

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

GHASSAN ALASAAD, NADIA )  
ALASAAD, SUHAIB ALLABABIDI, SIDD )  
BIKKANNAVAR, JÉRÉMIE DUPIN, )  
AARON GACH, ISMAIL ABDEL-RASOUL )  
AKA ISMA'IL KUSHKUSH, DIANE )  
MAYE, ZAINAB MERCHANT, )  
MOHAMMED AKRAM SHIBLY, AND )  
MATTHEW WRIGHT, )

Plaintiffs, )

v. )

KIRSTJEN NIELSEN, SECRETARY OF )  
THE U.S. DEPARTMENT OF HOMELAND )  
SECURITY, IN HER OFFICIAL )  
CAPACITY; KEVIN MCALEENAN, )  
COMMISSIONER OF U.S. CUSTOMS )  
AND BORDER PROTECTION, IN HIS )  
OFFICIAL CAPACITY; AND RONALD )  
VITIELLO, ACTING DIRECTOR OF U.S. )  
IMMIGRATION AND CUSTOMS )  
ENFORCEMENT, IN HIS OFFICIAL )  
CAPACITY, )

Defendants. )

Civil Action No. 17-cv-11730-DJC  
Hon. Denise J. Casper

**JOINT STATEMENT AND PROPOSED DISCOVERY SCHEDULE**

The parties submit this joint statement pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, Local Rule 16.1, and this Court’s orders. *See* ECF Nos. 36, 56-57.

**I. Plaintiffs’ Preliminary Statement of the Case**

Plaintiffs filed this lawsuit in September 2017. *See* ECF. 7. Defendants are three officials of the U.S. Department of Homeland Security, sued in their official capacities. Defendants are responsible for government policies and practices regarding searches and lengthy confiscations of travelers’ electronic devices at the border. Plaintiffs are ten U.S. citizens and one lawful

permanent resident who have been subjected to device searches at the border, including four whose devices were confiscated at the border and held for lengthy periods. Plaintiffs allege that the First and Fourth Amendments prohibit border officers from searching travelers' devices absent a warrant (and that such searches require probable cause or, at a minimum, reasonable suspicion). *See* ECF No. 7 (Amended Complaint) at ¶ 156(c) (“all Plaintiffs are at great risk of constitutional harm, namely, search and seizure of their devices absent a warrant, probable cause or reasonable suspicion”). *See also* ECF No. 19 (Plaintiffs' opposition to Defendants' Motion to Dismiss) at pp. 14-25 (presenting all of these Fourth Amendment search claims). Plaintiffs also allege that the Fourth Amendment prohibits border officers from confiscating travelers' devices for a prolonged and unreasonable period of time, and absent probable cause. Plaintiffs seek injunctive and declaratory relief.

In May 2018, this Court denied Defendants' motion to dismiss (ECF No. 34) and ordered the parties to file this joint statement in preparation for an initial scheduling conference (ECF No. 36). In June 2018, the parties jointly moved for an extension of time, in order to explore the possibility of factual stipulations that might narrow discovery. ECF No. 55. This Court granted that motion (ECF No. 56) and set an initial scheduling conference for July 16 (ECF No. 57). Plaintiffs have sent Defendants two sets of proposed stipulations. Negotiations continue on both sets.

## **II. Defendants' Preliminary Statement of the Case**

In this case, Plaintiffs seek a wholesale and sweeping change to how the federal government conducts searches and inspections of persons and merchandise crossing our nation's borders; the Government's authority to conduct such searches is broad and extensive, and it has been so established since the founding of the country. Plaintiffs seek to upset this long-settled

practice, despite a lack of caselaw in support. Defendants' position as to Plaintiffs' allegations and legal claims is set forth in their motions to dismiss as well as Defendants' Answer, filed June 1, 2018. ECF Nos. 14, 42.

Defendants specifically disagree with Plaintiffs' characterization of their legal claims insofar as they state that Plaintiffs "allege" that the First and Fourth Amendments prohibit border searches of electronic devices absent, "at a minimum, reasonable suspicion." Plaintiffs' Amended Complaint made repeated allegations that any searches or detentions of an electronic device require probable cause and/or a warrant. *See, e.g.*, Amended Complaint, ECF No. 7 at ¶¶ 1, 6, 9, 10, 46 169, 171, 173, Prayer for Relief (setting forth Plaintiffs' legal claims, that any searches or "confiscations"<sup>1</sup> are unlawful "absent probable cause" or "absent a warrant supported by probable cause").<sup>2</sup> Neither Plaintiffs' legal claims nor their prayer for relief cited reasonable suspicion. Indeed, the parties spent several months briefing a motion to dismiss directed at Plaintiffs' claim that the Fourth Amendment requires probable cause and a warrant for a border search of electronic devices (ECF Nos. 14-22); the Court has already ruled on that motion. Defendants subsequently answered the Amended Complaint (ECF No. 42). Plaintiffs have not sought to further amend their Complaint to add a "reasonable suspicion" claim (an amendment that now can only be granted by Defendants' consent or leave of Court under Rule 15(a)(2)). Plaintiffs cannot amend their complaints through pleadings and, as a result, any "reasonable suspicion" claim is not properly before the Court.

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<sup>1</sup> Plaintiffs use the term "confiscation" in their Amended Complaint without including a definition of that term. The relevant CBP and ICE policies do not refer to "confiscation;" they contain standard operating procedures for detaining, searching, reviewing, retaining, seizing, and sharing information contained in electronic devices pursuant to the border search authority.

<sup>2</sup> Counts 1 and 2 of the Amended Complaint explicitly allege that Defendants violate the Fourth and First Amendment by conducting searches "absent a warrant supported by probable cause."

### **III. Plaintiffs' Position on Pretrial Discovery and Motion Schedule**

#### **A. Overview**

To adjudicate this case, three issues must be resolved: (1) whether Defendants violate the First and Fourth Amendments by searching Plaintiffs' electronic devices without a warrant (and also without probable cause or reasonable suspicion); (2) whether Defendants violate the Fourth Amendment by confiscating Plaintiffs' electronic devices for prolonged periods without probable cause; and (3) whether Plaintiffs have standing and are entitled to injunctive and declaratory relief.

To facilitate the adjudication of these issues, Plaintiffs propose limited discovery regarding Defendants' policies and practices and Plaintiffs' standing. Plaintiffs anticipate that factual stipulations may narrow the scope of this discovery. Following this discovery, Plaintiffs propose to file cross-motions for summary judgment addressing the constitutional merits and Plaintiffs' entitlement to relief. Plaintiffs respectfully suggest that this Court should adjudicate this entire case on the basis of that record.

This Court need not address (in discovery, briefing, or adjudication) any factual predicate for Defendants' past searches and confiscations of Plaintiffs' electronic devices at the border, because Plaintiffs seek only prospective injunctive and declaratory relief against Defendants' policies and practices of searches and confiscations. If this Court holds that a warrant is required for searches, then Plaintiffs would prevail regarding searches, because there is no dispute that all of the device searches alleged in the Amended Complaint were conducted absent a warrant. If this Court holds that no suspicion is required for searches and confiscations, then Defendants would prevail. If this Court holds that probable cause or reasonable suspicion is required for searches, or that probable cause is required for confiscations, then Plaintiffs would prevail,

without regard to the factual predicate of the past searches and confiscations, because of the prospective nature of the relief sought.

If, however, (1) this Court holds that probable cause or reasonable suspicion, but not a warrant, is required for border searches or confiscations of electronic devices, and (2) this Court concludes, contrary to Plaintiffs' position, that it is necessary to address the factual predicate for Defendants' past searches and confiscations of Plaintiffs' devices, and (3) Defendants decline to stipulate that the officers lacked the requisite factual predicate – then at that point, the parties could undertake a second stage of discovery on whether the officers had the requisite factual predicate. Depending on the results of that discovery, the Court could then issue rulings on the remaining merits issues through summary judgment or trial.

**B. Scope of Discovery on Defendants' Policies and Practices**

In deciding whether a warrant is required to search travelers' electronic devices at the border, a critical issue will be the balancing of the parties' respective interests. As the Court stated in its Order denying Defendants' motion to dismiss, further factual development will illuminate those interests. *See, e.g.*, ECF No. 34 at pp. 41-42 (identifying “the limited record before the Court,” and later stating that “it is unclear—based on the record before the Court at this time”). Further, the cases Defendants cite below denying discovery are inapposite, because this case (unlike those) has disputed facts bound up with the legal questions.

Thus, Plaintiffs respectfully propose that fact discovery regarding Defendants' policies and practices on border searches and confiscations of travelers' electronic devices should include, but not be limited to:

1. Training and guidance on how border officers conduct device searches and confiscations, and information reflecting the invasiveness of such searches and the

duration and nature of confiscations.

2. The government interests that the challenged policies and practices purportedly serve.
3. Evidence regarding the extent to which the challenged policies and practices actually advance these interests.
4. The prevalence of digital contraband (*e.g.*, child pornography not already on the Internet) entering the United States with travelers at ports of entry, both in absolute terms, and also relative to the amount of digital contraband traveling over the Internet.
5. Evidence regarding the extent to which a warrant requirement for border searches of electronic devices would unduly impede Defendants' ability to advance the government interests.
6. Defendants' policies and practices on border officers seeking warrants to search travelers and their possessions.

### **C. Scope of Discovery on Plaintiffs' Standing**

In deciding whether to grant prospective relief, one issue will be whether Plaintiffs have proven their injunctive standing. Thus, Plaintiffs respectfully propose that fact discovery regarding Plaintiffs' standing to seek injunctive and declaratory relief should include, but not be limited to:

1. Defendants' aggregate data regarding the number of border searches and confiscations of travelers' devices.
2. The incident reports, database entries, and correspondence of border officers about the searches and confiscations of Plaintiffs' devices.
3. Any other information about Plaintiffs that is available to border officers when Plaintiffs cross the border.

4. Defendants' policies and practices regarding how border officers select travelers for device searches and confiscations.
5. The information from the searches of Plaintiffs' devices that Defendants continue to retain.

#### **IV. Defendants' Position on Pretrial Discovery and Motion Schedule**

This case turns on a question of law: whether the search or detention of electronic devices at the border requires probable cause and a warrant, under the First and Fourth Amendments. This is the central issue in this case based on how Plaintiffs pled their claims in the Amended Complaint. Fact discovery is therefore "not proportional to the needs of the case," as it will not assist the Court in resolving the facial legal challenge posed by Plaintiffs. *See* Fed. R. Civ. Pro. 26(b)(1). Indeed, courts routinely deny discovery where a facial legal challenge is made. *See, e.g., Diaz v. City of Fitchburg*, 176 F.3d 560, 562 (1st Cir. 1999) (noting and approving a *sua sponte* grant of summary judgment as claim of a "*per se* violation of the . . . federal constitution[] is a question of law which does not depend on the development of further facts"); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, No. 2:08-MD-1954, 2009 WL 3824393, at \*3 (D. Me. Nov. 16, 2009) (holding that a "question of law alone" by definition "did not depend on further development of the record through discovery"); *Goss Int'l Americas, Inc. v. MAN Roland, Inc.*, No. CIV. 03-CV-513-SM, 2006 WL 1134930, at \*1 (D.N.H. Apr. 28, 2006) ("[L]egal contentions are not a proper subject for factual discovery."). Plaintiffs' contention that there are "disputed facts bound up with the legal questions" is at odds with how they have set forth their claims in this litigation. This is particularly true given that Defendants have made their extensive guidance and standard operating procedures for conducting border searches of electronic devices public and have also published a privacy impact assessment further describing

these procedures. See <https://www.cbp.gov/document/directives/cbp-directive-no-3340-049a-border-search-electronic-devices>; <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp008-bordersearcheselectronicdevices-january2018.pdf>. Concerning Plaintiffs' desire for discovery as to standing, this Court has already determined that all Plaintiffs have plausibly alleged a basis for standing, on every claim, and on every basis of injury alleged. Where the Court has already concluded that standing exists, further discovery on this issue seems similarly unnecessary.<sup>3</sup>

As to Plaintiffs' proposal for "stages" of discovery," Defendants concur that Plaintiffs have no immediate need for discovery as to whether each search of each Plaintiff was supported by a requirement for probable cause and a warrant. But this issue would also not be appropriate for any second "stage" of discovery either. Plaintiffs seek injunctive and declaratory relief, precluding the Government from conducting any electronic border searches in the future absent probable cause and a warrant. CBP and ICE policies permit border searches absent probable cause and a warrant, and thus, for injunctive relief purposes, it is immaterial whether Plaintiffs past border searches were, in fact, supported by probable cause or a warrant. Indeed, Plaintiffs concede herein that the factual predicate as to each search of Plaintiffs' devices is irrelevant here, obviating the need for related discovery. Defendants accordingly oppose Plaintiffs' request for a second phase of discovery, if necessary.

To the extent that the Court determines that any factual development through discovery is appropriate, Defendants are willing to discuss the possibility of stipulations that may obviate the need for any discovery on particular topics. And if the parties are unable to agree on stipulations,

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<sup>3</sup> Moreover, there is some inconsistency on what Plaintiffs contend would be appropriate for discovery on standing. They note that there is no need for the Court to address the "factual predicate for Defendants' past searches and confiscations of Plaintiffs' electronic devices at the border" but then they also simultaneously say they need discovery of the incident reports associated with the searches of Plaintiffs' devices.



and the Court determines discovery is in order, Defendants would propose to undertake limited discovery on certain subjects. Given Plaintiffs' statement that they do not require discovery on the predicate for the searches of the Plaintiffs, Defendants would propose to allow requests for admission and interrogatories on the following topics, which are somewhat similar to topics listed by Plaintiffs: (1) the government's interests in preserving its ability to conduct border searches of electronic devices without a warrant or probable cause and/or (2) the logistical and legal challenges associated with requiring probable cause and a warrant for all border searches of electronic devices.

#### **V. Joint Proposed Schedule**

While the parties do not agree on whether discovery is proper, or on the proper topics of discovery, the parties are attempting to reach agreement on factual stipulations which may resolve some of those issues. In addition, to the extent this Court allows discovery, the parties agree that the following discovery and briefing schedule would be proper:

- Rule 26(a) disclosures: either 30 days (Plaintiffs' position) or 45 days (Defendants' position) after entry of scheduling order.
- Close of discovery: four months after entry of scheduling order. Defendants separately note that because the scope of any discovery is as yet unclear, Defendants may need to subsequently assess the obligations imposed by any required discovery, in order to determine an appropriate time-frame.
- Briefing on cross-motions for summary judgment:
  - Plaintiffs' motion for summary judgment: five months after entry of scheduling order.
  - Defendants' cross-motion for summary judgment and opposition to Plaintiffs'

motion for summary judgment: six months after entry of scheduling order.

- Plaintiffs' opposition to Defendants' cross-motion for summary judgment and reply in support of Plaintiffs' motion for summary judgment: seven months after entry of scheduling order.
- Defendants' reply in support of Defendants' motion for summary judgment: eight months after entry of scheduling order.

#### **VI. Limitations on Discovery**

Defendants propose that the following forms of discovery be permitted to the extent the Court determines discovery is in order: 25 interrogatories (including sub-parts) and 25 requests for admissions. Defendants do not presently contemplate a need for either party to engage in depositions or requests for production. Defendants propose that, to the extent that any depositions and/or requests for production are provided for by the Court, then Defendants should be given the same number of depositions and/or requests for production as Plaintiffs.

Given the scope of issues to be explored, Plaintiffs propose 40 interrogatories (including sub-parts) and 30 requests for admissions. Plaintiffs also request that each party be permitted the ordinary scope of requests for production and depositions as provided by the Federal Rules of Civil Procedure and the local rules.

#### **VII. Settlement**

Plaintiffs submitted a written settlement demand to Defendants on June 4, 2018. Defendants will not accede to Plaintiffs' demand.

#### **VIII. Magistrate Judge**

The parties do not consent at this time to trial by a magistrate judge.

#### **IX. Certifications**

The parties separately filed certifications as required by Local Rule 16.1(d)(3). *See* ECF Nos. 43-54.

Respectfully submitted,

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