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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KAJI DOUSA,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

CASE NO. 19cv1255-LAB (KSC)

**ORDER DENYING PLAINTIFF'S
MOTION FOR A PRELIMINARY
INJUNCTION [Dkt. 25];**

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS [Dkt. 36]**

Plaintiff Kaji Dousa, a Christian pastor, is compelled by her religious beliefs to minister to asylum seekers and others on the Mexican side of our nation's southern border. As a result of her activities on the border, she alleges the Government has subjected her to surveillance, detention, and harassment, all of which impermissibly burden her right to freely exercise her religion. She now seeks a preliminary injunction requiring the Government to cease its pattern of retaliation. The Government, for its part, argues that Dousa's claims are not cognizable and must be dismissed. For the reasons discussed below, Dousa's Motion for a Preliminary Injunction is **DENIED** and Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

BACKGROUND

1
2 Plaintiff Kaji Dousa is a U.S. citizen who serves as the Senior Pastor at Park
3 Avenue Christian Church in New York City. She also serves as the co-chair of the New
4 Sanctuary Coalition (“New Sanctuary”), a faith-based network of congregations,
5 organizations, and individuals dedicated to immigrant rights. As a member of the United
6 Church of Christ, Dousa follows the teachings of Jesus Christ and is compelled by her
7 religious beliefs to minister to, among others, migrants and refugees.

8 For several years, Dousa has felt specifically compelled to minister to migrants at
9 the U.S. Southern Border with Mexico. In 2018, for example, she helped organize a
10 “Sanctuary Caravan,” which she describes as a mobile clinic of faith leaders,
11 congregants, and humanitarian workers who provided pastoral services, including prayer
12 and church-blessed marriage ceremonies, to migrants seeking asylum in the United
13 States. Her ministry is wide-ranging and includes providing support and religious
14 guidance to individuals who have suffered sexual assault, family violence, and political
15 persecution. As a pastor, she claims a religious and moral obligation to keep all
16 information she receives confidential.

17 As part of the Sanctuary Caravan, Dousa continued visiting Tijuana, Mexico
18 throughout the winter of 2018 and 2019 to provide pastoral services to migrants and their
19 advocates. On January 1, 2019, while Dousa was in meetings in San Diego,
20 confrontations erupted at the border between United States Customs and Border Patrol
21 (“CBP”) agents and a group of migrants. The incident, which involved the use of tear gas,
22 received widespread coverage in the media. Neither Dousa nor any other clergy in the
23 Sanctuary Caravan were directly involved in this confrontation.

24 On January 2, 2019, Dousa traveled from San Diego to Tijuana to gather
25 information about the previous day’s confrontation. When she attempted to reenter the
26 United States that afternoon using her Global Entry card—a method she had previously
27 used to enter the United States without incident—she was sent to a secondary inspection
28 area. At some point during this secondary inspection, Dousa was questioned by a CBP

1 officer who asked her for standard information, including her name and date of birth, how
2 many times she had crossed the border, and the reasons she was in Tijuana. But the
3 officer also asked more probing questions, including details of her work with the “migrant
4 caravan,” whether she had encouraged asylum seekers to lie in their asylum applications,
5 and whether she was involved in illegal activities. Dousa denied involvement with
6 anything illegal or encouraging asylum seekers to lie, and she was eventually released
7 into the United States. The parties disagree on the length of Dousa’s detention. Dousa
8 alleges that she was “[confined to] the waiting area for several hours” before being
9 questioned by the CBP officer, while the Government argues that, according to its
10 records, “only about 43 minutes passed between the time [Dousa] was sent to secondary
11 and her release by CBP.” Complaint (“Compl.”), Dkt. 1, ¶ 49; Opposition (“Opp.”), Dkt.
12 36, at 4.

13 On March 6, 2019, NBC 7 San Diego published whistleblower documents from the
14 Department of Homeland Security (“DHS”) related to a program called “Operation Secure
15 Line.” The document relevant here, titled “San Diego Sector Foreign Operations Branch:
16 Migrant Caravan FY-2019, Suspected Organizers Coordinators, Instigators, and Media,”
17 is dated January 9, 2019 and contains information about 59 people supposedly
18 associated with the migrant caravan. This document contains a photograph of each
19 individual—usually from a passport, but in some cases from social media—and other
20 personal information, including date of birth, arrest records, and any adverse immigration
21 action taken by the Government, such as having a visa or SENTRI card¹ revoked. In
22 Dousa’s case, she observed that her photo had a yellow “X” over it and an accompanying
23 note stating “Disposition: SENTRI Revoked.” See October 11, 2019 Dousa Declaration,
24

25 _____
26 ¹ According to the Government, SENTRI (Secure Electronic Network for Travelers Rapid
27 Inspection) and Global Entry are both “Trusted Traveler” programs that allow expedited
28 entry into the United States. Although there are some differences between the programs,
the two programs provide the same expedited clearance benefits for someone returning
to the United States on foot or in an automobile. See Oliveri Decl., Dkt. 59-2, ¶ 3.

1 Dkt. 55-1, Exs. F, G. She alleges the Government's decision to place her on this list and
2 revoke her SENTRI membership was a direct result of her activity on the border.

3 Dousa claims the Government's retaliation following the January 2019 border
4 incident was part of a larger pattern of surveillance of immigration activists dating back at
5 least a year. On the same day she learned of the NBC 7 report about Operation Secure
6 Line, for example, she read an article by *The Nation* regarding Immigration and Customs
7 Enforcement ("ICE") surveillance of protests in her hometown of New York. See Jimmy
8 Tobias, *Exclusive: ICE Has Kept Tabs on 'Anti-Trump' Protesters in New York City*, THE
9 NATION (Mar. 6, 2019), [https://www.thenation.com/article/ice-immigration-protest-](https://www.thenation.com/article/ice-immigration-protest-spreadsheet-tracking/)
10 [spreadsheet-tracking/](https://www.thenation.com/article/ice-immigration-protest-spreadsheet-tracking/). According to that article, one of her organizations, New
11 Sanctuary, was repeatedly referenced in an ICE spreadsheet labeled "Anti-Trump
12 Protests." The report quoted email exchanges between ICE officers in which the officers
13 discussed events organized by New Sanctuary. One such event was an immigration-
14 related Ash Wednesday demonstration in New York in February 2018, nearly a year
15 before the border incident. According to the article, ICE officials attended this event and
16 one official is quoted as saying that monitoring the event "saves us the trip of going over
17 to the church," which Dousa understood to mean that ICE was also surveilling the Judson
18 Memorial Church where she often works with New Sanctuary. Another event on the
19 spreadsheet was a "Suitcase Rally" Dousa led. She believes this event was likewise
20 monitored by the Government. Finally, when Dousa and several others went to meet with
21 ICE's New York Field Office Deputy Director, Scott Mechkowski, in January 2018, the
22 official told Dousa that he "know[s] exactly how to find [her]," that she is "all over the
23 documents that [he] has," and that he "know[s] [her] network just as good as [she] do[es]."
24 July 24, 2019 Dousa Decl., Dkt. 25-1, ¶ 49.

25 Dousa brought this suit in July 2019 alleging four causes of action: (1) Retaliation
26 in Violation of the First Amendment; (2) Violation of the First Amendment's Free Exercise
27 Clause; (3) Hybrid First Amendment Rights Claim; and (4) Violation of the Religious
28 Freedom Restoration Act ("RFRA"). She now seeks a preliminary injunction (1)

1 restraining the Government from surveilling, detaining, or otherwise targeting her for her
2 protected activity, and (2) ordering Defendants to restore her SENTRI status. The various
3 defendants—who, except where relevant, are referred to collectively as “Defendants” or
4 “the Government”—move to dismiss Dousa’s complaint, arguing that she does not have
5 standing to bring this suit and, in any event, has not stated a plausible cause of action.

6 ANALYSIS

7 1. Standing

8 The Court begins, as it must, with deciding whether Dousa has standing to pursue
9 her claims. It concludes that she does.

10 The judicial power of federal courts is limited to “cases and controversies.” See
11 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting U.S. Const. art. III, § 2).
12 The shorthand for determining whether a live case or controversy exists is whether a
13 given plaintiff has “standing” to pursue the claims at issue. *Id.* To satisfy Article III’s
14 standing requirement, a plaintiff must show (1) she has suffered an “injury in fact” that is
15 (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
16 (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is
17 likely, as opposed to merely speculative, that the injury will be redressed by a favorable
18 decision. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

19 A plaintiff seeking injunctive relief, as Dousa does here, must meet several other
20 requirements to have standing. As the Ninth Circuit explained in *Bates v. United Parcel*
21 *Serv., Inc.*, 511 F.3d 974, 985-86 (9th Cir. 2007):

22 The standing formulation for a plaintiff seeking prospective
23 injunctive relief is simply one implementation of *Lujan’s*
24 requirements. The plaintiff must demonstrate that he has
25 suffered or is threatened with a “concrete and particularized”
26 legal harm, *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, coupled
27 with “a sufficient likelihood that he will again be wronged in a
28 similar way.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111,
103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). As to the second
inquiry, he must establish a “real and immediate threat of
repeated injury.” *O’Shea v. Littleton*, 414 U.S. 488, 496, 94
S.Ct. 669, 38 L.Ed.2d 674 (1974). “[P]ast wrongs do not in

1 themselves amount to [a] real and immediate threat of injury
2 necessary to make out a case or controversy.” *Lyons*, 461
3 U.S. at 103, 103 S.Ct. 1660. However, “past wrongs are
4 evidence bearing on whether there is a real and immediate
5 threat of repeated injury.” *O’Shea*, 414 U.S. at 496, 94 S.Ct.
6 669. In addition, the claimed threat of injury must be likely to
7 be redressed by the prospective injunctive relief. *Graham v.*
8 *Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th
9 Cir.1998) (recognizing that “[p]laintiffs need not demonstrate
10 that there is a ‘guarantee’ that their injuries will be redressed
11 by a favorable decision” but “only that a favorable decision is
12 *likely* to redress” their injuries) (quotation marks and citation
13 omitted).

9 The parties’ dispute here focuses largely on the first prong of the standing analysis:
10 whether Dousa has suffered a concrete, particular harm that is likely to repeat without
11 court intervention. In Dousa’s view, she has suffered at least three separate harms, which
12 the Court addresses in turn. First, she alleges the Government has revoked, or at least
13 attempted to revoke, her SENTRI card, thereby hindering her ability to enter the United
14 States. Second, the Government detained and interrogated her on January 2, 2019 as a
15 direct result of her engaging in protected activity on the Southern Border. Third, the
16 Government has “extensively monitored” her domestic activities even prior to the January
17 2019 border incident. The cumulative effect of these harms, Dousa argues, is that she is
18 dissuaded from traveling to Mexico and ministering to refugees, something her religious
19 beliefs compel her to do. More saliently, she “feels compelled to warn penitents about
20 the possibility of government surveillance, chilling her ability to provide pastoral
21 counseling and absolution.” Reply, Dkt. 55, at 5; July 24, 2019 Dousa Decl. ¶¶ 40, 41.

22 The Court concludes that the first two alleged harms are not of the type that would
23 provide Dousa standing to sue. As to the supposed revocation of Dousa’s SENTRI card,
24 the Government has submitted competent evidence² that Dousa *never* possessed a

25 _____
26 ² The Government makes both factual and facial challenges to Dousa’s standing. In
27 resolving a factual attack, such as this argument regarding the revocation of Dousa’s
28 SENTRI card, the court may “review evidence beyond the complaint without converting
the motion into a motion for summary judgment. The court need not presume the

1 SENTRI card. See Oliveri Decl. ¶ 4. Instead, in 2016, Dousa applied for and received
2 Global Entry, a similar but distinct program that allows expedited entry into the United
3 States. *Id.* Dousa’s Global Entry privileges have never been revoked or suspended, and
4 her Global Entry status remains valid until it expires on August 22, 2022. *Id.* Why Dousa’s
5 photo appeared on the NBC 7 whistleblower documents with the comment “SENTRI
6 revoked” remains a mystery, (see October 11, 2019 Dousa Declaration, Dkt. 55-1, Exs.
7 F, G), but the evidence shows that the Government did not in fact revoke Dousa’s
8 expedited entry privileges, so this is not the type of concrete harm that provides standing
9 to sue.

10 So too with her detention and interrogation at the border in January 2019. As
11 discussed above, Dousa alleges that when she attempted to return to the United States
12 from the Sanctuary Caravan meeting in Tijuana, CBP officials held her for “several hours”
13 before questioning and ultimately releasing her into the United States. See July 24, 2019
14 Dousa Decl. ¶ 21. The official first asked personal questions, including her address, date
15 of birth, and how many times she had crossed the border. *Id.* ¶ 22. He also inquired into
16 her activities in Tijuana, her ministry to migrants, and her involvement with the Sanctuary
17 Caravan. *Id.* ¶ 23. Finally, he asked more probing questions about whether she had
18 engaged in any illegal activities in Tijuana and whether she had ever encouraged
19 migrants to lie on their asylum applications. *Id.* ¶ 24. Dousa provided truthful answers to
20 these questions and was eventually released. Although Dousa alleges that this encounter
21 lasted “several hours,” government evidence now shows that just 43 minutes elapsed
22 between the time she was referred to secondary inspection and the time she was released
23 into the United States. See Oliveri Decl. ¶ 6 (“[T]he time between [Dousa’s] referral to
24 the secondary inspection area at the SYPOE[] and her release by officers questioning
25 her in secondary[] was 43 minutes.”); Oliveri Decl. Ex. B (“At approximately 1847 hours,

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truthfulness of the plaintiff’s allegations.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,
1039 (9th Cir. 2004) (internal citations omitted).

1 Kaji Dousa applied for entry into the [United States]. . . . Dousa was released at
2 approximately 1930 hours.”). More importantly, though, the detention appears to have
3 been an isolated incident. Since the January 2, 2019 questioning, Dousa has left and
4 reentered the United States three times. *Id.* ¶¶ 5-7. Two of these trips—one in April 2019
5 and another in November 2019—involved the same San Ysidro port of entry where she
6 was detained in January. *Id.* The other trip, in August 2019, was to the Bahamas. *Id.*
7 On two of these trips, she used her Global Entry card for reentry, and on all three of the
8 trips she was allowed to reenter the United States without detention or questioning. As
9 such, even assuming for the sake of argument that Dousa’s January 2, 2019 detention
10 was a direct result of her engaging in protected activity, she has not shown that she faces
11 “a real and immediate threat of repeated injury” absent an injunction. *Updike v.*
12 *Multnomah Cty.*, 870 F.3d 939, 948 (9th Cir. 2017) (“Although past wrongs are evidence
13 bearing on whether there is a real and immediate threat of repeated injury, past wrongs
14 do not in themselves amount to a real and immediate threat of injury necessary to make
15 out a case or controversy.”) (citations, quotation marks, and alterations omitted). She
16 therefore lacks standing to seek injunctive relief based on this harm.³

17 Dousa’s final alleged harm—the Government’s pattern of domestic surveillance
18 and the chilling effect it has on Dousa’s ministry—is a closer call. Dousa points to at least
19 four separate incidents dating back to early 2018 as support for her argument that the
20 Government regularly surveils her religious and political activities. First, according to
21 leaked government spreadsheet she found online, ICE officials attended two separate
22 immigration-related demonstrations she held in early 2018: an Ash Wednesday
23 demonstration she organized in New York in February 2018 and a “Suitcase Rally” she
24 organized sometime later. Notably, ICE officials were quoted as saying that attending the
25 Ash Wednesday “saves us the trip of going over to the church,” which Dousa understood

26 _____
27 ³ The Court acknowledges that this incident may still be relevant to the extent it is part of
28 a larger pattern of surveillance. By itself, though, it is not enough to provide Dousa with
standing to seek prospective injunctive relief.

1 to mean that ICE was also surveilling the Judson Memorial Church where she often works
2 with New Sanctuary. July 24, 2019 Dousa Decl., ¶ 34. Second, in January 2018, Dousa
3 and several others met with ICE's New York Field Office Deputy Director, Scott
4 Mechkowski. During that meeting, Mechowski told Dousa that he "know[s] exactly how
5 to find [her]," that she is "all over the documents that [he] has," and that he "know[s] [her]
6 network just as good as [she] do[es]." *Id.* ¶ 49. Finally, and perhaps most relevant to this
7 case, Dousa has uncovered a document entitled "Migrant Caravan FY-2019 Suspected
8 Organizers, Coordinators, Instigators, and Media," in which the Government lists Dousa
9 and 58 others as possible targets for investigation. See Perdue Decl., Dkt. 55-12, at CBP
10 00035-44. This list was compiled roughly one week after Dousa was detained and
11 questioned at the border, even though the Government acknowledges that the
12 questioning resulted in no "derogatory information" about Dousa. *Id.* at CBP 00030.

13 Dousa alleges that this surveillance has "upended" her ministry. See Reply at 5.
14 Among other things, she has canceled a planned trip to Mexico and has refrained from
15 blessing marriages of migrants, fearing that her involvement might subject the participants
16 to government monitoring. See July 24, 2019 Dousa Decl. ¶ 42, 45. She also feels
17 compelled to warn penitents about the possibility of government surveillance, chilling her
18 ability to provide pastoral counseling and absolution. *Id.* ¶¶ 40-41, 44. Finally, her church
19 has declined to host a *pro se* asylum clinic and has seen migrants and refugees deterred
20 from participating in church activities. *Id.* ¶¶ 37-38.

21 The Court concludes that this surveillance is a concrete harm that gives rise to
22 standing. The Ninth Circuit has long recognized that where a party is "chilled from
23 participating in worship activities . . . because they fear the Government is spying on
24 them," that party, under certain circumstances, has standing to sue. *The Presbyterian*
25 *Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989). Dousa has plausibly
26 shown that the Government surveilled her religious and political activities for the better
27 part of two years and that she has withdrawn from many of her normal religious activities
28 as a result of that surveillance.

1 Further, unlike the January 2019 border stop, there is no indication that the
2 surveillance will stop without court intervention. The surveillance began in early 2018 and
3 continued at least through January 2019, several months before Dousa brought this suit.
4 Government records from August 8, 2019 continue to describe Dousa as a “Suspect,”
5 although they do not describe what makes her a suspect. See Perdue Decl. at CBP
6 00050. All told, the duration and extent of past surveillance means that it’s not a stretch
7 to think the surveillance continues today. Dousa therefore faces “a real and immediate
8 threat of repeated injury.” *Updike*, 870 F.3d at 947. As discussed in more detail below,
9 these allegations may be insufficient to support the entry of a preliminary injunction, but
10 Dousa has shown that she has suffered a concrete (if subjective) harm as a result of the
11 Government’s actions, which is sufficient to find standing here.

12 The Government’s final argument on standing is that the conduct alleged in
13 Dousa’s complaint is not fairly traceable to each of the named defendants. Dousa seeks
14 relief against CBP, ICE, DHS, the individual heads of each of those agencies agency in
15 their official capacities, and CBP’s Director of Field Operations in San Diego. Each of
16 these agencies and officers was at least arguably involved in the pattern of surveillance
17 Dousa alleges. CBP’s San Diego field office oversees the San Ysidro Port of Entry, and
18 CBP is itself a division of DHS. Because the January 2019 incident at San Ysidro is a
19 significant part of Dousa’s allegation of government surveillance, each of those
20 defendants is properly named. ICE, which is also a division of DHS, is alleged to have
21 participated in the surveillance through, among other things, its monitoring of Dousa’s
22 political activity in New York. The Court finds that Dousa has adequately demonstrated
23 her standing to seek injunctive relief against each of the defendants.

24 In short, Dousa has demonstrated that she has standing to pursue her claims
25 against the Government based on its pattern of surveillance and the chilling effect this
26 surveillance has had on her exercise of protected activity. Defendants’ motion to dismiss
27 for lack of jurisdiction under Rule 12(b)(1) is **DENIED**.

28 ///

1 **2. Dousa’s Motion for Preliminary Injunction**

2 Dousa seeks a preliminary injunction restraining the Government from surveilling,
3 detaining, or otherwise targeting her for engaging in protected activity. As discussed
4 previously, Dousa brings four separate causes of action: (1) Retaliation in Violation of the
5 First Amendment; (2) Violation of the First Amendment’s Free Exercise Clause; (3) Hybrid
6 First Amendment Rights Claim; and (4) Violation of RFRA. The Government argues that
7 she is unlikely succeed on the merits of any of these claims and that her request for a
8 preliminary injunction must therefore be denied.

9 A plaintiff seeking a preliminary injunction must establish that she is “likely to
10 succeed on the merits, that [s]he is likely to suffer irreparable harm in the absence of
11 preliminary relief, that the balance of equities tips in h[er] favor, and that an injunction is
12 in the public interest.” *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir.
13 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). These
14 are commonly referred to as the “*Winter* factors.”

15 **a. Likelihood of Success on the Merits**

16 The first prong of the injunction inquiry is whether the plaintiff is likely to succeed
17 on the merits of her claims. “Likelihood of success on the merits ‘is the most important’
18 *Winter* factor,” and the Court need not consider the remaining factors if this threshold
19 element is not satisfied. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th
20 Cir. 2017) (quoting *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citations
21 omitted). Taking each of Dousa’s substantive claims in turn, the Court concludes that
22 she cannot, at this stage, show a likelihood of success on the merits.

23 **i. Free Exercise**

24 Dousa first alleges that the Government’s pattern of surveillance impermissibly
25 burdens her First Amendment right to freely exercise her religious beliefs.

26 The Free Exercise Clause guards an individual’s practice of her own religion
27 against restraint or invasion by the Government. See *Sch. Dist. Of Abington Twp., Pa. v.*
28 *Schempp*, 374 U.S. 203, 222–23 (1963). In order to establish a violation of the Free

1 Exercise Clause, a plaintiff must establish that the challenged conduct resulted in an
2 impairment of the plaintiff's free exercise of genuinely held beliefs. See *United States v.*
3 *Lee*, 455 U.S. 252, 256–57 (1982). In evaluating these claims, the Court must be mindful
4 that “every person cannot be shielded from all burdens incident to exercising every aspect
5 of the right to practice religious beliefs.” *Id.* at 261. Indeed, “the right of free exercise
6 does not relieve an individual of the obligation to comply with a ‘valid and neutral law of
7 general applicability on the ground that the law proscribes (or prescribes) conduct that his
8 religion prescribes (or proscribes).” *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990); see
9 also *Christian Legal Soc. Chapter of the Univ. of Cal. Hastings Coll. Of Law v. Martinez*,
10 561 U.S. 661, 697 n. 27 (2010) (“[T]he Free Exercise Clause does not inhibit enforcement
11 of otherwise valid regulations of general application that incidentally burden religious
12 conduct.”).

13 Ordinarily, the framework for analyzing a Free Exercise claim is straightforward.
14 The court first determines whether the Governmental action being challenged is “neutral
15 and of general applicability,” meaning that the object of the Government action is not “to
16 infringe upon or restrict practices *because of* their religious motivation.” *Church of the*
17 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 533 (1993) (emphasis
18 added). The court then applies the appropriate judicial review test. If the Government
19 action is neutral and generally applicable, rational basis review applies, “even if the law
20 has the incidental effect of burdening a particular religious practice.” *Id.* at 531. If the
21 action infringes upon religious practices *because of* their religious motivation, it is subject
22 to strict scrutiny. *Id.*

23 The application of that framework to this case is not so straightforward. The
24 primary wrinkle here is that, unlike most Free Exercise claims, Dousa does not challenge
25 a specific government law or regulation. She instead challenges the Government's
26 pattern of surveilling her activities, which she claims was a direct result of her engaging
27 in protected religious activities. In such situations, “when the challenged government
28 action is neither regulatory, proscriptive or compulsory,” the question is not necessarily

1 whether the Government action is neutral and generally applicable, but rather “whether it
2 substantially burdens a religious practice and either is not justified by a substantial state
3 interest or is not narrowly tailored to achieve that interest.” *Am. Family Ass’n, Inc. v. City*
4 *& Cty. Of San Francisco*, 277 F.3d 1114, 1123-24 (9th Cir. 2002).

5 Dousa has not shown at this stage that the Government has substantially
6 burdened her Free Exercise rights. The harms she alleges—a “canceled trip to Mexico,
7 refrain[ing] from blessing migrant marriages, hav[ing] her pastoral counseling chilled,” see
8 Reply at 19—are subjective, and the Ninth Circuit is clear that “a subjective chilling effect
9 on free exercise rights is not sufficient to constitute a substantial burden.” *Id.* at 1124;
10 *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1394 (9th Cir. 1994) (same). Two cases
11 are instructive.

12 First, in *Vernon v. City of Los Angeles*, the Ninth Circuit found that a plaintiff had
13 not demonstrated a substantial burden where he alleged that a government investigation
14 had “chilled [him] in the exercise of his religious beliefs, fearing that he can no longer
15 worship as he chooses, consult with his ministers and the elders of his church, participate
16 in Christian fellowship and give public testimony to his faith without severe consequence.”
17 *Vernon*, 27 F.3d at 1394. While the investigation did not interfere with his ability to
18 communicate with God, it “interfered with his freedom to worship in the way he wants
19 without repercussions.” *Id.* (alterations omitted). The court found that this amounted
20 only to a “subjective chilling effect[] with neither ‘a claim of specific present objective
21 harm [n]or a threat of specific future harm.’” *Id.* at 1395 (quoting *Laird v. Tatum*, 408 U.S.
22 1, 14 (1972)). “Such chilling effects are simply not objectively discernable and are
23 therefore not constitutionally cognizable.” *Id.*

24 A more recent case, *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202 (9th
25 Cir. 2019), reached the same result. The plaintiffs there—both Muslims who provided
26 counseling at a local mosque—brought suit against the FBI for surveillance of their
27 mosque. Like Dousa, the Plaintiffs there alleged that they retreated from their normal
28 religious practices as a result of this surveillance:

1 Plaintiffs . . . allege that they altered their religious practices
2 as a result of the FBI's surveillance: Malik trimmed his beard,
3 stopped regularly wearing a skull cap, decreased his
4 attendance at the mosque, and became less welcoming to
5 newcomers than he believes his religion requires. AbdelRahim 'significantly decreased his attendance to
6 mosque,' limited his donations to mosque institutions, and
7 became less welcoming to newcomers than he believes his
8 religion requires. Fazaga, who provided counseling at the
9 mosque as an imam and an intern therapist, stopped
10 counseling congregants at the mosque because he feared the
11 conversations would be monitored and thus not confidential.

9 *Fazaga*, 916 F.3d at 1247. The Ninth Circuit held that even though the plaintiffs had, by
10 all accounts, fundamentally changed the way they practiced their religion in response to
11 the Government surveillance, the Government defendants were entitled to qualified
12 immunity because it was not clearly established that surveillance like this constituted a
13 "substantial burden." *Id.* at 1248.

14 Dousa's alleged harms are remarkably similar to those alleged in *Fazaga* and
15 *Vernon*. Like the plaintiffs in those cases, Dousa alleges that she has refrained from
16 providing religious counseling and from blessing marriages, fearing that those services
17 might be monitored. The Ninth Circuit is clear, though, that these are "subjective chills"
18 that do not rise to the level of a substantial burden.⁴ Importantly, she does not face a
19 "present objective harm [n]or a threat of specific future harm." *Vernon*, 27 F.3d at 1395.
20 She remains free to travel to Mexico, to minister there, and to return to the United States
21 with ease. Indeed, she has used her Global Entry privileges to travel abroad multiple
22 times in the last year. The evidence at this stage suggests that any harms felt are not the
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25 ⁴ There is a certain tension in the Ninth Circuit's precedent on this point. A church or a
26 pastor that alleges a reduction in membership may have suffered a substantial burden,
27 see, e.g., *Presbyterian Church*, 870 F.2d at 521–22, while the individual who was deterred
28 from attending that same church may *not* have suffered a substantial burden because
they were "subjectively chilled." See, e.g., *Vernon*, 27 F.3d at 1395. Adding further layers
of complexity, the Ninth Circuit recognizes that the same injury that establishes standing
in this context may be insufficient to constitute a "substantial burden." See *id.* at 1394.

1 direct result of government action, but rather a result of her decision to limit her religious
2 practices for her own subjective reasons.

3 To be clear, if the Government had revoked Dousa’s SENTRI card (and Dousa
4 could show that the revocation was the result of her engaging in protected activity), the
5 Court would have no problem finding a substantial burden. That action would effectively
6 amount to a government sanction, and it would undoubtedly make it more difficult for her
7 to travel and to practice her sincerely held beliefs. The problem on this front is that the
8 Government has submitted evidence that it has *not* rescinded her SENTRI card, so she
9 cannot rely on this to demonstrate a likelihood of success on her Free Exercise claim.

10 In sum, Dousa’s alleged Free Exercise harms do not rise above a “subjective chill.”
11 The Court is therefore unable to conclude that she is likely to succeed on the merits of
12 this claim.

13 **ii. Violation of RFRA**

14 Dousa’s next claim is that the Government’s actions in this case violate RFRA. For
15 the same reasons she has failed to show a likelihood of success on the merits on her
16 Free Exercise claim, the Court concludes that she has also failed to show a likelihood of
17 success on her RFRA claim.

18 Congress enacted RFRA in 1993 in response to the Supreme Court’s decision in
19 *Smith*, 494 U.S. 872. Prior to *Smith*, courts analyzed Free Exercise claims under a
20 balancing test—similar to the one applied above—that looked to whether the challenged
21 government action imposed a substantial burden on the practice of religion and then
22 applied the appropriate level of scrutiny. See *Burwell v. Hobby Lobby Stores, Inc.*, 573
23 U.S. 682, 694 (2014) (discussing the development of RFRA). *Smith* changed that
24 landscape, holding that, under the Free Exercise clause, a “neutral, generally applicable
25 law” may substantially burden a religious practice even when it is not supported by a
26 compelling governmental interest. *Id.* Congress, seeking to bring back the traditional
27 “substantially burdens” test, then passed RFRA, which provides that a “rule of general
28 applicability” that “substantially burden[s] a person’s exercise of religion” may be upheld

1 only if it is the least restrictive means of advancing a compelling government interest. See
2 42 U.S.C. §§ 2000bb-1. In other words, any substantial burden is subject to strict scrutiny.

3 The analysis for Free Exercise claims and RFRA claims is similar, especially
4 where, as here, the government conduct challenged is “neither regulatory, proscriptive or
5 compulsory”—that is, where the government action is something other than a law or
6 regulation. *Am. Family Ass’n*, 277 F.3d at 1123-24. This is because the Ninth Circuit has
7 held that the Supreme Court’s decision in *Smith* had no effect on Free Exercise claims
8 premised on government actions other than laws or regulations, leaving in place (for that
9 narrow slice of Free Exercise claims) the same pre-*Smith* framework Congress sought to
10 bring back with RFRA. See *id.* A plaintiff must show two elements to establish a prima
11 facie case under RFRA: “First, the activities the plaintiff claims are burdened by the
12 Government action must be an ‘exercise of religion.’ Second, the Government action
13 must ‘substantially burden’ the plaintiff’s exercise of religion.” *Navajo Nation v. U.S.*
14 *Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (citations omitted). If the plaintiff
15 establishes a prima facie case, the burden shifts to the Government to show a compelling
16 interest that is implemented by the least restrictive means. *Burwell*, 573 U.S. at 705.

17 The Government concedes that Dousa’s activities are an “exercise of religion,”
18 satisfying the first prong of the *prima facie* RFRA analysis. The problem here for Dousa
19 is that she is still must show that the Government has “substantially burdened” those
20 activities. See *Navajo Nation*, 535 F.3d at 1076 (9th Cir. 2008) (“Absent a substantial
21 burden, the Government need not establish a compelling interest, much less prove it has
22 adopted the least restrictive means.”). The analysis applied to determine a substantial
23 burden under RFRA is identical to the standard applied under the Free Exercise clause.
24 See *id.* Because the Court has already concluded that Dousa is unlikely to show a
25 substantial burden in the Free Exercise context, it likewise concludes that she is unlikely
26 to show a substantial burden in the RFRA context.

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1 **iii. First Amendment Retaliation**

2 Dousa next argues that the Government’s actions in this case constitute retaliation
3 for her exercise of First Amendment rights.

4 To succeed on a First Amendment retaliation claim, a plaintiff must show that (1)
5 she engaged in constitutionally protected activity; (2) as a result, she was subjected to
6 adverse action by the defendant that would chill a person of ordinary firmness from
7 continuing to engage in the protected activity; and (3) there was a substantial causal
8 relationship between the constitutionally protected activity and the adverse action. *Blair*
9 *v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). The Government does not dispute
10 that Dousa’s ministry work on the border and her vocal opposition to the Government’s
11 immigration policies constitute “constitutionally protected activity,” so the Court will focus
12 on the latter two elements.

13 For at least some of the Government’s conduct, Dousa has not shown that there
14 was a “substantial causal relationship” between her protected activity and Government’s
15 adverse action. This causation element is generally “understood to be but-for causation.”
16 *Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012) (citing *Hartman v. Moore*, 547
17 U.S. 250, 260 (2006)). She alleges, for example, that the Government surveilled two of
18 her immigration-related rallies in New York. See Compl. at ¶¶ 69-70. Although Dousa
19 has provided the Court with little evidence regarding this specific aspect of the
20 surveillance, the limited information she has provided suggests the Government
21 monitored the events not *because of* Dousa’s protected activities, but because of ICE’s
22 statutory mandate to enforce the nation’s immigration laws and the fact that Dousa’s
23 events were attended by undocumented aliens. In other words, Dousa has not shown—
24 at least not with the level of particularity needed to secure injunctive relief—that the
25 Government’s surveillance was a result of her protected activity rather than a byproduct
26 of the fact that her work (religious or not) intersects with two areas of interest to the
27 Government: the border and undocumented aliens.

28

1 Other aspects of the Government’s surveillance seem more directly related to
2 Dousa’s First Amendment activities. The Government’s decision to place her on a list of
3 “Suspected Organizers, Coordinators, Instigators, and Media,” for example, seems to be
4 quite clearly linked to her work on the border. See Perdue Decl. at CBP-00035. The
5 name of the document alone conveys a message that the Government understood her to
6 be an “organizer, coordinator, or instigator,” all descriptors that carry speech-related
7 implications. Another field report describes the “Migrant Caravan” as “a common cause
8 for numerous open border, humanitarian, and other groups with the goal to challenge
9 U.S. immigration laws.” *Id.* at CBP-00022. That report identifies Pastor Dousa, among
10 others, as having traveled to the Southern Border as part of that project. Again, the fact
11 that Dousa is listed on a document of individuals whose goal is to “challenge U.S.
12 immigration laws” strongly suggests the Government’s decision to monitor her activities
13 was motivated at least in part by Dousa’s protected speech.

14 But it’s not enough to show that the retaliation was a direct result of her protected
15 activity. She must also show that the retaliation was an adverse action that “would chill
16 a person of ordinary firmness from continuing to engage in the protected activity.” *Blair*,
17 608 F.3d at 543. Dousa has not made that showing here. “The most familiar adverse
18 actions are ‘exercise[s] of governmental power’ that are ‘regulatory, proscriptive, or
19 compulsory in nature.” *Blair*, 608 F.3d at 544 (9th Cir. 2010) (quoting *Laird*, 408 U.S. at
20 11). As the Ninth Circuit explained in *Blair*:

21 The prototypical plaintiff in these cases is a government
22 worker who loses his job as a result of some public
23 communication critical of the Government entity for whom he
24 works, *e.g.*, *Pickering v. Bd. Of Educ. Of Township High Sch.*
25 *Dist.*, 391 U.S. 563, 564 (1968) (teacher dismissed by the
26 Board of Education after sending a letter critical of the Board
27 to a local newspaper), or a regulated entity that is stripped of
28 its business license after engaging in speech that displeases
the regulator, *e.g.*, *CarePartners, LLC v. Lashway*, 545 F.3d
867, 871 (9th Cir. 2008) (boarding home operators engaged
in lobbying and other speech and petition activities which they
alleged led to retaliation by the regulators), or a prisoner who

1 is retaliated against by prison officials for filing grievances or
2 initiating actions in court, e.g., *Bruce v. Ylst*, 351 F.3d 1283,
3 1286 (9th Cir. 2003) (prison officials allegedly retaliated
4 against prisoner on the basis of his jailhouse lawyering
5 activities), or citizens who are allegedly targeted by law
6 enforcement because of their political speech activities, e.g.,
Mendocino Env'tl. Ctr. [v. Mendocino Cty.], 192 F.3d [1283,]
1288–89 (9th Cir. 1999) (police officers sued for engaging in
conspiracy to falsely accuse political activists of a crime in an
effort to inhibit their political activities).

7 *Blair*, 608 F.3d at 544.

8 Dousa bears little similarity to these “prototypical” retaliation plaintiffs. The
9 Government has not taken “regulatory, proscriptive, or compulsory” steps to restrict her
10 First Amendment activities, as would be the case if it had revoked her SENTRI card and
11 made it objectively more difficult for her to travel abroad. Nor has she shown a pattern of
12 government detention at the border⁵ or any other affirmative government action that
13 would limit her exercise of constitutionally protected activities. At this stage, Dousa’s
14 alleged harm amounts to a single, isolated incident of questioning at the border and a
15 generalized practice of monitoring her border-related activities. The Court acknowledges
16 that this pattern of surveillance may have caused Dousa subjective harm; she feels as
17 though she is being watched and feels compelled to warn potential penitents that they
18 might be watched too. The Court also acknowledges that, in some circumstances,
19 surveillance might become so pervasive that it becomes tantamount to “regulatory,
20 proscriptive, or compulsory” government action. But at this stage, the Court cannot find
21 that Dousa is likely to show that she suffered adverse government action that would chill
22 a person of ordinary firmness from engaging in protected activity. It therefore cannot find
23 that she is likely to succeed on her First Amendment retaliation claim.

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25 _____
26 ⁵ Especially if viewed in the light most favorable to Dousa, a pattern of detention could be
27 seen as analogous to false arrest that might give rise to a cognizable retaliation claim.
28 *Cf. Mendocino Env'tl. Ctr.*, 192 F.3d at 1288 (finding a triable retaliation claim where the
defendants obtained a search warrant based on false information and then arrested the
plaintiffs in retaliation for their political speech).

1 **iv. Hybrid First Amendment Rights**

2 Dousa’s final substantive claim is a “hybrid” First Amendment rights claim. She
3 argues that where a “Free Exercise claim is brought in conjunction with a claim alleging
4 a separate constitutional violation for the same communicative activity, strict scrutiny is
5 triggered and the Government policy, custom or practice in question must be justified by
6 a compelling governmental interest and narrowly tailored to advance that interest.” Mot.
7 at 19 (citing *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir.
8 2004)). The “hybrid rights” doctrine, however, has been effectively repudiated, at least in
9 the Ninth Circuit. See *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir.
10 2008) (noting that the hybrid rights doctrine has been “widely criticized” and declining to
11 “be the first court . . . [to] allow[] a plaintiff to bootstrap a free exercise clause in this
12 manner”); *Ass’n of Christian Sch. Int’l v. Stearns*, 362 F. App’x 640, 646 (9th Cir. 2010)
13 (re-affirming the decision in *Jacobs*); *Church of the Lukumi*, 508 U.S. at 566–67 (Souter,
14 J., dissenting) (explaining why the hybrid rights doctrine is “ultimately untenable”). As
15 such, the Court cannot conclude that Dousa is likely to succeed on the merits of this claim.

16 **b. Remaining Injunction Factors and Conclusion**

17 “Likelihood of success on the merits ‘is the most important’ *Winter* factor; if a
18 movant fails to meet this ‘threshold inquiry,’ the court need not consider the other [three]
19 factors in the absence of ‘serious questions going to the merits.’” *Disney Enters., Inc.*,
20 869 F.3d at 856 (quoting *Garcia*, 786 F.3d at 740 (citations omitted)). Because Dousa
21 has failed to make the threshold showing that she is likely to succeed on the merits of her
22 claims, the Court does not address the remaining three injunction factors: irreparable
23 harm, balance of equities, and public interest.

24 It bears repeating that a preliminary injunction is an “extraordinary remedy that
25 may only be awarded upon a clear showing that the plaintiff is entitled to relief.” *Winter*,
26 555 U.S. at 22. The conclusion here that Dousa is not entitled to an injunction is simply
27 a finding that she has not made that “clear showing” at this stage; it is not a finding that
28 she *cannot* make that showing down the line, perhaps with the advantage of additional

1 discovery. For now, though, Dousa’s Motion for a Preliminary Injunction is **DENIED**.
2 Dkt. 25.

3 **3. Government’s Motion to Dismiss**

4 The final motion before the Court is the Government’s motion to dismiss Dousa’s
5 complaint under Rule 12(b)(6). In its view, none of Dousa’s four causes of action state a
6 plausible claim for relief. The Court (mostly) disagrees. Although she has not made a
7 “clear showing” that she is entitled to an injunction, each of Dousa’s three substantive
8 claims are plausible. With additional evidence, for example, it is plausible that the
9 Government’s pattern of continued surveillance might rise to the level of a “substantial
10 burden” that would support a Free Exercise or RFRA claim. It is likewise possible that
11 she might uncover additional evidence showing that the surveillance was so pervasive
12 that it is actionable as a First Amendment retaliation claim.

13 The Court agrees with the Government on one point. For reasons already
14 discussed, the Court finds that Dousa cannot state a Hybrid First Amendment Rights
15 claim as a matter of law. Accordingly, the Defendants’ Motion to Dismiss under Rule
16 12(b)(6) is **GRANTED** as to Dousa’s Hybrid First Amendment Rights claim, and that claim
17 is **DISMISSED WITH PREJUDICE**. The remainder of the Defendants’ Motion to Dismiss
18 is **DENIED**. Dkt. 36.

19 **CONCLUSION**

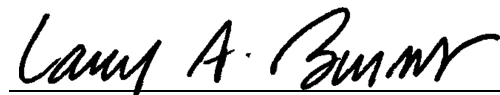
20 For the reasons above:

- 21 1. Dousa’s Motion for Preliminary Injunction is **DENIED** [Dkt. 25];
- 22 2. Defendants’ Motion to Dismiss under Rule 12(b)(1) is **DENIED** [Dkt. 36];
- 23 3. Defendants’ Motion to Dismiss under Rule 12(b)(6) is **GRANTED** as to Dousa’s
24 Third Cause of Action (Hybrid First Amendment Rights Claim), and that Claim is
25 **DISMISSED WITH PREJUDICE** [Dkt. 36];
- 26 4. Defendants’ Motion to Dismiss under Rule 12(b)(6) is otherwise **DENIED**; and
- 27 5. The Motions by Interested Parties Mijente, The General Synod of the United
28 Church of Christ, and the National Council of Churches for Leave to File Amicus

1 Briefs are **GRANTED** [Dkt. 52, 56]. The Court thanks these and other amici for
2 the time they have spent on this matter.

3 **IT IS SO ORDERED.**

4 Dated: January 27, 2020



5 **HONORABLE LARRY ALAN BURNS**
6 Chief United States District Judge

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