that were barred by sovereign immunity).[5]

III. RECOMMENDATION

Plaintiff's claims for injunctive relief against Defendants in their official capacities should be **DISMISSED with prejudice**.

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[5] Because the exception to sovereign immunity does not apply to permit Plaintiff to seek injunctive relief against Defendants in their official capacities, it is unnecessary to reach the issue of whether the conduct of which he complains violated the Constitution. *Peltier v. Assumption Par. Police Jury*, 638 F.2d 21, 22 (5th Cir. 1981) (citing cases in recognizing that courts should "resolve federal constitutional claims only when a case cannot be decided on any other basis.").

SO RECOMMENDED on this 18th day of October, 2018.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions an recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See*

Douglass v. United Servs. Automobile Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE ANIBOWEI, Plaintiff, VS. JEFFERSON B. SESSIONS, III, et al., Defendants,	§ § § § § § § §	Civil Action No. 3:16-CV-3495-D

MEMORANDUM OPINION
AND ORDER

After conducting an independent review of the pleadings in this case, the December 15, 2017 findings, conclusions, and recommendation of the magistrate judge, defendants' December 29, 2017 objections to the magistrate judge's findings, conclusions, and recommendation on defendants' motion to dismiss plaintiff's first amended complaint, and plaintiff's January 10, 2018 response to defendants' objections to the magistrate judge's findings, conclusions, and recommendation, the court concludes that the magistrate judge's findings, conclusions, and recommendation are correct in part and are therefore adopted in part. Without suggesting that the magistrate judge should alter the result of the recommendation, the court also concludes that the recommendation should specifically address the merits of one objection. Accordingly, the court re-refers

this matter to the magistrate judge for further proceedings.[1]

Plaintiff brings this action for declaratory and injunctive relief against eight officers of federal agencies,[2] alleging First and Fourth Amendment violations stemming from a search and seizure conducted at Dallas-Fort Worth International Airport. Defendants move to dismiss plaintiff's first amended complaint for lack of standing and subject matter jurisdiction under Fed R. Civ. P. 12(b)(1) and failure to state a claim under Rule 12(b)(6).

In her findings, conclusion, and recommendation, the magistrate judge recommends that defendants' motion to dismiss be granted in part and denied in part. She concludes that plaintiff has standing to assert his claims, and she recommends that the motion to dismiss under Rule 12(b)(1) be denied. Following *de novo* review, the court agrees with the magistrate judge that plaintiff has standing and that defendants' Rule 12(b)(1) motion to dismiss should be denied.

The magistrate judge also recommends that defendants' Rule 12(b)(6) motion be granted in part as to

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[1] Under § 205(a)(5) of the E-Government Act of 2002 and the definition of "written opinion" adopted by the Judicial Conference of the United States, this is a "written opinion[] issued by the court" because it "sets forth a reasoned explanation for [the] court's decision." It has been written, however, primarily for the parties, to decide issues presented in this case, and not for publication in an official reporter, and should be understood accordingly.

[2] Jefferson B. Sessions, III succeeded Loretta Lynch; Christopher Wray succeeded James Comey; Elaine Duke succeeded Jeh Johnson; Kevin K. McAleenan succeeded Gil Kerlikowske; David P. Pekoske succeeded Peter Neffenger; and Thomas D. Homan succeeded Sarah Saldaña. Under Fed R. Civ. P. 25(d), each successor "is automatically substituted as a party."

plaintiff's claims brought against the officers in their individual capacities under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Finally, the magistrate judge recommends that plaintiff's claims under the Administrative Procedure Act ("APA") be dismissed *sua sponte* for lack of subject matter jurisdiction.

Defendants maintain that, even if it is determined that plaintiff has standing, the court must still address the merits of outstanding claims for injunctive relief against the officers in their official capacities—not only the *Bivens* and APA claims. The court agrees.

Aside from actions under *Bivens* or the APA, direct officer suits seeking injunctive relief are not barred by sovereign immunity. An individual can bring such a suit directly against a federal officer in two circumstances: (1) when the officer acts outside of his or her delegated statutory power; and (2) if the officer's conduct, while statutorily authorized, offends a provision of the Constitution. *Larson v. Domestic & Foreign Exchange Corp.*, 337 U.S. 682, 689-91(1949); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"). The latter is a "constitutional exception to the doctrine of sovereign immunity." *Larson*, 337 U.S. at 696; Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 895 (7th ed. 2015) ("Hart and Wechsler") ("[I]f the officer acted within the conferred statutory limits of the office, but his or her conduct allegedly offended a provision of the Constitution, then sovereign immunity will be lifted.") (internal quotation marks and citation omitted). Through this line

of cases, individuals have "a right to sue directly under the [C]onstitution to enjoin . . . federal officials from violating [their] constitutional rights." *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979); *see also Unimex, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 594 F.2d 1060, 1061-62 (5th Cir. 1979) (per curiam) (examining whether official capacity suit against federal officers may survive under constitutional exception to sovereign immunity); *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 41 (1st Cir. 2002) ("[O]ur courts have long recognized that federal officers may be sued in their official capacity for prospective injunctive relief to prevent ongoing or future infringements of federal rights."); Erwin Chemerinski, Federal Jurisdiction § 9.2.2, at 676 (7th ed. 2016) ("[U]nconstitutional government actions can be halted by seeking an injunction against the individual officer responsible for executing the government's policy."); Hart and Wechsler, *supra* at 892 ("The principle that the Constitution creates a cause of action against governmental officials for injunctive relief . . . has also come to apply in suits challenging federal official action.").

In the present case, plaintiff seeks injunctive and declaratory relief, asserting jurisdiction—not only under *Bivens* and the APA—but also under the Constitution. Am. Compl. ¶1. He alleges that the agents who copied and retained the contents of his cell phone were acting pursuant to official Customs and Border Protection and Immigration and Customs Enforcement policy. *Id.* at ¶¶40, 43. Plaintiff also avers that the actions authorized by the policy are unconstitutional. *Id.* at ¶¶47, 48. Accordingly, the court concludes that the magistrate judge should consider anew whether plaintiff has alleged claims against defendants under the direct officer exception to sovereign immunity, and, if so, whether he

has stated a claim for relief against the officers in their official capacities for the alleged constitutional violations.[3]

The December 15, 2017 findings, conclusions, and recommendation of the magistrate judge are adopted in part, and this matter is re-referred to the magistrate judge.

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[3] *Larson* offers different justifications for the validity of direct federal officer suits, *compare Larson*, 337 U.S. at 696 (describing a "constitutional exception to the doctrine of sovereign immunity"), *with id.* at 690 ("[T]he conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign."). As a result, courts are inconsistent as to whether these suits seeking injunctions for a federal officer's unconstitutional actions are brought against the officer in the officer's official or personal capacity. *Compare Unimex*, 594 F.2d at 1061 (stating the exception applies when official sued in official capacity); *Clark v. Library of Cong.*, 750 F.2d 89, 103 (D.C. Cir. 1984) (same); *Rhode Island Dep't of Envtl. Mgmt.*, 304 F.3d at 41 (same), *with Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225 (5th Cir. 1976) ("The applicability of the doctrine of sovereign immunity is to be determined, not by the party named as defendant, but by the result of the judgment or decree which may be entered."). And since the 1976 amendments to the APA have allowed a majority of these cases to be brought under 5 U.S.C. § 702, courts have not had many opportunities to clarify this distinction. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232-33 (10th Cir. 2005) (explaining that § 702 was passed to address "the impact of the doctrine of sovereign immunity on vindication of constitutional and other legal rights"). Regardless, even if these suits are considered to be brought against an officer in the officer's individual capacity, the facts regarding the official Customs and Border Protection and Immigration and Customs Enforcement policy remain relevant to the analysis of whether plaintiff plausibly states a direct federal officer claim.

SO ORDERED.

March 27, 2018.

SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE ANIBOWEI, Plaintiff,	§	
v.	§	Civil Action No. 3:16-CV-3495-D
JEFFERSON B. SESSIONS, et al.,[1] Defendants,	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Order of Reference* dated April 11, 2017 (doc. 14), before the Court for recommendation is *Defendants' Motion to Dismiss Plaintiff's First Amended Complaint*, filed April 10, 2017 (doc. 13). Based on the relevant filings and applicable law, the defendants' motion to dismiss should be **DENIED in part**, and **GRANTED in part**.

I. BACKGROUND

On December 23, 2016, George Anibowei (Plaintiff) filed suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 5

[1] Jefferson B. Sessions succeeded Loretta Lynch, Christopher Wray succeeded James Comey, Elaine Duke succeeded Jeh Johnson, Kevin K. McAleenan succeeded Gil Kerlikowske, David P. Pekoske succeeded Peter Neffenger, and Thomas D. Homan succeeded Sarah Saldana. Under Rule 25(d) of the Federal Rules of Civil Procedure, each successor "is automatically substituted as a party."

U.S.C. §§ 702, 706 of the Administrative Procedures Act (APA), for alleged violations of his First and Fourth Amendment rights during a border search on October 10, 2016. (doc. 1 at 1-2.)[2] He names the U.S. Attorney General, Director of the Federal Bureau of Investigation, Director of the Terrorist Screening Center, Director of the National Counterterrorism Center, Secretary of the Department of Homeland Security, Commissioner of the United States Customs and Border Protection Agency, Administrator of the United States Transportation Security Administration, and the Director of the United States Immigration and Customs Enforcement Agency (Defendants) in their official capacities only. (doc. 8 at 1-3.)

Plaintiff is a licensed Texas attorney who frequently flies internationally. (doc. 17 at 8.) He was an approved member of the Global Entry Trusted Traveler Program administered by the United States Customs and Border Protection Agency (CBP). (doc. 8 at 5, 21.) After approximately two and a half years of active membership, his membership was revoked for not meeting the "program eligibility requirements." (*Id.* at 6, 22.) Plaintiff asserts that "even before and subsequent to the revocation" of his membership, he was referred for secondary inspection, detained, and questioned by CBP officers on many occasions. (*Id.* at 7-8.) On one occasion, he and his teenage son were prevented from boarding and detained for approximately two hours before being allowed to board their flight, which was delayed while they were detained. (*Id.*) On another occasion, he was detained and questioned for almost five hours by the

[2] Citations to the record refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

Canada Border Services at the insistence of CBP, which caused him to miss his flight. (*Id.*)

On October 10, 2016, Plaintiff arrived at the Toronto International airport to board his flight to the United States. (*Id.* at 12.) Plaintiff contends that, upon his arrival at the Dallas/Fort Worth International Airport (DFW), CBP agents escorted him to an interrogation room. (*Id.* at 2; doc. 17 at 9.) There, they "seized and detained" his cell phone without consent or a search warrant for "examination and copying," but they did not tell him why. (doc. 8 at 2, 14.) CBP agents detained and questioned Plaintiff for approximately two hours, during which time they allegedly copied the contents of his cell phone for examination. (*Id.* at 14.) CBP agents then returned Plaintiff's cell phone and released him without indicating "what information had been copied from his cell phone, what agencies or individuals would have access to any copies made, and whether any such copies would ultimately be destroyed or stored." (*Id.*)

After filing this lawsuit, on February 27, 2017, Plaintiff returned to the United States from Nigeria and landed at DFW, where he was again referred for secondary inspection. (*Id.* at 15.) During this subsequent inspection, he was detained and questioned by CBP agents while his cell phone, luggage, and carry-on bag were searched. (*Id.*) Plaintiff asserts that a CBP agent went through his text messages and emails on his cell phone without his consent or a search warrant. (*Id.* at 15-16.) CBP agents detained him for approximately three hours during this inspection. (*Id.* at 16.)

Plaintiff seeks a declaratory judgment that the detention of his cell phone for copying and examination and the retention and dissemination of its contents without reasonable suspicion violates the First and

Fourth Amendments. (*Id.* at 19.) He also seeks "injunctive relief" in the form of an order requiring Defendants to (1) return all information retrieved from his cell phone or, if the information cannot be returned, to expunge or destroy that information; and (2) disclose whether the information obtained from his cell phone was disclosed to other agencies and, if so, what information was disclosed and in what form. (*Id.* at 2-3, 19-20.) Finally, he seeks attorneys' fees and costs. (*Id.* at 20.)

II. RULE 12(b)(1)

Defendants move to dismiss Plaintiff's claims for declaratory and injunctive relief under Rule 12(b)(1) for lack of subject-matter jurisdiction, alleging that he lacks standing to sue. (doc. 13 at 10.)

A. Legal Standard

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges a federal court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction; without jurisdiction conferred by the Constitution and statute, they lack the power to adjudicate claims. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). They "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). When a court dismisses for lack of subject matter jurisdiction, that dismissal "is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." *Id.*

The district court may dismiss for lack of subject matter jurisdiction based on (1) the complaint alone; (2)

the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). A motion to dismiss based on the complaint alone presents a "facial attack" that requires the court to merely decide whether the allegations in the complaint, which are presumed to be true, sufficiently state a basis for subject matter jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1998). "If sufficient, those allegations alone provide jurisdiction." *Id.*

Here, because the Rule 12(b)(1) motion to dismiss relies on Plaintiff's amended complaint, it presents a facial attack that does not require resolution of matters outside the pleadings. *See Bridgewater v. Double Diamond–Delaware, Inc.*, 3:09–CV–1758–B, 2010 WL 1875617, at *5 (N.D. Tex. May 10, 2010); *Lester v. Lester*, No. 3:06-CV-1357-BH, 2009 WL 3573530, at *4 (N.D. Tex. Oct. 29, 2009).

B. Constitutional Standing

Defendants assert that Plaintiff's claims for equitable relief should be dismissed for lack of Article III standing because he has not demonstrated that he has suffered the requisite harm, since his allegations "do not establish a likelihood that [his] cell phone will be similarly searched again in the future." (doc. 13 at 14.)

"Article III of the Constitution limits federal 'Judicial Power,' that is, federal-court jurisdiction, to 'Cases' and 'Controversies.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980). One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "Standing is an issue of subject matter jurisdiction, and thus can be contested by a Rule 12(b)(1)

motion to dismiss." *Lee v. Verizon Commc'ns Inc.*, 954 F. Supp. 2d 486, 496 (N.D. Tex. 2013) (citing *Hunter v. Branch Banking & Trust Co.*, 2013 WL 607151, at *1 (N.D. Tex. Feb. 19, 2013); *see Cobb v. Cent. States*, 461 F.3d 632, 635 (5th Cir. 2006) (noting "the issue of standing is one of subject matter jurisdiction"). This requirement, like other jurisdictional requirements, is not subject to waiver. *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996).

To meet the Article III constitutional standing requirement, plaintiffs "must *allege personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines*, 521 U.S. at 818 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *accord Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). A plaintiff seeking equitable relief can establish standing by showing "actual present harm or a significant possibility of future harm." *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003) (quoting *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998). "Past exposure to illegal conduct" does not in itself establish standing for equitable relief "if unaccompanied by continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *see Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 288 (5th Cir. 2015); *Bauer*, 341 F.3d at 358 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). "To obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future." *Bauer*, 341 F.3d at 358. When a plaintiff seeks relief from governmental action, as here, the court "should not intervene unless the need for equitable relief is clear, not remote or speculative." *Id.* (quoting *Henschen v. City of Houston*, 959 F.2d 584, 588 (5th Cir. 1992)).

Neither the Supreme Court nor the Fifth Circuit have specifically addressed the issue of Article III standing to sue for equitable relief in the context of a border search.[3] The seminal case, upon which Defendants rely, appears to be *Abidor v. Napolitano*, 990 F. Supp. 2d 260 (E.D.N.Y. 2013). In that case, CBP agents searched an individual's laptop computer and hard drive upon his return to the United States from Canada. *Id.* at 268. They found pictures depicting terrorist organizations and retained the laptop for further inspection, but returned it along with the external hard drive eleven days later by mail. *Id.* The individual and two associations filed suit seeking a declaratory judgment that the CBP and Immigration and Customs Enforcement (ICE) policies violated the First and Fourth Amendments and that the border search of the individual's laptop violated his rights, and an injunction to prevent the defendants from "enforcing their policies of searching, copying, and detaining electronic devices at the international border without reasonable suspicion." 990 F. Supp. 2d at 264.[4] The defendants' motion to dismiss argued that the plaintiffs lacked standing to challenge the directives, and alternatively, that they failed to state a claim upon which relief could be granted. *Id.* The court determined that all of the plaintiffs lacked standing because it was "unlikely" that the individual plaintiff or any member of the association would "have his electronic device searched at the border . . . ." *Abidor*, 990 F. Supp. 2d at 274–75.

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[3] No other circuit court appears to have specifically addressed this issue either.

[4] CBP and ICE directives authorize agents to inspect a traveler's electronic devices without reasonable suspicion upon reentry into the United States. *See Abidor*, 990 F. Supp. 2d at 264–67 (describing the challenged directives).

More recently, the same court again considered the standing issue in *Janfeshan v. United States*, No. 16-CV-6915 (ARR) (LB), 2017 WL 3972461, *2 (E.D.N.Y. Aug. 21, 2017), which involved the questioning of the plaintiff upon his reentry into the United States and a forensic search of his phone. The plaintiff sued for declaratory and injunctive relief, alleging that the defendants had violated his rights under the Fourth and Fifth Amendments when they "reviewed and copied the contents of [his] smartphone, retained this information, and [] possibly disclosed it to other U.S. government or foreign agencies that in turn, may have retained that information as well." *Id.* at *2, 4. He sought (1) "a declaration that defendants violated the Fourth and Fifth Amendments . . . ."; (2) "that defendants return to him, or destroy, all the information they seized from his phone . . . ."; and (3) "that defendants disclose what information from his phone was shared with other agencies." *Id.* at *4. Relying on *Abidor*, the defendants argued that the plaintiff lacked standing because he "failed to establish a threatened future injury that was certainly impending." *Id.* at *6–7. The court found *Abidor* distinguishable, stating:

> I need not conclude that Janfeshan has established that a future search of his phone is certainly impending. Rather, Janfeshan has adequately alleged an injury in fact based on the ongoing effects of the previous search. And here, unlike in *Abidor*, Janfeshan has alleged that, under CBP Directive ¶ 5.4.1.2, CBP "retain[ed] . . . information relating to immigration, customs, and other enforcement matters"—the destruction of which the Directive does not provide for.

Id. at *7. It held that the plaintiff had standing because he had "alleged a concrete, particularized injury stemming

from the copying and retention of the digital contents of his phone." *Id.* at *7.[5]

Here, as in *Janfeshan*, Plaintiff alleges that officers violated his constitutional rights when they reviewed and copied the contents of his cell phone and retained and disseminated the information. (*See* doc. 8 at 3, 13-16, 18-19.) He likewise claims that his alleged injury—the retention of his cell phone for copying and the dissemination of its contents—is actual and ongoing. (*Id.* at 12-16; doc. 17 at 14-15.) Finally, he is also requesting a declaration that his constitutional rights were violated, an order that Defendants return or destroy any of the data seized from his phone, and information regarding whether the cell phone data has been disclosed to other agencies. (*Id.* at 2-3, 19-20.)

Based on the similarity of the allegations in this case to those in *Janfeshan,* its reasoning is more persuasive than that in *Abidor*, and the Court adopts it. Plaintiff has alleged more than a past injury because he claims that he continues to experience ongoing adverse effects from the allegedly unlawful copying, retention and dissemination of the contents of his phone. *See Janfeshan*, 2017 WL 3972461, at *7.[6] Additionally, because he alleges that CBP

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[5] The court also noted that its decision was consistent with the Second Circuit's decision in *Am. Civ. Liberties Union v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015), which found that plaintiffs challenging a government telephone metadata collection program had "standing to allege injury from the collection, and maintenance in a government database, of records relating to them." 2017 WL 3972461 at *7.

[6] *See also O'Shea*, 414 U.S. at 495–96 (recognizing that "continuing present adverse effects" in addition to "past exposure to illegal conduct" can establish standing); *Am. Civ. Liberties Union*, 785 F.3d at 801 (finding that if the challenged action is unlawful, "appellants have suffered a concrete and particularized injury fairly traceable to the challenged [conduct] and redressable by a favorable ruling").

and ICE policies permit the retention of "information relating to immigration, customs, and other enforcement matters," and he seeks to have this information either returned or destroyed, his injury is redressable. *See Janfeshan*, 2017 WL 3972461, at *7 (finding that the plaintiff's injury was redressable where the CBP directive authorized the retention of information and the plaintiff requested destruction of his information).[7] Because Plaintiff has demonstrated an ongoing injury from the retention and copying of his cell phone and that injury is redressable by a ruling in his favor, a finding of standing is consistent with Fifth Circuit precedent. *See Machete Prods., L.L.C.*, 809 F.3d at 288 (holding that the plaintiff lacked standing because there was no ongoing injury and its claims of future injury were too speculative); *Bauer*, 341 F.3d at 358 (finding that the plaintiff did not have

[7] At least one other district court has followed this reasoning in determining that a plaintiff has standing to seek the return or expungement of information gathered from him during a border search. *See Tabaa v. Chertoff*, No. 05-CV-582S, 2005 WL 3531828, at *7–9 (W.D.N.Y. 2005) (citing *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C. Cir. 2004)) ("the government's continued possession of information that the Plaintiffs allege was obtained from them through unlawful means constitutes a sufficient harm for purposes of establishing standing to pursue expungement of the information."). Although not in the context of a border search, other courts have similarly determined that plaintiffs have standing to challenge the government's maintenance of information relating to them in a government database. *See Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 209–10 (4th Cir. 2017) (finding that the organization had standing to challenge the government's action of intercepting and copying its communications); *Shuchardt v. President of the United States*, 839 F.3d 336, 352–53 (3d Cir. 2016) (determining that the plaintiff had standing to challenge the government's storage of his confidential communications in a government database).

standing where "there [was] no ongoing injury . . . and any threat of future injury [was] neither imminent or likely").

Because Plaintiff has met the Article III constitutional requirements to establish that he has standing to seek the equitable relief he requests, Defendants' motion to dismiss should be denied "to the extent they seek dismissal pursuant to [Rule] 12(b)(1)." *See Reitz v. City of Abilene*, No. 1:16-CV-0181-BL, 2017 WL 3046881, at *9 (N.D. Tex. May 25, 2017).[8]

III. RULE 12(b)(6)

Defendants also move to dismiss Plaintiff's constitutional claims under Rule 12(b)(6) for failure to state a claim. (doc. 13 at 2, 18.)

Rule 12(b)(6) allows motions to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Under the 12(b)(6) standard, a court cannot look beyond the face of the pleadings. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *see also Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000). It is well-established that "*pro se* complaints are held to less stringent standards than formal pleadings drafted by lawyers." *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981). Nonetheless, regardless of whether the plaintiff is proceeding *pro se* or is represented by counsel, pleadings must show specific, well-pleaded facts, not mere conclusory allegations to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). The court must accept those well-

[8] Defendants also seem to assert that Plaintiff lacks prudential standing as a basis for dismissal under Rule 12(b)(1). (doc. 13 at 16.) A motion to dismiss "for lack of prudential or statutory standing" is properly brought under Rule 12(b)(6) rather than Rule 12(b)(1). *Reitz*, 2017 WL 3046881, at *4 (citing *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F3d 787, 795 n.2 (5th Cir. 2011)).

pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker*, 75 F.3d at 196. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). Nevertheless, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555; *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasizing that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). The alleged facts must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In short, a complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (citations omitted). When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570; *accord Iqbal*, 556 U.S. at 678.

A. Prudential Standing

Defendants contend that even if Article III constitutional standing requirements are met, "dismissal would still be warranted for closely related prudential reasons." (doc. 13 at 16, 18.) This argument implicates prudential standing. Defendants assert that this court should decline to exercise jurisdiction over Plaintiff's claims because he "cannot show a clear need for the relief he seeks," and declining jurisdiction would afford Congress the first opportunity to address government policies. (doc. 13 at 17.)

"Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Bauer*, 341 F.3d at 357 (citing *McClure v. Ashcroft*, 335 F.3d 404, 410 (5th Cir. 2003)). Prudential standing limitations help courts identify proper questions of judicial adjudication, and further define the judiciary's role in the separation of powers. *Id.* Prudential standing relates to whether: (1) a plaintiff's grievance falls within the zone of interests protected by the statute or constitutional provision invoked, (2) the complaint raises a generalized grievance more properly addressed by the legislature, and (3) the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties. *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 539 (5th Cir. 2009); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

Here, Plaintiff has clearly asserted his need for relief and, as stated previously, a decision in his favor would grant him the relief he seeks. "If the seizure of [his] phone and the search of its contents were to be declared unlawful, CBP could be compelled to destroy any remaining copies of [his] data." *Janfeshan*, 2017 WL

3972461, at *7. Moreover, Plaintiff's claims are not generalized grievances more properly addressed by the legislature. *See St. Paul Fire & Marine Ins. Co.*, 579 F.3d at 539. His claims are specific to the search of his cell phone that occurred on October 10, 2016, and the rights he is seeking to protect—his right against unlawful search and seizure and his expressive and associational interests—are protected by the First and Fourth Amendments of the Constitution. (doc. 8 at 12, 18-19; doc. 17 at 30.) *See id*. at 543–44; *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 211 (5th Cir. 2009) (recognizing the First Amendment rights to freedom of expression and association as well as the "Fourth Amendment's prohibition on unreasonable searches and seizures"). Plaintiff has alleged prudential standing, and Defendants' motion to dismiss his claims for equitable relief on this basis should be denied.

B. *Bivens*

Defendants also assert that all of Plaintiff's claims against them are subject to dismissal because he "has failed to plead any specific facts showing involvement by any government officers from these agencies in any of the alleged wrongdoing made the basis of the suit." (doc. 13 at 24.)

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that the violation of a person's constitutional rights by a federal official may give rise to an action for monetary damages in federal court. The Fifth Circuit has recognized that a plaintiff may request "injunctive relief from violation of his federal constitutional rights." *Rourke v. Thompson*, 11 F.3d 47, 49 (5th Cir. 1993) (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)); *see also Ramsey v. United States*, No. 3:96–CV–3358–G, 1997 WL 786252, at

*2 n.2 (N.D. Tex. Dec. 11, 1997) (a plaintiff may seek injunctive or declaratory relief in addition to monetary relief in a *Bivens* action). Unless the defendants have deprived a plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States, however, a plaintiff has no viable claim under *Bivens*. *See Evans v. Ball*, 168 F.3d 856, 863 n.10 (5th Cir. 1999) (recognizing that "[a] *Bivens* action is analogous to an action under § 1983— the only difference being that § 1983 applies to constitutional violations by state, rather than federal, officials").

Here, Plaintiff expressly names Defendants in their official capacities only. *Bivens* provides a remedy for victims of constitutional violations by government officers in their *individual capacities*. *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999). This is because the purpose of a *Bivens* cause of action is to deter a federal officer from violating a person's constitutional rights. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Claims against federal employees in their official capacities based on alleged constitutional violations are therefore barred under *Bivens* because they are the equivalent to claims against the federal agencies who employ the employees. *See Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985). Because Plaintiff expressly names Defendants in their official capacities only, he has not stated a viable *Bivens* claim against them (or their predecessors).

To the extent that Plaintiff's pro se complaint may be liberally construed as asserting claims against Defendants (or their predecessors) in their individual capacities, a *Bivens* action must be premised upon the personal involvement of the named defendants. *See Meyer*, 510 U.S. at 485; *Guerrero-Aguilar v. Ruano*, 118

F. App'x 832 (5th Cir. 2004) (per curiam). Under *Bivens*, an individual cannot be held liable under a theory of respondeat superior. *Ashcroft*, 129 S.Ct. at 1948. A supervisory federal employee and/or official may be held liable only where he has personal involvement in the acts that caused the deprivation of a constitutional right or if he implements or enforces a policy that causally results in a deprivation of constitutional rights. *Bustos v. Martini Club Inc.*, 599 F.3d 458, 468 (5th Cir. 2010); *Cronn v. Buffington*, 150 F.3d 538, 544-45 (5th Cir. 1998). Because Plaintiff has alleged neither that Defendants had personal involvement in acts that caused the alleged deprivation of his constitutional rights, nor that they implemented policies that caused the deprivation, he has also failed to state a *Bivens* claim against them (or their predecessors) in their individual capacities.[9]

IV. *SUA SPONTE* DISMISSAL

Plaintiff also appears to allege claims under the APA. (*See* doc. 8 at 3.) Defendants have not moved to dismiss this claim. (*See* doc. 13)

As noted, federal courts are courts of limited jurisdiction and "must presume that a suit lies outside this limited jurisdiction. *Kokkonen*, 511 U.S. at 377; *Howery*, 243 F.3d at 916. Courts have "a continuing obligation to examine the basis for their jurisdiction." *See MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 173 (5th Cir. 1990). They may *sua sponte* raise the jurisdictional issue at any time. *Id.*; *EEOC v. Agro Distrib.*, LLC, 555 F.3d 462, 467 (5th Cir. 2009) (even without an objection to subject

[9] Because Plaintiff has failed to state a claim against Defendants under *Bivens* based on a lack of personal involvement, the Court need not reach Defendants' arguments that Plaintiff has failed to state a claim that the border search of his cell phone violated his First and Fourth Amendment rights.

matter jurisdiction, a court must consider *sua sponte* whether jurisdiction is proper).

The APA provides a right of review for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Judicial review under the APA is limited to "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court." 5 U.S.C. § 704. If there is no "[a]gency action made reviewable by statute" or a "final agency action, a court lacks subject-matter jurisdiction." *Mackenzie v. Castro*, No. 3:15-CV-0752-D, 2017 WL 1021299, at *4 (N.D. Tex. Mar. 16, 2017) (quoting *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 388 (5th Cir. 2014)); *see* 5 U.S.C. § 704. "The reason the requirements are jurisdictional is because § 704 effects a waiver of sovereign immunity." *Mackenzie*, 2017 WL 1021299, at *4.

Here, Plaintiff's amended complaint only generally alleges that "[j]urisdiction is proper pursuant to . . . 5 U.S.C. § 702, 5 U.S.C. § 706." (doc. 8 at 3.) He does not allege that he is challenging an "[a]gency action made reviewable by statute" or a "final agency action for which there is no adequate remedy in a court." 5 U.S.C. § 704; *see MacKenzie*, 2017 WL 1021299, at *4–6. Any APA claim should therefore be dismissed *sua sponte* for lack of subject-matter jurisdiction because Plaintiff has failed to allege agency action. *See MacKenzie*, 2017 WL 102199, at *4-6, 8 (dismissing APA claim for lack of subject-matter jurisdiction where the plaintiff did not successfully allege a final agency action).

V. RECOMMENDATION

Defendants' Rule 12(b)(1) motion to dismiss should be **DENIED**, and their Rule 12(b)(6) motion to dismiss

should be **GRANTED in part**. Plaintiff's *Bivens* claims should be **DISMISSED with prejudice** for failure to state a claim, and his APA claims should *sua sponte* be **DISMISSED without prejudice** for lack of subject-matter jurisdiction.

SO RECOMMENDED on this 15th day of December, 2017.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See*

Douglass v. United Servs. Automobile Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE ANIBOWEI, Plaintiff, v. CHAD WOLF, *et al.*, Defendants,	Civil Action No. 3:16-CV-3495-D

DEFENDANTS CHAD WOLF, MARK A. MORGAN, MATTHEW T. ALBENCE, WILLIAM P. BARR, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, AND U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants Chad Wolf[1], Acting Secretary of Homeland Security, in his official capacity; Mark A. Morgan, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; Matthew T. Albence, Acting Director of U.S. Immigration and

[1] The defendants are federal officials sued in their official capacities. Some no longer hold government office, and hence their successors should be "automatically substituted" as defendants pursuant to Fed. R. Civ. P. 25(d). These successors are: Chad Wolf (Acting U.S. Secretary of Homeland Security, for Kirstjen M. Nielsen), Mark A. Morgan (Acting Commissioner of U.S. Customs and Border Protection, for Kevin K. McAleenan), and Matthew T. Albence (Acting Director of U.S. Immigration and Customs Enforcement, for Ronald D. Vitiello).

Customs Enforcement, in his official capacity; William P. Barr, Attorney General of the United States, in his official capacity; the United States Department of Homeland Security ("DHS"); the United States Customs and Border Protection ("CBP"); and the United States Immigration and Customs Enforcement ("ICE") (collectively, "Defendants") file, without waiving any defenses to which they may be entitled, this partial answer and defenses to the March 14, 2019 second amended complaint of Plaintiff George Anibowei.[2] (Doc. 59.) Answering the allegations of each paragraph of the complaint and using the same headings (which are not admissions) and paragraph numbers, the Defendants respond as follows:

1. Defendants admit that in *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court held that the search incident to arrest exception, which generally allows for a warrantless search of an individual at the time of arrest, does not apply to the search of a cell phone seized incident to an arrest. 573 U.S. at 381-85, 401. Instead, the Supreme Court held that, in such a situation, the police would be required to get a warrant. *Riley*, 573 U.S. at 402 ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."). Defendants deny the allegations in paragraph 1 of Anibowei's second amended complaint to the extent they imply that the Supreme Court issued a broader ruling in *Riley* regarding any law enforcement search of a cell phone.

2. Defendants admit that the CBP and ICE policies at issue in this case allow for a basic search of a cell phone

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[2] Defendants Transportation Security Administration ("TSA") and David P. Pekoske, Administrator of the TSA, are moving to dismiss all claims as to either TSA or the TSA Administrator. Their motion to dismiss is being filed concurrently with this answer.

carried by an individual entering the United States, and also allow for a more extensive advanced search (i.e., the connection of external equipment to the device to download or analyze the contents) of a cell phone carried by an individual entering the United States in specific circumstances, under the long- standing border search doctrine and in accordance with applicable federal law and regulations. Defendants further note that these policies contain specific guidance for law enforcement officers regarding when a search may be appropriate and how the search may be properly executed to comply with applicable federal law and regulations. Defendants deny all other allegations in paragraph 2 of Anibowei's second amended complaint.

3. Defendants admit that the CBP and ICE policies at issue in this case allow for a basic search of a cell phone carried by an individual entering the United States, and also allow for a more extensive advanced search (i.e., the connection of external equipment to the device to download or analyze the contents) of a cell phone carried by an individual entering the United States in specific circumstances, under the long-standing border search doctrine and in accordance with applicable federal law and regulations. Defendants further note that these policies contain specific guidance for law enforcement officers regarding when a search may be appropriate and how the search may be properly executed to comply with applicable federal law and regulations. Defendants also admit that the language from *Riley* is an accurate quotation from the Supreme Court's opinion, with the clarification that the citation should indicate the quotation is from page 396, but deny the allegation to the extent Anibowei is implying the Supreme Court's opinion addresses cell phone searches at the border or otherwise

applies to this case. Defendants deny all other allegations in paragraph 3 of Anibowei's second amended complaint.

4. Defendants admit that CBP and ICE have complied with their policies at issue in this case for all searches of Anibowei's cell phone, and admit that similar searches are performed each year of other individuals' cell phones at the border in accordance with these same policies. Defendants also admit that a basic search has been performed on Anibowei's cell phone on at least one occasion, that an advanced search was performed of Anibowei's cell phone on one occasion, and that information from Anibowei's cell phone was downloaded and eventually retained as a result of the advanced search. Defendants deny all other allegations in paragraph 4 of Anibowei's second amended complaint.

5. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 5 of Anibowei's second amended complaint regarding the generalizations about how all lawyers, journalists, and other individuals use their electronic devices, and therefore deny these allegations. Defendants admit that the articles Anibowei cites in footnote 1 in paragraph 5 can be found at the provided web addresses and do contain the factual statements alleged, but Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in these articles, and therefore deny the same. Defendants deny all other allegations in paragraph 5 of Anibowei's second amended complaint.

6. Defendants admit that the CBP and ICE policies at issue in this action authorize searches of an electronic device carried by an individual entering the United States, but deny the allegations in paragraph 6 of Anibowei's second amended complaint that the policies

give CBP and ICE agents "unilateral authority to search every piece of stored information," as these policies contain specific guidance for law enforcement officers regarding when a search may be appropriate and how the search may be properly executed to comply with applicable federal law and regulations. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 6 of Anibowei's second amended complaint regarding the generalizations about what an average person may reasonably believe regarding cell phone searches, and therefore deny these allegations. Defendants deny all other allegations in paragraph 6 of Anibowei's second amended complaint.

7. Defendants deny all allegations in paragraph 7 of Anibowei's second amended complaint.

INTRODUCTION

8. Defendants admit that the articles Anibowei cites in paragraph 8 of his second amended complaint can be found at the provided web addresses and do contain the factual statements alleged, but Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in these articles, and therefore deny the same. Defendants deny all other allegations in paragraph 8 of Anibowei's second amended complaint.

9. Defendants admit that the statements from *Riley* in paragraph 9 of Anibowei's second amended complaint are accurate quotations from the Supreme Court's opinion, but deny the allegations to the extent Anibowei is implying the Supreme Court's opinion addresses cell phone searches at the border or otherwise applies to this case. Defendants deny all other allegations in paragraph 9 of Anibowei's second amended complaint.

10. Defendants admit that in both *Riley* and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court has held that a warrant is required in the specific situations at issue in those two cases (i.e., a search incident to arrest in *Riley*, acquiring an individual's historical cell phone records to obtain cell site location information when investigating criminal activity within the interior of the United States in *Carpenter*), but deny the allegations to the extent Anibowei is implying the Supreme Court's rulings in these cases address cell phone searches at the border. Defendants deny all other allegations in paragraph 10 of Anibowei's second amended complaint.

11. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 11 of Anibowei's second amended complaint regarding the generalization that "some relics of policy persist from the era" before the Supreme Court's first case addressing the level of suspicion required in a specific situation for a law enforcement officer to search a cell phone, and therefore deny these allegations. Defendants deny all other allegations in paragraph 11 of Anibowei's second amended complaint.

12. Defendants admit that both CBP and ICE issued directives in August 2009 regarding when and how their officers were allowed to search electronic devices during the course of a border search, and that these directives can be found at the web addresses provided by Anibowei in footnotes 4 and 5 to paragraph 12 of his second amended complaint. Defendants further admit that Anibowei correctly cites the definition for "electronic devices" used by both directives. Defendants also admit that the 2009 directives allowed for searches of electronic devices either with or without individualized suspicion, but note that these searches were only authorized by the

directives when done "consistent with the guidelines and applicable laws set forth" in the directives. Defendants admit that the 2009 directives addressed searches of legal material, medical records, and other sensitive information such as information carried by journalists, but deny that the directives provided independent authorization for "warrantless and suspicionless searches" of this information, as the directives specifically provide instructions for officers on how to handle this information "in accordance with all applicable federal law and [agency] policy," recommend contacting agency counsel regarding the search of sensitive information, and direct officers to contact agency counsel before searching legal materials. Defendants deny all other allegations in paragraph 12 of Anibowei's second amended complaint.

13. Defendants admit that CBP issued an updated directive regarding border searches of electronic devices in 2018, which superseded the 2009 directive. Defendants deny all other allegations in paragraph 13 of Anibowei's second amended complaint.

14. Defendants deny all allegations in paragraph 14 of Anibowei's second amended complaint.

15. Defendants admit that the plaintiff in this action is George Anibowei, and that his application for enrollment in CBP's Global Entry Trusted Traveler Program was approved on November 1, 2012. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 15 of Anibowei's second amended complaint, and therefore deny these allegations. Defendants deny all other allegations in paragraph 15 of Anibowei's second amended complaint.

16. Defendants admit that on October 10, 2016, law enforcement officers at Dallas-Fort Worth Airport

detained Anibowei's cell phone and conducted a search of the contents of the device, although Defendants clarify that the search was performed by ICE officers with Homeland Security Investigations ("HSI"). Defendants also admit that Anibowei was not presented "with a search warrant", as a warrant is not required for a search of an electronic device at the border under federal law. Defendants deny all other allegations in paragraph 16 of Anibowei's second amended complaint.

17. Defendants admit that Anibowei's cell phone has been searched on several occasions by either CBP or ICE agents, including the search on October 10, 2016. Defendants also admit that these searches were authorized under the relevant directives. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 17 of Anibowei's second amended complaint as to what he saw the officers do while searching his phone, and therefore deny these allegations. Defendants deny all other allegations in paragraph 17 of Anibowei's second amended complaint.

18. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 18 of Anibowei's second amended complaint as to how Anibowei uses his cell phone, and therefore deny these allegations. Defendants deny all other allegations in paragraph 18 of Anibowei's second amended complaint.

19. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 19 of Anibowei's second amended complaint as to Anibowei's legal practice, and therefore deny these allegations. Defendants deny all other allegations in paragraph 19 of Anibowei's second amended complaint.

20. Defendants deny all allegations in paragraph 20 of Anibowei's second amended complaint.

21. Defendants deny all allegations in paragraph 21 of Anibowei's second amended complaint.

22. Defendants deny all allegations in paragraph 22 of Anibowei's second amended complaint.

23. The allegations in paragraph 23 of Anibowei's second amended complaint address his requested relief, and are not allegations to which a response is required. To the extent a response is required, Defendants deny all allegations in paragraph 23 of Anibowei's second amended complaint.

JURISDICTION AND VENUE

24. Defendants deny all allegations in paragraph 24 of Anibowei's second amended complaint.

25. Defendants admit the allegations in paragraph 25 of Anibowei's second amended complaint that the Court has authority to issue declaratory and injunctive relief under 28 U.S.C. § 2201, 28 U.S.C. § 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the Court's equitable powers, but deny the allegations to the extent they imply such relief is appropriate in this case.

26. Defendants admit the allegations in paragraph 26 of Anibowei's second amended complaint.

PARTIES

27. Defendants admit that the plaintiff in this action is George Anibowei. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 27 of Anibowei's second amended complaint, and therefore deny these allegations. Defendants deny all other allegations in paragraph 27 of Anibowei's second amended complaint.

28. Defendants admit the allegations in paragraph 28 of Anibowei's second amended complaint that the

Secretary of Homeland Security oversees DHS and its sub- agencies, and that the Secretary is sued in his official capacity. Defendants clarify that Chad Wolf is now the Acting Secretary of Homeland Security.

29. Defendants admit the allegations in paragraph 29 of Anibowei's second amended complaint that the Commissioner of U.S. Customs and Border Protection oversees CBP, and that the Commissioner is sued in his official capacity. Defendants clarify that Mark A. Morgan is now the Acting Commissioner of U.S. Customs and Border Protection.

30. Defendants admit the allegations in paragraph 30 of Anibowei's second amended complaint that the Director of U.S. Immigration and Customs Enforcement oversees ICE, and that the Director is sued in his official capacity. Defendants clarify that Matthew T. Albence is now the Acting Director of U.S. Immigration and Customs Enforcement.

31. As David P. Pekoske has moved for dismissal of all claims against him, no response is required to the allegations in paragraph 31 of Anibowei's second amended complaint. To the extent a response is required, Defendants deny all allegations in paragraph 31 of Anibowei's second amended complaint.

32. Defendants admit the allegations in paragraph 32 of Anibowei's second amended complaint.

33. Defendants admit the allegations in paragraph 33 of Anibowei's second amended complaint.

34. Defendants admit that CBP is a component of DHS, and that it is responsible for enforcing and administering federal law at and between ports of entry. Anibowei's characterization of CBP's statutory duties as "administering security checks at airports and other ports

of entry" is inaccurate, and therefore, Defendants deny the remaining allegations in paragraph 34 of Anibowei's second amended complaint.

35. Defendants admit the allegations in paragraph 35 of Anibowei's second amended complaint.

36. As TSA has moved for dismissal of all claims against it, no response is required to the allegations in paragraph 36 of Anibowei's second amended complaint. To the extent a response is required, Defendants deny all allegations in paragraph 36 of Anibowei's second amended complaint.

BACKGROUND

A. Searches and Seizures of Electronic Data

37. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 37 of Anibowei's second amended complaint, and therefore deny the same.

38. Defendants admit that the websites Anibowei cites in footnotes 6 and 7 to paragraph 38 of his second amended complaint can be found at the provided web addresses and do contain the factual statements alleged, but Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations on these websites, or the generalization that these devices can carry information "far beyond any other object a traveler could possibly carry", and therefore deny the same. Defendants deny all other allegations in paragraph 38 of Anibowei's second amended complaint.

39. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 of Anibowei's second amended complaint regarding the generalizations about the type of

information an individual may store on his electronic device or the types of applications an individual may use, and therefore deny these allegations. Defendants deny all other allegations in paragraph 39 of Anibowei's second amended complaint.

40. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 40 of Anibowei's second amended complaint regarding the generalizations about how "data on some electronic devices" can be used, or the "national debate" and "emerging societal consensus" about technology and privacy, and therefore deny these allegations. Defendants admit that the articles Anibowei cites in footnote 8 in paragraph 40 can be found at the provided web addresses and do contain the factual statements alleged, but Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in these articles, and therefore deny the same. Defendants admit that the language cited from *Smith v. Maryland*, 442 U.S. 735 (1979), is an accurate quotation from the Supreme Court's opinion, but deny the allegations to the extent Anibowei is implying the Supreme Court's opinion addresses cell phone searches at the border or otherwise applies to this case. Defendants deny all other allegations in paragraph 40 of Anibowei's second amended complaint.

41. Defendants admit that the language cited from *Riley* is an accurate quotation from the Supreme Court's opinion, with the clarification that the language is on page 396 of the opinion, but deny the allegations to the extent Anibowei is implying the Supreme Court's opinion addresses cell phone searches at the border or otherwise applies to this case. Defendants deny all other allegations in paragraph 41 of Anibowei's second amended complaint.

42. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 42 of Anibowei's second amended complaint regarding the generalizations about how electronic devices affect people's lives, and therefore deny these allegations. Defendants deny all other allegations in paragraph 42 of Anibowei's second amended complaint.

43. Defendants admit that Anibowei correctly cites to publicly-available information on CBP's website regarding the statistics for the number of people inspected daily on average by CBP, but clarifies that this data is from fiscal year 2018 (not 2017) and only addresses individuals entering the United States. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 43 of Anibowei's second amended complaint regarding Anibowei's assumptions regarding the percentage of individuals inspected daily by CBP who are U.S. citizens, the percentage of Americans who own cell phones, or the percentage of cell-phone-owning Americans who either enter or exit the United States each day, and therefore deny these allegations. Defendants deny all other allegations in paragraph 43 of Anibowei's second amended complaint.

44. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 44 of Anibowei's second amended complaint regarding how many cell phones are estimated to leave or enter the United States each day, and how many of these belong to U.S. citizens, and therefore deny these allegations. Defendants deny all other allegations in paragraph 44 of Anibowei's second amended complaint.

45. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations

in paragraph 45 of Anibowei's second amended complaint regarding the number of electronic devices travelers carry across the U.S. border each day, and therefore deny these allegations. Defendants deny all other allegations in paragraph 45 of Anibowei's second amended complaint.

46. Defendants deny all allegations in paragraph 46 of Anibowei's second amended complaint.

B. CBP and ICE Policies

47. Defendants admit that, on August 18, 2009, ICE issued ICE Directive No. 7-6.1 to provide legal guidance and establish policy and procedures regarding ICE's border search authority over electronic devices possessed by individuals at the border. Defendants deny all other allegations in paragraph 47 of Anibowei's second amended complaint.

48. Defendants admit that, on August 20, 2009, CBP issued CBP Directive No. 3340-049 to provide similar guidance regarding CBP's border search authority over electronic devices possessed by individuals at the border. Defendants deny all other allegations in paragraph 48 of Anibowei's second amended complaint.

49. Defendants admit that both CBP and ICE have officers and agents working at U.S. ports of entry. Defendants deny all other allegations in paragraph 49 of Anibowei's second amended complaint.

50. Defendants admit that the 2009 ICE and CBP directives authorized the respective agency's officers to conduct border searches to examine electronic devices, to review information found on those devices where appropriate and when in accordance with the directives and applicable law, and to retain devices and data when appropriate. Defendants also admit that the directives provide that officers conducting border searches of

electronic devices, with or without suspicion, were subject to the requirements contained in the directive and applicable law. Defendants deny all other allegations in paragraph 50 of Anibowei's second amended complaint.

51. Defendants admit that the 2009 ICE and CBP directives authorized officers to detain electronic devices and take off-site for a more detailed search, and that the 2009 CBP directive indicated that the detention should not last longer than five days without extenuating circumstances, and that 2009 ICE directive indicated that the detention should not last longer than 30 days unless circumstances warranted additional time, but deny Anibowei's characterization of these quotations from the 2009 directives. Defendants clarify that the 2009 CBP directive required that any extension of the detention of any device or data for continuation of the border search for more than five days be approved by the Port Director or equivalent level manager, and any detention exceeding 15 days had to be approved by the Director of Field Operations or equivalent level manager and re-approved at least every seven days thereafter. Additionally, Defendants clarify that the 2009 ICE directive required that any extension of the detention of any device or data beyond 30 days had to be approved by a Group Supervisor or equivalent level manager, and re-approved every 15 days thereafter. Defendants deny all other allegations in paragraph 51 of Anibowei's second amended complaint.

52. Defendants admit that the 2009 CBP directive required CBP to return the detained electronic device and destroy any copies of information retained from it within seven days (or 21 days with supervisor approval) if there was not probable cause to seize the device or if the information did not relate to immigration, customs, or other enforcement matters and retention of the information would not be consistent with applicable

privacy and data protections, while the 2009 ICE directive required destruction of any retained information within the same periods of time where the information on the device was not relevant to ICE, but Defendants deny Anibowei's characterization of these quotations from the 2009 directives. Defendants deny all other allegations in paragraph 52 of Anibowei's second amended complaint.

53. Defendants admit all allegations in paragraph 53 of Anibowei's second amended complaint.

54. Defendants admit that ICE has not issued a directive to supersede its 2009 directive. Defendants deny all other allegations in paragraph 54 of Anibowei's second amended complaint.

55. Defendants admit all allegations in paragraph 55 of Anibowei's second amended complaint.

56. Defendants admit that the 2018 CBP directive describes two types of searches, basic and advanced, and that a warrant for probable cause is not required for either. Defendants deny all remaining allegations in paragraph 56 of Anibowei's second amended complaint.

57. Defendants admit that under the 2018 CBP directive, a CBP officer may perform a basic search of an individual's electronic device without individualized suspicion, and that as part of a basic search, the officer may examine the device and may review and analyze information encountered at the border, but deny Anibowei's characterization of these quotations from the 2018 directive. Defendants deny all other allegations in paragraph 57 of Anibowei's second amended complaint.

58. Defendants admit all allegations in paragraph 58 of Anibowei's second amended complaint, with the clarification that before an advanced search can be

performed, the officer must receive appropriate supervisory approval.

59. Defendants admit that the 2018 CBP directive explains that there are many factors that could create reasonable suspicion or constitute a national security concern, and that the quotation Anibowei provides from the 2018 CBP directive in this paragraph is an accurate copy of the directive's language, but deny Anibowei's characterization of the quotation. Defendants deny all other allegations in paragraph 59 of Anibowei's second amended complaint.

60. Defendants deny all allegations in paragraph 60 of Anibowei's second amended complaint.

61. Defendants admit that the quotations Anibowei provides from the 2018 CBP directive in this paragraph are an accurate copy of the directive's language, and that officers may request (not "require") an individual's passcode or other means of access, but deny Anibowei's characterization of these quotations. Defendants deny all other allegations in paragraph 61 of Anibowei's second amended complaint.

62. Defendants admit that the 2018 CBP directive indicates that "[s]earches of electronic devices should be conducted in the presence of the individual whose information is being examined, unless there are national security, law enforcement, officer safety, or other operational considerations that would make it inappropriate to allow the individual to remain present." Defendants deny all other allegations in paragraph 62 of Anibowei's second amended complaint.

63. Defendants admit that the 2018 CBP directive authorizes officers to detain electronic devices and information copied from them for a brief, reasonable

period of time and may detain a device after the individual has departed from the port of entry with supervisory approval, but deny Anibowei's characterization of the 2018 directive. Defendants further admit that detention of devices should ordinarily not exceed five days, and that any detention in excess of five days can occur in extenuating circumstances when approved repeatedly by a manager (and at escalating levels of agency management). Defendants deny all other allegations in paragraph 63 of Anibowei's second amended complaint.

64. Defendants admit that, unless further retention is otherwise authorized, the 2018 CBP directive requires the detained electronic device to be returned and any information copies from the device to be destroyed within no more than seven days of determining that there is no probable cause to seize the device or information contained therein, but deny Anibowei's characterization of the directive. Defendants deny all other allegations in paragraph 64 of Anibowei's second amended complaint.

65. Defendants admit all allegations in paragraph 65 of Anibowei's second amended complaint.

66. Defendants deny all allegations in paragraph 66 of Anibowei's second amended complaint.

67. Defendants admit all allegations in paragraph 67 of Anibowei's second amended complaint.

68. Defendants admit that, in certain circumstances where notification would impair national security, law enforcement, officer safety, or other operational interests, an individual subject to search is not required to be notified that his electronic device or information contained therein has been provided to another federal agency for assistance. Defendants deny all other

allegations in paragraph 68 of Anibowei's second amended complaint.

69. Defendants admit that the quotations Anibowei provides from the 2018 CBP directive in this paragraph are an accurate copy of the directive's language, but deny Anibowei's characterization of these quotations. Defendants deny all other allegations in paragraph 69 of Anibowei's second amended complaint.

70. Defendants admit that the quotations Anibowei provides from the 2018 CBP directive in this paragraph are an accurate copy of the directive's language, but deny Anibowei's characterization of these quotations. Defendants deny all other allegations in paragraph 70 of Anibowei's second amended complaint.

71. Defendants admit all allegations in paragraph 71 of Anibowei's second amended complaint.

72. Defendants deny all allegations in paragraph 72 of Anibowei's second amended complaint.

73. Defendants deny all allegations in paragraph 73 of Anibowei's second amended complaint.

C. The Law of Electronic-Device Searches

74. Defendants deny all allegations in paragraph 74 of Anibowei's second amended complaint.

75. Defendants admit that in *Riley v. California*, 573 U.S. 373 (2004), the Supreme Court held that the search incident to arrest exception, which generally allows for a warrantless search of an individual at the time of arrest, does not apply to the search of a cell phone seized incident to an arrest. 573 U.S. at 381-85, 401. Defendants deny all other allegations in paragraph 75 of Anibowei's second amended complaint.

76. Defendants admit that in *Riley*, the Supreme Court applied the traditional balancing test for warrant requirements, and concluded that the balance of equities favored requiring a warrant for a search of a cell phone incident to an arrest, but deny the implication that the Supreme Court's opinion in *Riley* addresses the search of electronic devices at the border or otherwise apply to this case. Defendants deny all other allegations in paragraph 76 of Anibowei's second amended complaint.

77. Defendants admit that the citations to *United States v. Zavala*, 541 F.3d 562 (5th Cir. 2008), *United States v. Heckenkamp*, 482 F.3d 1142 (9th Cir. 2007), and *United States v. Buckner*, 473 F.3d 551 (4th Cir. 2007), are correct and that these cases stand for the propositions cited in paragraph 77 of Anibowei's second amended complaint, but deny the allegations to the extent they imply that these cases address the search of cell phones at the border or otherwise apply to this case. Defendants deny all other allegations in paragraph 77 of Anibowei's second amended complaint.

78. Defendants admit that the citations to and quotations from *United States v. Jones*, 565 U.S. 400 (2012), and *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016), are correct, but deny the allegations in paragraph 78 of Anibowei's second amended complaint to the extent they imply that these cases address the search of cell phones at the border or otherwise apply to this case. Defendants deny all other allegations in paragraph 78 of Anibowei's second amended complaint.

79. Defendants admit that the citations to and quotations from *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (with the clarification that the applicable page numbers in the Supreme Court's opinion are pages 2221-23), and *United States v. Warshak*, 831 F.3d 1292 (10th

Cir. 2016), are correct, but deny the allegations in paragraph 79 of Anibowei's second amended complaint to the extent they imply that these cases address the search of cell phones at the border or otherwise apply to this case. Defendants deny all other allegations in paragraph 79 of Anibowei's second amended complaint.

80. Defendants admit that the citations to and quotations from *Riley*, 573 U.S. 373 (2014) and *Missouri v. McNeely*, 569 U.S. 141 (2013), are correct, but deny the allegations in paragraph 80 of Anibowei's second amended complaint to the extent they imply that these cases address the search of cell phones at the border or otherwise apply to this case. Defendants deny all other allegations in paragraph 80 of Anibowei's second amended complaint.

FACTUAL ALLEGATIONS

A. Mr. Anibowei Begins Receiving Intense Scrutiny at the Airport, and is Removed Without Notice from CBP's Global Entry Trusted Traveler Program

81. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 81 of Anibowei's second amended complaint, and therefore deny all allegations in paragraph 81 of Anibowei's second amended complaint.

82. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 82 of Anibowei's second amended complaint, and therefore deny all allegations in paragraph 82 of Anibowei's second amended complaint.

83. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 83 of Anibowei's second amended complaint,

and therefore deny all allegations in paragraph 83 of Anibowei's second amended complaint.

84. Defendants admit that the USCIS Policy Manual can be found at the web address in footnote 11 of paragraph 84 of Anibowei's second amended complaint, and that there are security check requirements for individuals to become naturalized U.S. citizens. As Defendants do not administer or manage the naturalization process, Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 84 of Anibowei's second amended complaint, and therefore deny all allegations in paragraph 84 of Anibowei's second amended complaint.

85. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 85 of Anibowei's second amended complaint, and therefore deny all allegations in paragraph 85 of Anibowei's second amended complaint.

86. Defendants admit that Anibowei's application for enrollment in CBP's Global Entry Trusted Traveler Program was approved on November 1, 2012. Defendants further admit that applicants to the Global Entry Trusted Traveler Program must complete a thorough background check and complete an in-person interview with a security officer. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 86 of Anibowei's second amended complaint regarding why Anibowei applied for membership in the Global Entry Trusted Traveler Program, and therefore deny the remaining allegations in paragraph 86 of Anibowei's second amended complaint.

87. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations

in paragraph 87 of Anibowei's second amended complaint, and therefore deny all allegations in paragraph 87 of Anibowei's second amended complaint.

88. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 88 of Anibowei's second amended complaint, and therefore deny all allegations in paragraph 88 of Anibowei's second amended complaint.

89. Defendants admit that Anibowei was referred for secondary screening on several occasions, but lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 89 of Anibowei's second amended complaint regarding the timing of these secondary screenings, and therefore deny these allegations. Defendants also lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 89 of Anibowei's second amended complaint, and therefore deny all remaining allegations in paragraph 89 of Anibowei's second amended complaint.

90. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 90 of Anibowei's second amended complaint regarding Anibowei's belief as to why he was "flagged for routine additional screening," and therefore deny all allegations in paragraph 90 of Anibowei's second amended complaint.

91. Defendants deny all allegations in paragraph 91 of Anibowei's second amended complaint.

92. Defendants deny all allegations in paragraph 92 of Anibowei's second amended complaint.

93. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations

in paragraph 93 of Anibowei's second amended complaint regarding why the Canadian Border Services Agency questioned Anibowei, and therefore deny all allegations in paragraph 93 of Anibowei's second amended complaint.

94. Defendants admit that Anibowei's membership in the Global Entry Trusted Traveler Program was revoked on March 7, 2015, and that Anibowei would have been able to download a revocation notice from the Global Online Enrollment System website maintained by CBP. Defendants further admit that Anibowei may not have received a separate hard-copy letter via U.S. mail notifying him of the Global Entry revocation, as the Global Entry online system automatically sends an email notification to the email address provided by a member on his Global Entry application when a membership is revoked. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 94 of Anibowei's second amended complaint regarding what allegedly occurred when Anibowei attempted to use a Global Entry kiosk when reentering the United States on May 12, 2015, and therefore deny these allegations. Defendants deny all remaining allegations in paragraph 94 of Anibowei's second amended complaint.

95. Defendants admit that the CBP Ombudsman sent a letter to Anibowei dated March 11, 2016 regarding his request for reconsideration of his revocation from the Global Entry Trusted Traveler Program, and that the letter indicated Anibowei did not meet the Program's eligibility requirements. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 95 of Anibowei's second amended complaint regarding Anibowei's additional alleged requests for reconsideration, and

therefore deny all allegations in paragraph 95 of Anibowei's second amended complaint.

96. Defendants admit all allegations in paragraph 96 of Anibowei's second amended complaint (with a correction to the alleged Redress Request control number, which was #2232473).

B. Mr. Anibowei's Cell Phone is Copied by CBP, and Subjected to a Search on No Fewer Than Five Occasions

97. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 97 of Anibowei's second amended complaint regarding Anibowei's beliefs or behavior regarding his return travels to the United States, and therefore deny all allegations in paragraph 97 of Anibowei's second amended complaint.

98. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 98 of Anibowei's second amended complaint regarding the reason for Anibowei's travel on October 10, 2016, or statements made by the airplane pilot on that flight, and therefore deny all allegations in paragraph 98 of Anibowei's second amended complaint.

99. Defendants admit that on October 10, 2016, Anibowei underwent a secondary inspection upon his return to the United States. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 99 of Anibowei's second amended complaint regarding Anibowei's feelings regarding this incident, and therefore deny these allegations. Defendants deny all remaining allegations in paragraph 99 of Anibowei's second amended complaint.

100. Defendants admit that, on October 10, 2016, Anibowei underwent a secondary inspection upon his return to the United States, and that law enforcement officers at Dallas-Fort Worth Airport detained Anibowei's cell phone and conducted a search of the contents of the device. Defendants deny all other allegations in paragraph 100 of Anibowei's second amended complaint.

101. Defendants admit that Anibowei was provided an electronic media tear sheet explaining CBP's authority to conduct a search of electronic devices at the border and the available options for the individual to retrieve his electronic device after the search was completed. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 101 of Anibowei's second amended complaint regarding Anibowei's comments to the officers, and therefore deny all remaining allegations in paragraph 101 of Anibowei's second amended complaint.

102. Defendants admit the allegations in paragraph 102 of Anibowei's second amended complaint that the officers returned Anibowei's phone to him about thirty minutes after they temporarily detained it for purposes of a border inspection.

103. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 103 of Anibowei's second amended complaint regarding how Anibowei used the cell phone that was searched on October 10, 2016, and therefore deny all allegations in paragraph 103 of Anibowei's second amended complaint.

104. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 104 of Anibowei's second amended

complaint regarding Anibowei's emotions regarding the seizure, and therefore deny all such allegations in paragraph 104 of Anibowei's second amended complaint. Defendants deny all other allegations in paragraph 104 of Anibowei's second amended complaint.

105. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 105 of Anibowei's second amended complaint regarding any changes in Anibowei's actions after the search and Anibowei's beliefs regarding the search, and therefore deny all allegations in paragraph 105 of Anibowei's second amended complaint.

106. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 106 of Anibowei's second amended complaint regarding any changes in Anibowei's actions after the search and what information is accessible from Anibowei's personal cell phone, and therefore deny all allegations in paragraph 106 of Anibowei's second amended complaint.

107. Defendants admit the allegations in paragraph 107 of Anibowei's second amended complaint that Anibowei's phone has been searched on several occasions by federal law enforcement officers.

108. Defendants admit that Anibowei underwent secondary inspection upon his return to the United States, where a CBP officer searched Anibowei's three pieces of luggage for 15 minutes and may have performed a basic search on his phone, but clarify that the search occurred on February 27, 2017. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 108 of Anibowei's second amended complaint regarding Anibowei's beliefs about what the officer may have viewed

on the phone or what information may have been accessible at that time on the phone, and therefore deny remaining allegations in paragraph 108 of Anibowei's second amended complaint.

109. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 109 of Anibowei's second amended complaint regarding Anibowei's beliefs regarding the border searches of his electronic devices, and therefore deny all allegations in paragraph 109 of Anibowei's second amended complaint.

110. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 110 of Anibowei's second amended complaint regarding Anibowei's fears regarding the searches, and therefore deny all allegations in paragraph 110 of Anibowei's second amended complaint.

111. Defendants deny all allegations in paragraph 111 of Anibowei's second amended complaint.

112. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 112 of Anibowei's second amended complaint regarding Anibowei's future travel plans, and therefore deny all allegations in paragraph 112 of Anibowei's second amended complaint.

113. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 113 of Anibowei's second amended complaint regarding Anibowei's beliefs regarding potential future searches of his electronic devices, and therefore deny all allegations in paragraph 113 of Anibowei's second amended complaint.

FACTS RELEVANT TO ALL CLAIMS FOR RELIEF

114. Defendants admit all allegations in paragraph 114 of Anibowei's second amended complaint.

115. Defendants deny all allegations in paragraph 115 of Anibowei's second amended complaint.

116. Defendants admit that, to the best of their knowledge and belief, Anibowei has traveled across the United States border with a cell phone on at least five occasions. Defendants deny all other allegations in paragraph 116 of Anibowei's second amended complaint.

117. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 117 of Anibowei's second amended complaint regarding Anibowei's fear of potential future searches, and therefore deny all allegations in paragraph 117 of Anibowei's second amended complaint.

118. Defendants deny all allegations in paragraph 118 of Anibowei's second amended complaint.

119. Defendants deny all allegations in paragraph 119 of Anibowei's second amended complaint.

120. Defendants deny all allegations in paragraph 120 of Anibowei's second amended complaint.

121. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 121 of Anibowei's second amended complaint regarding how Anibowei uses his cell phone, and therefore deny all allegations in paragraph 121 of Anibowei's second amended complaint.

122. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 122 of Anibowei's second amended

complaint regarding how Anibowei uses his cell phone, and therefore deny all allegations in paragraph 122 of Anibowei's second amended complaint.

123. Defendants deny all allegations in paragraph 123 of Anibowei's second amended complaint.

124. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 124 of Anibowei's second amended complaint regarding how Anibowei's emotions regarding the prior searches of his cell phone, and therefore deny all allegations in paragraph 124 of Anibowei's second amended complaint.

125. Defendants admit that they developed the CBP and ICE directives at issue in this case, and that the agencies' officers are required to comply with these directives when performing a border search of an electronic device. Defendants deny all allegations in paragraph 125 of Anibowei's second amended complaint to the extent they imply that these actions were in any way improper or unconstitutional.

126. Defendants deny all allegations in paragraph 126 of Anibowei's second amended complaint.

127. Defendants deny all allegations in paragraph 127 of Anibowei's second amended complaint.

128. Defendants deny all allegations in paragraph 128 of Anibowei's second amended complaint.

CLAIMS FOR RELIEF

COUNT I
FIRST AMENDMENT

129. Paragraph 129 of Anibowei's second amended complaint consists of legal conclusions to which no response is required. To the extent a response is required,

Defendants deny all allegations in paragraph 129 of Anibowei's second amended complaint.

130. Defendants deny all allegations in paragraph 130 of Anibowei's second amended complaint.

131. Defendants deny all allegations in paragraph 131 of Anibowei's second amended complaint.

132. Defendants deny all allegations in paragraph 132 of Anibowei's second amended complaint.

133. Defendants deny all allegations in paragraph 133 of Anibowei's second amended complaint.

COUNT II
FOURTH AMENDMENT
(Unlawful Search of Electronic Devices)

134. Paragraph 134 of Anibowei's second amended complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendants deny all allegations in paragraph 134 of Anibowei's second amended complaint.

135. Defendants deny all allegations in paragraph 135 of Anibowei's second amended complaint.

136. Defendants deny all allegations in paragraph 136 of Anibowei's second amended complaint.

137. Defendants deny all allegations in paragraph 137 of Anibowei's second amended complaint.

138. Defendants deny all allegations in paragraph 138 of Anibowei's second amended complaint.

139. Defendants deny all allegations in paragraph 139 of Anibowei's second amended complaint.

140. Defendants deny all allegations in paragraph 140 of Anibowei's second amended complaint.

COUNT III
FOURTH AMENDMENT
(Unlawful Search of Communications)

141. Paragraph 141 of Anibowei's second amended complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendants deny all allegations in paragraph 141 of Anibowei's second amended complaint.

142. Defendants deny all allegations in paragraph 142 of Anibowei's second amended complaint.

143. Defendants deny all allegations in paragraph 143 of Anibowei's second amended complaint.

144. Defendants deny all allegations in paragraph 144 of Anibowei's second amended complaint.

145. Defendants deny all allegations in paragraph 145 of Anibowei's second amended complaint.

146. Defendants deny all allegations in paragraph 146 of Anibowei's second amended complaint.

147. Defendants deny all allegations in paragraph 147 of Anibowei's second amended complaint.

COUNT IV
FOURTH AMENDMENT
(Unlawful Seizure of Devices)

148. Paragraph 148 of Anibowei's second amended complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendants deny all allegations in paragraph 148 of Anibowei's second amended complaint.

149. Defendants deny all allegations in paragraph 149 of Anibowei's second amended complaint.

150. Defendants deny all allegations in paragraph 150 of Anibowei's second amended complaint.

151. Defendants deny all allegations in paragraph 151 of Anibowei's second amended complaint.

152. Defendants deny all allegations in paragraph 152 of Anibowei's second amended complaint.

COUNT V
FOURTH AMENDMENT
(Unlawful Seizure of Data)

153. Paragraph 153 of Anibowei's second amended complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendants deny all allegations in paragraph 153 of Anibowei's second amended complaint.

154. Defendants deny all allegations in paragraph 154 of Anibowei's second amended complaint.

155. Defendants deny all allegations in paragraph 155 of Anibowei's second amended complaint.

156. Defendants deny all allegations in paragraph 156 of Anibowei's second amended complaint.

COUNT VI
ADMINISTRATIVE PROCEDURE ACT,
5 U.S.C. § 706
(Agency Policies)

157. Paragraph 157 of Anibowei's second amended complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendants deny all allegations in paragraph 157 of Anibowei's second amended complaint.

158. Defendants admit all allegations in paragraph 158 of Anibowei's second amended complaint.

159. Defendants deny all allegations in paragraph 159 of Anibowei's second amended complaint.

160. Defendants deny all allegations in paragraph 160 of Anibowei's second amended complaint.

COUNT VII
ADMINISTRATIVE PROCEDURE ACT,
5 U.S.C. § 706
(Global Entry)

161. Paragraph 161 of Anibowei's second amended complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendants deny all allegations in paragraph 161 of Anibowei's second amended complaint.

162. Defendants admit all allegations in paragraph 162 of Anibowei's second amended complaint.

163. Defendants admit all allegations in paragraph 163 of Anibowei's second amended complaint.

164. Defendants deny all allegations in paragraph 164 of Anibowei's second amended complaint.

PRAYER FOR RELIEF

This unnumbered section of Anibowei's second amended complaint contains a prayer for relief to which no response is required. Insofar as the allegations in this paragraph, including all subparagraphs, may be construed as containing allegations of fact, Defendants deny the same.

GENERAL DENIAL

Any allegation contained in Anibowei's second amended complaint that has not been specifically and expressly admitted or explained by the Defendants herein is hereby denied.

Defenses

As separate and complete defenses hereto, and without waiving any of the above, the Defendants offer the following defenses:

First Defense

Anibowei's second amended complaint fails, in whole or in part, to state a claim upon which relief can be granted.

Second Defense

Anibowei's second amended complaint fails to demonstrate that this Court has jurisdiction over his claims.

Third Defense

Anibowei failed to exhaust his administrative remedies to the extent he did not give fair notice of specific problems that form the basis of this suit, and failed to exhaust all available remedies for the claims raised in this suit.

Fourth Defense

Anibowei's claims are barred in whole or in part by sovereign immunity.

Fifth Defense

Anibowei's claims are barred because the Defendants' decisions were not arbitrary, capricious, contrary to law, or an abuse of discretion, and were supported with substantial evidence.

Sixth Defense

Anibowei's second amended complaint does not implicate final agency actions subject to judicial review under the Administrative Procedures Act.

Seventh Defense

To the extent that federal common law or statutory law governing this type of action limits Anibowei's causes of action, damages, or recoveries or the Defendants' liability, such laws and limitations apply in this case to the extent consistent with the Administrative Procedures Act.

Eighth Defense

Attorneys' fees may not exceed the percentages specified in 28 U.S.C. § 2678.

Ninth Defense

Anibowei is not entitled to an award of costs except as provided for by 28 U.S.C. § 2412.

Tenth Defense

Defendants specifically preserve any and all other defenses, not currently known, which through discovery may become applicable.

Prayer for Relief

Having fully answered Anibowei's second amended complaint, Defendants Acting Secretary of Homeland Security Chad Wolf, Acting Commissioner of CBP Mark A. Morgan, Acting Director of ICE Matthew T. Albence, Attorney General William P. Barr, DHS, CBP, and ICE respectfully request that judgment be granted in their favor dismissing Anibowei's second amended complaint with prejudice, with Anibowei to bear the costs of

defending this litigation, and for such other relief to which the Defendants are justly entitled.

Respectfully submitted,

ERIN NEALY COX
United States Attorney

/s/ Sarah E. Delaney
Sarah E. Delaney
Assistant United States Attorney
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Attorneys for Defendants Chad Wolf, Mark A. Morgan, Matthew T. Albence, William P. Barr, DHS, CBP, and ICE

CERTIFICATE OF SERVICE

On January 28, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another

manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Sarah E. Delaney
Sarah E. Delaney
Assistant United States
Attorney

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE ANIBOWEI, *Plaintiff*, v. KIRSTJEN M. NIELSEN, U.S. Secretary of Homeland Security, in her official capacity; KEVIN K. MCALEENAN, Commissioner of U.S. Customs and Border Protection, in his official capacity; RONALD D. VITIELLO, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; DAVID P. PEKOSKE, Administrator of the Transportation Security Administration, in his official capacity; WILLIAM P. BARR, Attorney General of the United States, in his official capacity; U.S. DEPARTMENT OF	Case No. 3:16-cv-03495-D

HOMELAND SECURITY; U.S. CUSTOMS AND BORDER PROTECTION; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRANSPORTATION SECURITY ADMINISTRATION,

Defendants.

VERIFIED SECOND AMENDED COMPLAINT FOR VACATUR OF UNLAWFUL AGENCY POLICIES AND DECLARATORY AND INJUNCTIVE RELIEF

1. In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court unanimously held that law enforcement must not search digital information on a cell phone without first obtaining a warrant, except in narrow exigent circumstances. The Justices based this holding on the unique character of cell phones. *Id.* at 375. Nearly every person carries one, and nearly every cell phone has a "digital record of nearly every aspect" of a person's life stored on it. The Supreme Court thus held that warrants are required to search them, even in circumstances when government agents have long been allowed to search a person's other effects for some other function (such as a search incident to arrest) without a warrant or even suspicion.

2. This case is *Riley* at the border. *Riley* says that only a warrant supported by probable cause can justify

the search of a cell phone except in exigent circumstances. But policies promulgated by U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE), invoking the "border search exception," permit border agents to search cell phones without warrants, probable cause, or reasonable suspicion for no other reason than that an individual is seeking to cross an international border. Those same policies allow border agents to download (*i.e.*, seize) and store the information on a seized cell phone forever without a warrant or probable cause. Again, all for no other reason but that an individual has crossed an international border.

3. In other words, according to CBP and ICE regulations, the government may require a person to turn over a "digital record of nearly every aspect" of that person's life to government agents, and the government may store it forever, for no other reason than because that person took a flight from Toronto to Dallas. The government could not search a person's house just because that person crossed the border. But "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Riley*, 573 U.S. at 376.

4. CBP and ICE follow their policies. They perform tens of thousands of cell phone searches each year under their policies. CBP agents, relying on CBP and ICE directives and authority, have searched plaintiff George Anibowei's cell phone on at least five occasions. On one of those occasions, they downloaded all of the data off the phone and kept it. To the best of Mr. Anibowei's knowledge, they keep it to this day.

5. The need to apply *Riley*'s warrant requirement at the border only grows. Lawyers use electronic devices to store interview notes and briefs for their clients.

Journalists do the same with their records of conversations with whistleblowers and confidential sources. And everyday people use these devices to catalog their most sensitive and personal thoughts, conversations, and life events in extensive detail—from data about their health, to condolences on the loss of a loved one, to political rants emailed to friends, to gossip about other parents in the PTA, to intimate messages from a romantic partner.[1]

6. A person does not give up the right to privacy and invite scrutiny of "nearly every aspect" of their lives simply by crossing the U.S. border. The average person reasonably believes that the communications and photographs sent, received, and stored on a phone are protected from arbitrary and suspicionless searches by the government—not just some of the time, not just in the Nation's interior, but all of the time. But every time a person enters or exits the United States with a phone or laptop, that person's devices come within the scope of CBP and ICE policies that give agents unilateral authority to search every piece of stored information—without a warrant, probable cause, or even a reasonable suspicion of any wrongdoing.

7. CBP and ICE's arbitrary and suspicionless search policies violate the time-honored presumption of privacy in sensitive communications, intimate relationships, and confidential information. And they

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[1] A recent survey suggests that half of all adults had not just received a sext or explicit photo, but had actually *stored* sexts and explicit images that they receive. *Sext Much? If So, You're Not Alone*, Sci. Am., https://www.scientificamerican.com/article/sext-much-if-so-youre-not-alone; *see also* Emily C. Stasko & Pamela A. Geller, *Reframing Sexting as a Positive Relationship Behavior*, Am. Psych. Ass'n (Aug. 2015), https://www.apa.org/news/press/releases/2015/08/reframing-sexting.pdf.

violate the First and Fourth Amendments to the Constitution.

INTRODUCTION

8. By early 2018, 95% of Americans owned a cell phone, and 77% of Americans owned a smartphone.[2] Approximately two-thirds of all people alive in the world today, counting every age group and country, also own a cell phone.[3]

9. As the Supreme Court recognized in 2014, cell phones, and in particular today's smartphones, "place vast quantities of personal information literally in the hands of individuals." *Riley v. California*, 573 U.S. 373, 386 (2014). The nature of cell phones makes the search of a cell phone by law enforcement extraordinarily invasive and potentially humiliating. Thus, "[a]llowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case." *Id.* at 395.

10. For this reason, when the Supreme Court has been called to weigh in on law enforcement searches and seizures of cell phones, it has uniformly held that the collection of data from cell phones requires the safeguard of a particularized warrant supported by probable cause. *See Riley*, 573 U.S. 373; *Carpenter v. United States*, 138 S. Ct. 2206, 2209 (2018) .

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[2] *Mobile Fact Sheet*, Pew Research Center: Internet & Technology (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/mobile/.

[3] Paul Sawers, *5 Billion People Now Have a Mobile Phone Connection, According to GSMA Data*, Venture Beat (June 13, 2017), https://venturebeat.com/2017/06/13/5-billion-people-now-have-a-mobile-phone-connection-according-to-gsma-data/.

11. Nonetheless, some relics of policy persist from the era before the Supreme Court decided its first cell-phone-search cases.

12. In August 2009, U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) issued a pair of directives that permitted officials of the two agencies to search "electronic devices"—defined as devices that "contain information, such as computers, disks, drives, tapes, mobile phones and other communication devices"—"[i]n the course of a border search, with or without individualized suspicion."[4] The directives specifically authorize CBP and ICE officials to conduct warrantless and suspicionless searches, including of privileged and sensitive information like "[l]egal materials," "medical records," and "work-related information carried by journalists."[5]

13. CBP updated its policy in 2018 to add nominal safeguards, none of which cures the structural constitutional defects of the 2009 policy. CBP's 2018 directive continues to authorize searches of electronic devices with zero individualized suspicion and without any protections for privileged and sensitive information.

14. CBP and ICE's extraordinarily broad policies expose one million travelers a day to the threat of having

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[4] U.S. Customs and Border Protection, Border Search of Electronic Devices Containing Information, CBP Directive No. 3340-49 (Aug. 20, 2009), https://www.eff.org/document/customs-and-border-protection-directive-no-3340-049-border-search-electronic-devices; see also U.S. Immigration and Customs Enforcement, Border Searches of Electronic Devices, ICE Directive 7-6.1 (Aug. 18, 2009), https://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf (containing nearly identical language).

[5] CBP Directive No. 3340-049 (Aug. 20, 2009).

their most sensitive information searched and seized without any sort of individualized suspicion.

15. Among the untold number of people whose sensitive personal information has been swept up in this policy is plaintiff George Anibowei. Mr. Anibowei is a naturalized U.S. citizen born in Nigeria, and is the sole proprietor of his own law firm in Texas. Several times a year, he travels for work and personal reasons, including to see friends and relatives in Nigeria and other countries. Mr. Anibowei passed numerous and extensive security checks in the course of his journey from Nigerian immigrant to naturalized U.S. citizen. He also passed the additional security checks required for participation in CBP's Global Entry Trusted Traveler Program, and was issued membership in the program on November 1, 2012.

16. Nonetheless, for reasons unknown to Mr. Anibowei and that the government will not share, on October 10, 2016, CBP officers at the Dallas-Fort Worth Airport seized Mr. Anibowei's cell phone, saying that they were going to "copy the hard drive." The officers did not ask Mr. Anibowei for his consent or present him with a search warrant.

17. Mr. Anibowei has had his cell phone searched a total of at least five times by CBP agents, beginning with this first search and seizure in 2016. In four of these instances, Mr. Anibowei saw the agent search his text messages and other communications. Each of these searches was authorized by the 2009 ICE and CBP policies. Each of these searches would similarly be authorized by the 2018 CBP policy.

18. As an attorney, Mr. Anibowei regularly uses his smartphone to engage in sensitive and confidential communications with his immigration clients. During these searches, it is virtually certain that CBP viewed and

copied privileged communications between Mr. Anibowei and his clients. CBP's searches and seizures of Mr. Anibowei's privileged client communications, as well as other sensitive and private information on his phone, violate both his and his clients' expectations of privacy in their privileged communications.

19. CBP's repeated searches and seizures of Mr. Anibowei's cell phone also have the potential to harm Mr. Anibowei's business. Given that some of Mr. Anibowei's clients are adverse to the U.S. Department of Homeland Security (DHS) in immigration proceedings, Mr. Anibowei's inability to safeguard their information from an agency of DHS threatens to damage the trust and confidence of his clients.

20. These warrantless and suspicionless searches of Mr. Anibowei's cell phone are "unreasonable searches and seizures" prohibited by the Fourth Amendment. The CBP and ICE policies authorizing warrantless and suspicionless searches of electronic devices facially violate the Fourth Amendment.

21. Moreover, these warrantless and suspicionless searches violate the First Amendment rights of individuals entering and exiting the United States. The CBP and ICE policies expose individuals' sensitive, expressive, and associational information to arbitrary search by government agents. The ever-present possibility of warrantless and suspicionless search chills protected expression. This specter encourages individuals to leave their devices at home so that they cannot communicate at all, or to censor their speech if they do carry them.

22. Every day that government agents keep Mr. Anibowei's data, the government holds in its possession the fruits of an unconstitutional search and seizure. The

injury to Mr. Anibowei's constitutional rights wrought by the continued retention of this data continues to this day.

23. Mr. Anibowei seeks a declaration that CBP's searches of his cell phone were unlawful, and an injunction requiring that the government destroy his data. He also seeks vacatur of CBP and ICE's unlawful policies.

JURISDICTION AND VENUE

24. This Court has subject matter jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331 because he challenges federal law and final agency action under the laws and Constitution of the United States.

25. This Court has authority to issue declaratory and injunctive relief under 28 U.S.C. § 2201 and § 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and its inherent equitable powers.

26. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

PARTIES

27. Plaintiff George Anibowei is a U.S. citizen licensed to practice law in the State of Texas since 2002. He resides at 934 Colorado Drive in Allen, TX.

28. Defendant Kirstjen M. Nielsen is the Secretary of the U.S. Department of Homeland Security. She oversees DHS and its sub-agencies. She is sued in her official capacity.

29. Defendant Kevin K. McAleenan is the Commissioner of U.S. Customs and Border Protection. He oversees CBP. He is sued in his official capacity.

30. Defendant Ronald D. Vitiello is the Acting Director of U.S. Immigration and Customs Enforcement. He administers ICE. He is sued in his official capacity.

31. Defendant David P. Pekoske is Administrator of the Transportation Security Administration (TSA). He administers TSA. He is sued in his official capacity.

32. Defendant William P. Barr is Attorney General of the United States. He oversees the Department of Justice and its sub-agencies. He is sued in his official capacity.

33. Defendant U.S. Department of Homeland Security (DHS) is a Department of the Executive Branch of the United States and is an "agency" within the meaning of 5 U.S.C. § 552(f)(1).

34. Defendant U.S. Customs and Border Protection (CBP) is a sub-agency of DHS. It is responsible for administering security checks at airports and other ports of entry.

35. Defendant U.S. Immigration and Customs Enforcement (ICE) is a sub-agency of DHS. It plays a supporting role in administering security checks at airports and other ports of entry.

36. Defendant Transportation Security Authority (TSA) is a sub-agency of DHS, housed within CBP. It has particular responsibility for administering security checks at airports.

BACKGROUND

A. Searches and Seizures of Electronic Data

37. Ninety-five percent of Americans and approximately two-thirds of all people in the world own a cell phone. These numbers are only projected to grow. By 2020, an estimated 80% of all adults in the world will own

not just a cell phone but a smartphone, with all the enhanced storage capability this implies.

38. These devices are capable of containing extraordinary amounts of information, far beyond any other object a traveler could possibly carry. Today's iPhones, for instance, are capable of storing up to 256 gigabytes of data[6]—enough to hold hundreds of thousands of emails, documents, or images. A typical laptop computer can store double that.[7]

39. These devices not only store massive amounts of information, but also the most sensitive and personal information in a user's life. Electronic devices may store virtually all of an individual's communications—texts, voice mails, emails, and social-media posts—as well as detailed information on his location; his financial, legal, and medical history; his contacts; and his browsing and social-media history. Applications on the market today allow cell phone, tablet, and laptop users to store and analyze detailed information about such deeply personal topics as disease and pregnancy status, weight loss and physical fitness, income and credit history, and relationship status. Other applications could be used to build a detailed record of a person's sexual orientation and sexual history, political beliefs, and religious affiliation.

40. The data on some electronic devices, in the aggregate, can be used to reconstruct virtually every aspect of a person's career, personal life, habits, beliefs, associations, and daily routines. Indeed, the explosive

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[6] *About Storage on Your Device and in iCloud*, Apple.com, https://support.apple.com/en-us/HT206504 (last visited Mar. 12, 2019).

[7] *15-inch MacBook Pro*, Apple.com, https://www.apple.com/macbook-pro/specs/ (last visited Mar. 12, 2019).

implications of these devices for personal privacy have become so alarming that they have spurred a national debate over technology, privacy, and the power of businesses—like Facebook and Google—that hold or can access personal data generated or stored on electronic devices.[8] The intensity of users' fears clearly demonstrates an emerging societal consensus that an expectation of privacy in these devices is "one that society is prepared to recognize as reasonable"—indeed, as essential. *See Smith v. Maryland*, 442 U.S. 735, 740 (1979).

41. As the Supreme Court has noted, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house"—historically the piece of property that the Constitution has protected most. *See Riley*, 573 U.S. at 397. The Supreme Court has duly recognized that electronic devices are in a category apart for Fourth Amendment purposes given their extraordinary privacy implications.

42. Electronic devices not only hold our deepest secrets; they are practically extensions of our bodies, traveling with us everywhere we go. Many people would not be able to retain a job, receive help in an emergency, or maintain their personal relationships without the help of a cell phone, laptop, tablet, or in many cases all three. Many workers use their electronic devices daily to receive

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[8] *See, e.g.*, Steve Shillingford, *Facebook, Twitter, and Google Have Too Much Power—We Can't Just Legislate Ourselves Out of This Mess*, Fox News (Sept. 5, 2018), https://www.foxnews.com/opinion/facebook-twitter-and-google-have-too-much-power-we-cant-just-legislate-ourselves-out-of-this-mess; John Herrman, *Have the Tech Giants Grown Too Powerful? That's an Easy One*, N.Y. Times (July 11, 2018), https://www.nytimes.com/2018/07/11/magazine/facebook-google-uber-tech-giants-power.html.

and respond to sensitive and pressing business communications. For most people, it is not an option to leave their electronic devices at home, including when they travel.

43. Every day, many of the 95% of Americans who own a cell phone enter and leave the United States, as do many thousands of foreign nationals. In 2017, CBP processed an average of over 1.1 million people per day coming into and leaving the United States by land, air, and sea.[9] Approximately half of these people are U.S. citizens.

44. Extrapolating from these figures, we can conservatively estimate that in a 24-hour period, approximately 885,000 cell phones enter or leave the United States at a port of entry. 522,500 of these cell phones belong to U.S. citizens.[10]

45. These travelers also carry thousands of other electronic devices across the border daily.

46. In great part due to the extraordinary capabilities of these devices, the Supreme Court affords far greater protection to cell phones and other electronic devices than to other objects subject to search, as explained in detail below. CBP and ICE nevertheless subject these most sensitive implements to extensive warrantless and suspicionless searches.

B. CBP and ICE Policies

47. On August 18, 2009, ICE issued an extraordinarily broad policy functionally permitting its

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[9] *On a Typical Day in Fiscal Year 2018, CBP…*, U.S. Customs and Border Protection (March 7, 2019), https://www.cbp.gov/newsroom/stats/typical-day-fy2018.

[10] This estimate is conservative because people who travel internationally may be more likely than the general population to own a cell phone.

border agents to conduct searches of all "electronic devices" in the possession of travelers into and out of the United States. *See* ICE Directive 7-6.1 (Aug. 18, 2009).

48. Two days later, on August 20, 2009, CBP issued a nearly identical directive. *See* CBP Directive No. 3340-049 (Aug. 20, 2009).

49. The majority of agents at ports of entry work for CBP, while ICE agents provide supplemental help in some cases.

50. The 2009 policies permitted CBP and ICE agents conducting border searches, "without individualized suspicion," to "examine electronic devices"; to "review and analyze the information" encountered during the course of the search; and to retain devices and data indefinitely. CBP Directive No. 3340-049, §§ 5.1.2, 5.3.1.

51. Under the agencies' 2009 policies, agents may confiscate devices from travelers for a "thorough" search, either on-site or off-site, without individualized suspicion. *See id.* § 5.3.1; ICE Directive 7-6.1, §§ 6.1, 8.1.4. While CBP confiscations presumptively last no more than five days, CBP supervisors may extend this period based on undefined "extenuating circumstances." CBP Directive No. 3340-049, §§ 5.3.1, 5.3.1.1. Confiscations by ICE can last up to 30 days without supervisor approval, and can be extended under "circumstances … that warrant more time." ICE Directive 7-6.1, § 8.3.1.

52. The 2009 policies instruct the agencies to delete data only "if, after reviewing information … there is not probable cause to seize it." CBP Directive No. 3340-049, § 5.3.1.2. As a result, agents may permanently detain an electronic device and its data without a warrant. And the probable cause necessary to permanently detain devices or information can be generated through the initial

searches and seizures performed without any individualized suspicion.

53. On January 4, 2018, CBP issued a directive superseding its 2009 directive. *See* CBP Directive No. 3340-049A (Jan. 4, 2018) (the "2018 Policy").

54. While CBP's 2018 Policy supersedes its 2009 Policy, ICE has not issued a comparable new policy. Under ICE's 2009 Directive, ICE agents are currently authorized to search electronic devices and to review, analyze, and copy their contents without any individualized suspicion.

55. CBP's 2018 Policy covers "[a]ny device that may contain information in an electronic or digital form, such as computers, tablets, disks, drives, tapes, mobile phones and other communication devices, cameras, music and other media players." § 3.2.

56. The 2018 Policy opens up this entire category to two types of searches—"basic" and "advanced"—neither of which must be supported by a particularized warrant or even by probable cause. §§ 5.1.3, 5.1.4.

57. A "basic search" is by no means "basic"; it is highly intrusive and allows officers to access all content and communications stored on the device. An agent conducting a basic search "may examine an electronic device and may review and analyze information encountered at the border." § 5.1.3. The 2018 Policy authorizes an agent to perform a "basic search" without any individualized suspicion. *Id.*

58. An "advanced search" allows for the connection of "external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents." § 5.1.4. The 2018 Policy authorizes an agent

to perform an "advanced search" if he has either "reasonable suspicion of activity in violation of the laws enforced or administered by CBP" or where "there is a national security concern." § 5.1.4.

59. The 2018 Policy makes no effort to cabin its vague and capacious terms "reasonable suspicion" or "national security concern." The Policy explains that "[m]any factors may create reasonable suspicion or constitute a national security concern; examples include the existence of a relevant national-security-related lookout in combination with other articulable factors as appropriate, or the presence of an individual on a government-operated and government-vetted terrorist watch list." § 5.1.4.

60. Moreover, the 2018 Policy does not require that "reasonable suspicion" be in any way related to the electronic device or its data. Rather, the 2018 Policy authorizes agents to review, copy, and analyze the content of an electronic device based only on suspicion that the owner of the device is violating CBP-administered laws, regardless of whether the agents reasonably suspect that the device or its data contain evidence of such a violation.

61. The 2018 Policy adds insult to injury by demanding that individuals facilitate these unlawful searches and seizures. Individuals must "present electronic devices and the information contained therein in a condition that allows inspection." This means that officers may require individuals to unlock or decrypt their devices or information and can "request[] and retain" "[p]asscodes or other means of access … as needed to facilitate the examination of an electronic device or [its] information." § 5.3.1.

62. While the 2018 Policy recommends that agents obtain supervisor approval before conducting a search,

officers need only obtain such approval if it is "practicable." § 5.1.5. Similarly, while the 2018 Policy advises that "[s]earches of electronic devices should be conducted in the presence of the individual whose information is being examined," it permits agents to search devices outside their owners' presence if there are "national security, law enforcement, officer safety, or other operational considerations that make [owner presence] inappropriate." § 5.1.6.

63. Perhaps the most extraordinary part of the 2018 Policy relates to the detention of electronic devices and copying of their information. The policy gives officers power, absent any individualized suspicion, to detain electronic devices and information copied from them "for a brief, reasonable period of time to perform a thorough border search." This period "ordinarily should not exceed five (5) days" but can be extended for undefined "extenuating circumstances." § 5.4.1. Detention can continue even after the individual has departed from the port of entry. § 5.4.1.1.

64. The 2018 Policy provides that electronic devices will be returned and data will be deleted only "if, after reviewing information, there exists no probable cause to seize the device or information." § 5.4.1.2. As a result, agents may permanently detain an electronic device and its data without a warrant. And the probable cause necessary to permanently detain devices or information can be generated through the initial searches and seizures performed without any individualized suspicion, absent any review from a neutral magistrate.

65. Agents are authorized to retain "information relating to immigration, customs, and other enforcement matters if such retention is consistent with the applicable

system of record notice," even absent any individualized suspicion. § 5.5.1.2.

66. Without individualized suspicion, the officer is authorized to transfer electronic devices and information thereon to other government agencies for a variety of purposes.

67. For example, without individualized suspicion, "[o]fficers may convey electronic devices or copies of information contained therein to seek technical assistance" so as to allow access to the device or its information. § 5.4.2.1. Officers may also convey devices or information to "subject matter experts" in other federal agencies "when there is a national security concern or … reasonable suspicion." § 5.4.2.2.

68. Individuals need not be notified when their devices or information are transmitted to other agencies. § 5.4.2.5.

69. The 2018 Policy also provides inadequate guidance on how officers should handle privileged and sensitive material. It contemplates that officers may "encounter[] information they identify as, or that is asserted to be, protected by attorney-client privilege or attorney work product doctrine." § 5.2.1. But the Policy provides no meaningful direction on how officers should handle that information. Rather, the Policy vaguely instructs officers to "ensure the segregation of any privileged material" so that it is "handled appropriately while also ensuring that CBP accomplishes its critical border security mission." § 5.2.1.2.

70. The 2018 Policy's guidance on "[o]ther possibly sensitive information" is even vaguer. "[M]edical records and work-related information carried by journalists … shall be handled in accordance with any applicable federal

law and CBP policy." § 5.2.2. Business or commercial information shall be "protect[ed] from unauthorized disclosure." § 5.2.3.

71. The 2018 Policy contemplates that privileged or sensitive information may be shared with other federal agencies so long as those agencies "have mechanisms in place to protect appropriately such information." § 5.2.4.

72. The 2018 CBP Policy and 2009 ICE Policy essentially make the 885,000 cell phones that transit into and out of the United States every single day fair game for a warrantless and suspicionless search and seizure, alongside untold numbers of other devices containing sensitive information, like laptops.

73. These agency policies also promise to cause extraordinary inconvenience to travelers by authorizing detention of an electronic device for multiple days. For the many international travelers who do not intend to remain near their port of entry following admission to the United States, the policies constitute an extraordinary burden. And the burden is even greater for travelers whose electronics are detained as they are leaving the United States. These travelers are given a choice of evils: abandoning their devices, with all of their personal information, to ICE and CBP; or losing up to thousands of dollars and many days of their time in order to reschedule their travel until their electronics clear inspection. Even burdening a million travelers a day with the *possibility* that they will be forced to endure these inconveniences to permit a warrantless and suspicionless search is an extraordinary intrusion on the liberty of citizens and visitors alike.

C. The Law of Electronic-Device Searches

74. CBP and ICE's electronic search policies are not only breathtakingly broad. They fly directly in the face of Supreme Court jurisprudence on protection for cell phones and other electronic devices and digital records and communications.

75. In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court recognized that the extraordinary powers and capabilities of cell phones place them in a class apart from other objects, requiring particularly robust Fourth Amendment protection. The *Riley* court unanimously held that law enforcement must not search digital information on a cell phone without first obtaining a warrant, except in a very narrow set of exigent circumstances.

76. Tellingly, all of the Justices based this holding on the unique characteristics of cell phones. Cell phones, the Court noted, are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 385. Applying a traditional balancing assessment for warrant requirements, the Court concluded that the intrusion on privacy interests in a warrantless cell phone search far outweighs the government interest supporting it. *Id.* at 385-86. The Court noted that the only legitimate interest in a warrantless search—avoiding the remote deletion of evidence—was a relatively unlikely and weak one in most cases. *Id.* at 388-90. On the other hand, the Court recognized that allowing warrantless cell phone searches implicated stark and troubling privacy concerns. Noting the "immense storage capacity" of cell phones, the Court enumerated four distinct ways that cell phones, among all objects law enforcement might search, have unique

privacy implications: they collect "many distinct types of information … that reveal much more in combination than any isolated record"; they collect more of each individual type of information than previously possible; they collect this information over massive amounts of time, months or even years; and they are so pervasive in society that they function as a "digital record of nearly every aspect" of most Americans' lives, including their most personal information. *Id.* at 393-95. Taking these unique capacities together, the Supreme Court held that the balance of equities clearly favored requiring a warrant.

77. Similarly, courts have again and again found that people have a reasonable expectation of privacy in their computers and in folders and documents on their computers. *See United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (finding reasonable expectation of privacy in the contents of a person's cell phone and noting that "a cell phone is similar to a personal computer that is carried on one's person"); *see also, e.g.*, *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007); *United States v. Buckner*, 473 F.3d 551, 554 n.2 (4th Cir. 2007).

78. And, expectations of privacy aside, the Supreme Court has zealously guarded against "government trespass upon the areas ('persons, houses, papers, and effects')" that the Fourth Amendment enumerates. *United States v. Jones*, 565 U.S. 400, 406-07 (2012); *see also United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.).

79. Even some of the individual *functions* of cell phones and smartphones receive heightened constitutional protection. The Supreme Court recently held that law enforcement must secure a warrant to view data generated by the location-tracking functions of phones and other electronic devices. *Carpenter*, 138 S. Ct.

at 2232-33. Several circuits have held that law enforcement officials may not access an individual's emails without a warrant; email is an essential function of virtually every smartphone. *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 288-89 (6th Cir. 2010). In other words, courts have overwhelmingly found that searches of phones, laptops, similar devices, and even some of their component functions require a warrant.

80. Nor are the courts particularly burdening law enforcement by requiring warrants. If technology has opened up vast troves of sensitive information to inspection by government agencies, it has also made it exceptionally easy for these agencies to secure a warrant with minimal effort and delay. As the Supreme Court noted in *Riley*, in one jurisdiction, "police officers can e-mail warrant requests' to judges' iPads [and] judges have signed such warrants and emailed them back to officers in less than 15 minutes." 573 U.S. at 401. Such a practice is not rare: the Supreme Court has previously noted that the Federal Rules of Criminal Procedure have permitted telephonic warrants since 1977. *Missouri v. McNeely*, 569 U.S. 141, 154 (2013). Law enforcement officials can secure a warrant quickly by a variety of means, including "telephonic or radio communication, electronic communication such as e-mail, and video conferencing." *Id.* The hurdle of securing a warrant is not high.

FACTUAL ALLEGATIONS

A. Mr. Anibowei Begins Receiving Intense Scrutiny at the Airport, and Is Removed Without Notice from CBP's Global Entry Trusted Traveler Program

81. Plaintiff George Anibowei was born in Port Harcourt, Rivers State, Nigeria and is originally from Agbere, Bayelsa State, in the Niger Delta region of

Nigeria. Mr. Anibowei fled Nigeria in 1997 after his work as a pro-democracy activist put him in danger of retaliation by Nigeria's military dictatorship, then led by General Sani Abacha.

82. Seeking a life with more freedoms and civil liberties, Mr. Anibowei applied for and received asylum in the United States in 1998. He became a naturalized U.S. citizen in 2007.

83. A lawyer by profession in Nigeria, Mr. Anibowei completed a master's degree and Juris Doctor degree at Southern Methodist University Law School in Dallas. He is admitted to practice law before all courts in the State of Texas, the U.S. District Court for the Northern District of Texas, the U.S. Court of Appeals for the Fifth Circuit, and the U.S. Supreme Court. Originally drawn to Texas because one of his brothers lived there, he has settled in the Dallas suburbs and operates his own small legal practice, primarily representing immigrants.

84. To become a naturalized U.S. citizen in the years following the September 11th attacks, Mr. Anibowei had to pass an extensive security check.[11] The requirements for this background check are rigorous. All applicants must undergo fingerprinting, which the FBI then uses to run a full criminal background check. The FBI also conducts a "name check," which includes a search against a database that contains not only criminal files but also personnel, administrative, and applicant files. In addition to these FBI background checks, most applicants also go through additional inter-agency background checks

[11] *See USCIS Policy Manual: Chapter 2—Background and Security Checks*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter2.html (Feb. 12, 2019).

coordinated by U.S. Citizenship and Immigration Services.

85. Mr. Anibowei is a frequent traveler. He typically travels to Nigeria several times a year to visit his brothers and sisters who still live there, as well as his extended family and friends. He is also a frequent tourist in Europe, the Caribbean, and other African countries.

86. In order to facilitate his travel, Mr. Anibowei applied for and eventually received membership in CBP's Global Entry Trusted Traveler Program, beginning on November 1, 2012. The Trusted Traveler Program requires applicants to pass another layer of extremely thorough security checks in order to receive membership. Successful applicants must pass a background check against criminal, law enforcement, customs, immigration, agriculture, and terrorist indices, a process that includes fingerprinting.[12] Successful applicants also pass an in-person interview with a security officer.

87. In 2014, Mr. Anibowei took a leave of absence from his law practice to return to Nigeria in order to participate in a national constitutional conference called by the country's now democratically elected government. The convention, known as the 2014 Nigerian National Conference, brought together 492 distinguished delegates from Nigeria and the Nigerian Diaspora to debate structural problems with the country's constitution and propose reforms directly to the immediate past President, Goodluck Jonathan. Attendees at the conference included retired governors and ministers in the Nigerian Government and prominent

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[12] *Is Criminal History a Disqualifier for Global Entry?* U.S. Customs and Border Protection (Aug. 2, 2017), https://help.cbp.gov/app/answers/detail/a_id/1309/~/is-criminal-history-a-disqualifier-for-global-entry%3F.

Nigerian politicians and lawyers. Concerns at the conference included power-sharing among different states and the federal government and states' ability to profit off their own natural resources—a particular concern of states in the oil-rich Niger Delta, where Mr. Anibowei is from.

88. Mr. Anibowei spent much of his five months in Nigeria as one of the National Assembly's 492 delegates, while a colleague shouldered the matters pending at his solo practice. On breaks in the Assembly, he returned to Texas to check on his law office.

89. To the best of Mr. Anibowei's recollection, it was around the time of the Nigerian National Conference that TSA began to subject Mr. Anibowei to additional screening virtually every time he entered or left the United States, even as a member of the Trusted Traveler Program. Initially, this mainly consisted of putting Mr. Anibowei into secondary screening on his way to and from Nigeria to ask him about the purpose and length of his trip.

90. Mr. Anibowei believes he was initially flagged for routine additional screening because he was spending a long period of time in Nigeria and frequently traveling back to the United States.

91. TSA and CBP continued to question and detain Mr. Anibowei virtually every time he traveled internationally, and the screening of Mr. Anibowei gradually grew more intense. In spring of 2014, Mr. Anibowei was traveling with his son, who shares his name, from Houston, Texas to Lagos, Nigeria, when Mr. Anibowei's then-teenage son was taken aside by seven uniformed officers. The officers soon realized they were looking for Mr. Anibowei rather than his son. Subsequently, five officers took Mr. Anibowei into a small

room for interrogation, inviting his son in too against the wishes of Mr. Anibowei. As a result, Mr. Anibowei's son witnessed his father's interrogation, a situation his father found humiliating.

92. The officers detained and questioned Mr. Anibowei for approximately two hours, resulting in his flight being delayed for that period. Mr. Anibowei did not realize that he was the reason for the flight delay until a manager from United Airlines walked into the interrogation room and asked one of the officers whether they could begin boarding the flight. The officer responded that the manager could proceed because they were almost done questioning Mr. Anibowei.

93. This treatment continued after the Nigerian National Conference had ended. In another incident from that period, Mr. Anibowei was stranded in Toronto for two days after the Canadian Border Services Agency subjected him to a five-hour interrogation at the request of CBP, causing him to miss his flight.

94. On May 12, 2015, when returning from another international trip, Mr. Anibowei learned that, for reasons unknown to him, his membership in the Global Entry Trusted Traveler Program had been revoked on March 7, 2015. Mr. Anibowei received no notice of this development until he attempted to reenter the United States using a Global Entry kiosk at the airport only to be pulled once again into secondary inspection. In secondary inspection, the CBP agent told Mr. Anibowei that his Global Entry status had been revoked. CBP never sent Mr. Anibowei a letter notifying him of the change. Mr. Anibowei ultimately was able to download the revocation letter from his account on the Global Online Enrollment System, a website managed by CBP.

95. Mr. Anibowei has since made numerous and apparently unavailing efforts to appeal this decision. Mr. Anibowei first requested reconsideration of his application for the Trusted Traveler Program from CBP. In a response from the CBP Ombudsman dated March 11, 2016, the Ombudsman acknowledged receipt of Mr. Anibowei's request but reiterated, using the same language as the revocation letter, that Mr. Anibowei "d[id] not meet the eligibility requirements for the Trusted Traveler program."

96. Mr. Anibowei also filed a Redress Request (#2232471) with CBP on DHS's Traveler Redress Inquiry Program (TRIP) Website. In response to this Redress Request, Mr. Anibowei received a letter dated June 30, 2016 from Deborah O. Moore, the Director of TRIP. The letter stated:

> DHS has researched and completed our review of your case. Security Procedures and legal concerns mandate that we can neither confirm nor deny any information about you which may be within federal watch lists or reveal any law enforcement sensitive information. However, we have made any corrections to records that our inquiries determined were necessary, including, as appropriate, notations that may assist in avoiding incidents of misidentification.

B. Mr. Anibowei's Cell Phone Is Copied by CBP, and Subjected to a Search on No Fewer Than Five Occasions

97. At this point, Mr. Anibowei had simply accepted that he would be stopped and screened, sometimes for hours, any time he tried to leave or enter the United States. Trying to adjust to this new reality, he mentally prepared (and still does) to be pulled into secondary interrogation on every trip. On occasions when another

person intends to pick Mr. Anibowei up at the Dallas-Fort Worth Airport, he tells them to come two or three hours after his scheduled flight arrival time because he knows he will be put into inspection.

98. On October 10, 2016, Mr. Anibowei was returning to the Dallas area after a weekend spent visiting his best friend in Toronto. Upon landing in Dallas, the pilot announced that the passengers—who had begun to collect their luggage in preparation to exit the plane—should return to their assigned seats, because security had arrived at the gate to escort a passenger off.

99. Mr. Anibowei, who had slept through the flight, assumed that the announcement had to do with an unruly passenger. He was consequently surprised when a pair of agents boarded the flight, asked to see his identification, and told him to take his luggage and follow them. The officers subsequently escorted Mr. Anibowei off the plane and through three terminals at the airport, to his great humiliation and distress.

100. The officers eventually brought Mr. Anibowei to a small interrogation room, where they asked him for his phone. When Mr. Anibowei asked them why they wanted to see it, the agents told him that they planned to "copy the hard drive," taking his phone out of the room.

101. When Mr. Anibowei vigorously protested this action, the officers handed him a flyer explaining their legal authority, under the 2009 CBP Directive, to undertake the search and seizure.

102. The officers returned Mr. Anibowei's phone to him about thirty minutes after they seized it.

103. The phone the officers seized was Mr. Anibowei's work cell phone. As an attorney, Mr. Anibowei takes his work phone with him virtually everywhere, in order to be

accessible for time-sensitive matters or in a client emergency, and he estimates that approximately 80 percent of his clients prefer to call him on his cell phone. Mr. Anibowei's phone contains extremely sensitive information about his clients and their cases, including call logs, voice mails, text message threads with clients, and perhaps worst of all an archive of Mr. Anibowei's work emails, which in turn contains drafts of confidential filings among other information.

104. This seizure was particularly distressing to Mr. Anibowei because a significant number of his clients are immigrants in removal proceedings adverse to DHS. The seizure and copying of Mr. Anibowei's phone by an agency of DHS was a gross violation of these clients' expectation of privacy in their privileged legal communications with their attorney, committed by the adverse party in those clients' cases.

105. This was the last time Mr. Anibowei carried his work phone with him on an international trip. But the damage was already done. To this day, Mr. Anibowei has no idea why the agency copied data from his cell phone and for what purpose, if any, it has used the data. He believes that, to this day, the agency never destroyed the data and continues to retain them.

106. Furthermore, Mr. Anibowei's decision to stop carrying his work phone was not a complete solution. Mr. Anibowei's work emails are also accessible on his personal phone. However, to stop carrying his personal phone would render Mr. Anibowei completely inaccessible in either a personal or work emergency.

107. Since the October 16, 2016 incident, Mr. Anibowei's phone has been searched a minimum of four additional times by officers of DHS.

108. An incident on February 12, 2017 was typical. Mr. Anibowei was returning from a visit to his friends and relatives in Nigeria, and was put into secondary inspection on returning to the Dallas-Fort Worth Airport. In secondary inspection, TSA agents performed an extremely thorough search of all of Mr. Anibowei's luggage and asked to see his phone. A TSA agent then performed an extensive search of Mr. Anibowei's phone in front of him. Mr. Anibowei believes that the officer viewed his text messages, as well as encrypted messages he sent and received through WhatsApp (a texting application very popular globally). Because Mr. Anibowei's email is not password protected on his phone, it is possible the officer viewed Mr. Anibowei's email, too.

109. There is an extraordinary irony to Mr. Anibowei's case. Mr. Anibowei came to the United States seeking freedom. He makes a living helping other people who wish to enjoy this country's freedoms. While Mr. Anibowei is not certain, he believes that the catalyst for CBP's increased interest in him was his frequent travel overseas. And, since 2016, that travel has resulted in scrutiny of every aspect of his personal and professional life, via CBP's free and uninhibited access to all of the data on his phone.

110. Mr. Anibowei fears grave injury to his reputation and his business as a result of CBP and ICE's search and copying of his phone. Mr. Anibowei fears that if his clients knew or believed that CBP had copied their data from Mr. Anibowei's phone, it would diminish their trust and confidence in him as an attorney.

111. CBP and ICE's illegal electronics search and seizure policies have worked a grave injury to Mr. Anibowei's First and Fourth Amendment rights.

112. Mr. Anibowei intends to continue traveling internationally to visit his family in Nigeria and for pleasure.

113. Based on his experiences recounted above, Mr. Anibowei reasonably believes that Defendants will continue to violate his First and Fourth Amendment rights when he travels internationally in the future.

FACTS RELEVANT TO ALL CLAIMS FOR RELIEF

114. Defendants adopted the policies and practices discussed above related to searching and seizing electronic devices at the border.

115. The frequency with which border officials enforce these policies and practices against travelers is rapidly growing.

116. Mr. Anibowei has traveled across the U.S. border with his cell phone multiple times.

117. Mr. Anibowei has a credible fear that his cell phone will be searched again.

118. Mr. Anibowei is suffering the ongoing harm of the confiscation of the information on his cell phone.

119. Mr. Anibowei's phone is private personal property that agents have taken without his consent.

120. Mr. Anibowei has a reasonable expectation of privacy in the content on his cell phone, in the content he stores in the cloud that is accessible through his cell phone, in his device passwords, and in the information he holds as an information fiduciary on behalf of other people.

121. Mr. Anibowei uses his cell phone to communicate, associate, and gather and receive information privately and anonymously.

122. Mr. Anibowei uses his cell phone to store sensitive attorney work product and confidential information on behalf of his clients, some of whom are immigrants adverse to Defendants.

123. Mr. Anibowei, and the many other travelers who cross the United States border every year with electronic devices, are chilled from exercising their First Amendment rights of free speech and association, in knowing that their personal, confidential, and anonymous communications, and their expressive material, may be viewed and retained by government agents without any wrongdoing on their part.

124. Mr. Anibowei feels confused, embarrassed, upset, violated, and anxious about the search and copying of his cell phone. He worries that government agents have viewed personal information taken from his phone, including photos and messages, and shared it with other government agencies. He worries about his own personal information, and also personal information from and about other people, including friends, family, clients, and professional associates.

125. Defendants have directly performed, or aided, abetted, commanded, encouraged, willfully caused, participated in, enabled, contributed to, or conspired in the device searches, device confiscations, policies, and practices alleged above, by promulgating or causing to be promulgated the ICE and CBP policies permitting the search of Mr. Anibowei's phone, and by directing agents to enforce those policies.

126. By the acts alleged above, Defendants have proximately caused harm to Mr. Anibowei.

127. Defendants' conduct was done intentionally, with deliberate indifference, or with reckless disregard of Mr. Anibowei's constitutional rights.

128. Defendants will continue to violate Mr. Anibowei's constitutional rights unless enjoined from doing so by this Court.

CLAIMS FOR RELIEF

COUNT I
FIRST AMENDMENT

129. Plaintiff re-alleges each and every allegation in paragraphs 1-128 above as if fully set forth herein.

130. Defendants violate the First Amendment by searching and seizing individuals' devices and communications containing expressive content, associational information, and privileged information, *absent a warrant supported by probable cause* that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

131. Defendants violate the First Amendment by searching and seizing individuals' devices and communications containing expressive content, associational information, and privileged information, *absent probable cause* to believe that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

132. Defendants violate the First Amendment by searching and seizing individuals' devices and communications containing expressive content, associational information, and privileged information,

absent reasonable suspicion that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

133. Defendants have violated and will continue to violate Mr. Anibowei's First Amendment rights by searching and seizing his devices and communications containing expressive content, associational information, and privileged information, absent a warrant, probable cause, or a reasonable suspicion that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

COUNT II
FOURTH AMENDMENT
(Unlawful Search of Electronic Devices)

134. Plaintiff re-alleges each and every allegation in paragraphs 1-128 above as if fully set forth herein.

135. Defendants violate the Fourth Amendment by searching travelers' electronic devices, *absent a warrant supported by probable cause* that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

136. Defendants violate the Fourth Amendment by searching individuals' devices and communications containing expressive content, associational information, and privileged information, *absent probable cause* to believe that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

137. Defendants violate the Fourth Amendment by searching individuals' devices and communications containing expressive content, associational information, and privileged information, *absent reasonable suspicion*

that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

138. Defendants' searches are unreasonable at their inception, and in their scope, duration, and intrusiveness.

139. Defendants have violated and will continue to violate the Fourth Amendment by searching Mr. Anibowei's electronic devices, absent a warrant, probable cause, or a reasonable suspicion that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

140. Defendants' searches of Mr. Anibowei's electronic devices are unreasonable at their inception, and in their scope, duration, and intrusiveness.

COUNT III
FOURTH AMENDMENT
(Unlawful Search of Communications)

141. Plaintiff re-alleges each and every allegation in paragraphs 1-128 above as if fully set forth herein.

142. Defendants violate the Fourth Amendment by searching individuals' emails, text messages, and other private communications, *absent a warrant supported by probable cause* that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

143. Defendants violate the Fourth Amendment by searching individuals' devices and communications containing expressive content, associational information, and privileged information, *absent probable cause* to believe that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

144. Defendants violate the Fourth Amendment by searching individuals' devices and communications containing expressive content, associational information, and privileged information, *absent reasonable suspicion* that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

145. Defendants' searches are unreasonable at their inception, and in scope, duration, and intrusiveness.

146. Defendants have violated and will continue to violate the Fourth Amendment by searching Mr. Anibowei's electronic devices, absent a warrant, probable cause, or a reasonable suspicion that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

147. Defendants' searches of Mr. Anibowei's electronic devices are unreasonable at their inception, and in their scope, duration, and intrusiveness.

COUNT IV
FOURTH AMENDMENT
(Unlawful Seizure of Devices)

148. Plaintiff re-alleges each and every allegation in paragraphs 1-128 above as if fully set forth herein.

149. Defendants violate the Fourth Amendment by seizing individuals' electronic devices for the purpose of effectuating searches of those devices after individuals leave the border, *absent a warrant, probable cause, or reasonable suspicion* that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

150. These seizures are unreasonable at their inception, and in scope, duration, and intrusiveness.

151. Defendants have violated and will continue to violate the Fourth Amendment by seizing Mr. Anibowei's electronic devices for the purpose of effectuating searches of those devices after he leaves the border, absent a warrant, probable cause, or reasonable suspicion that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

152. Defendants' seizures of Mr. Anibowei's electronic devices are unreasonable at their inception, and in their scope, duration, and intrusiveness.

COUNT V
FOURTH AMENDMENT
(Unlawful Seizure of Data)

153. Plaintiff re-alleges each and every allegation in paragraphs 1-128 above as if fully set forth herein.

154. Defendants violate the Fourth Amendment by seizing individuals' data and retaining that data, often after individuals leave the border, *absent a warrant, probable cause, or reasonable suspicion* that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

155. These seizures are unreasonable at their inception, and in their scope, duration, and intrusiveness.

156. Defendants have violated and will continue to violate the Fourth Amendment by seizing Mr. Anibowei's data and retaining that data, after he leaves the border, absent a warrant, probable cause, or reasonable suspicion that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws.

COUNT VI
ADMINISTRATIVE PROCEDURE ACT,
5 U.S.C. § 706
(Agency Policies)

157. Plaintiff re-alleges each and every allegation in paragraphs 1-128 above as if fully set forth herein.

158. Each of the 2018 CBP Directive, the 2009 CBP Directive, and the 2009 ICE Directive (collectively, the "Agency Policies") is a "final agency action" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704.

159. The Agency Policies permit agents to conduct searches that violate the First and Fourth Amendments. The Agency Policies therefore violate the Administrative Procedure Act because they are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

160. The Agency Policies further violate the Administrative Procedure Act because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT VII
ADMINISTRATIVE PROCEDURE ACT,
5 U.S.C. § 706
(Global Entry)

161. Plaintiff re-alleges each and every allegation in paragraphs 1-128 above as if fully set forth herein.

162. Defendants' removal of Plaintiff from the Global Entry Trusted Traveler Program is a "final agency action" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704.

163. Plaintiff has exhausted all of his administrative remedies and any further pursuit of administrative relief would be futile.

164. Defendants' removal of Plaintiff from the Global Entry Trusted Traveler Program violated the Administrative Procedure Act because it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks for the following relief as to all counts:

a. Declare that Defendants' policies and practices violate the First and Fourth Amendments by authorizing searches of travelers' electronic devices and communications absent a warrant supported by probable cause that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

b. Declare that Defendants violated Plaintiff's First and Fourth Amendment rights by searching his electronic devices absent a warrant supported by probable cause that the devices contained contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched.

c. Enjoin Defendants to expunge all information gathered from, or copies made of, the contents of Plaintiff's electronic devices.

d. Enjoin enforcement of the Agency Policies against Plaintiff.

e. Enjoin enforcement of the Agency Policies.

f. Vacate the Agency Policies.

g. Award Plaintiff reasonable attorneys' fees and costs.

h. Grant such other or further relief as the Court deems proper.

Dated: March 14, 2019

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Andrew Tutt*

Andrew Tutt (*pro hac vice*)
Robert Stanton Jones (*pro hac vice*)
Stephen K. Wirth (*pro hac vice*)
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* Motion for pro hac vice admission forthcoming

Counsel for Plaintiff

VERIFICATION

STATE OF TEXAS)

) SS:

DALLAS COUNTY)

George Anibowei, being duly sworn, deposes and says:

I am George Anibowei, the plaintiff in this action; I have read the foregoing Verified Second Amended Complaint and know the contents thereof; except as to matters therein alleged on information and belief, I have learned of the facts alleged therein, either through my own personal knowledge or through information reported to me in the ordinary course of business; as to those matters as to which I do not have personal knowledge, I believe them to be true.

George Anibowei

Sworn to and subscribed this
12 day of March, 2019

VANESSA A. NARVAIZ
My Notary ID # 131302865
Expires October 3, 2021

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that this document will be served on the Defendants in accordance with Fed. R. Civ. P. 4.

/s/ Andrew Tutt
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