UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

MARK PETTIBONE, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., *et al.*,

Defendants.

Case No. 3:20-cv-1464-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge.

FINDINGS

Plaintiffs are individuals and organizations involved in the Black Lives Matter protests centered around downtown Portland during the summer of 2020. After plaintiffs were arrested or allegedly injured by federal officers, plaintiffs filed suit against a number of defendants including, as relevant to the currently pending motion to dismiss, several federal officers in their official capacities and two United States agencies—the Department of Homeland Security ("DHS") and the United States Marshals Service ("USMS") (collectively the "Agency Defendants").[1] The Agency Defendants moved to dismiss plaintiffs' claims against them on several grounds, including that the court lacks subject matter jurisdiction over the claims because

[1] Plaintiffs' claims against other defendants have been addressed in separate Findings and Recommendations and Orders. *See* ECF 95, 149, 205, and 228.

plaintiffs do not have standing to seek prospective equitable relief, their claims have become moot, or plaintiffs otherwise fail to state a claim for relief. Mot. Dismiss 5, ECF 26 (citing FED. R. CIV. P. 12(b)(1), 12(b)(6)). As explained more fully below, the motion to dismiss should be granted as to all claims that plaintiffs assert against the Agency Defendants. The conditions related to protest activity in Portland, and the federal response to any such activity, have drastically changed since this case was filed, thus rendering plaintiffs' claims for declaratory relief moot. Additionally, plaintiff Mark Pettibone lacks standing to seek expungement of records that the Agency Defendants retain related to his arrest because Pettibone has not shown that the Agency Defendants' retention of those records creates a substantial risk of imminent harm.

I. Background

Starting in late May 2020, and for more than 80 consecutive nights at the time this action was filed in August 2020, protestors gathered and marched in large numbers in the streets of Portland, including the area surrounding the federal courthouse and the Multnomah County Justice Center. Second Am. Compl. ¶ 54, ECF 80. On June 26, 2020, former President Trump issued Executive Order 13,933 on "Protecting American Monuments, Memorials, and Statutes and Combating Recent Criminal Violence," which directed cabinet officials and federal agency administrators, including defendant Chad Wolf[2] as then-Acting Secretary of the Department of Homeland Security, to provide "personnel to assist with the protection of Federal monuments, memorials, statues, or property." *Id.* ¶ 56. Wolf and other DHS officials "created and sent a Rapid Deployment Force to Portland in advance of the July 4, 2020 holiday weekend as part of

[2] Secretary Alejandro Mayorkas is automatically substituted for former Acting Secretary Wolf for all official-capacity claims. FED. R. CIV. P. 25(d).

what they termed 'Operation Diligent Valor.' " *Id.* ¶ 59. Federal agents from Customs and Border Protection, Immigration and Customs Enforcement, and the U.S. Marshals Service all participated in the operation. *Id.* ¶¶ 59–60.

According to the Complaint, these federal agents, while purportedly engaged in the mission to "protect federal property," used harsh and severe tactics against the protestors that included "surveillance, warrantless arrests, or custodial detentions of protesters, and the indiscriminate use of excessive force, including shooting protesters in the head and body with impact munitions and pepper balls, spraying them directly in the face with pepper spray, shoving them to the ground, hitting and beating them with batons, and firing massive clouds of tear gas at them, even when doing so was not necessary to protect federal property or the persons on it." *Id.* ¶ 62. And it is these actions, as specifically used against plaintiffs here at various times, that are the basis of plaintiffs' complaint.

The Complaint alleges that plaintiff Mark Pettibone was "snatched off the street by unidentified federal agents, who arrested him and detained him in jail for hours without ever informing him of the reasons for their actions, much less charging him with an offense." *Id.* ¶ 119. Plaintiff Mac Smiff was shot by a federal agent "in the head with an impact munition while he was lawfully attending the protests," *id.* ¶ 134, and plaintiff James McNulty was shot "three times with rubber bullets and one time with a pepper ball." *Id.* ¶ 198. Plaintiff Andre Miller was "shot . . . in the head with a tear gas cannister, causing a gash in his head that required seven stitches and a concussion that continues to have lingering effects," *id.* ¶ 145, and plaintiffs Nichol Denison and Maureen Healy were hit in the head with tear gas cannisters or other projectiles. *Id.* ¶¶ 151, 163. Federal agents knocked plaintiff Christopher David to the ground, struck him multiple times with batons, and sprayed him with chemical irritant. *Id.* ¶¶ 172–73.

Other federal agents also struck plaintiff Duston Obermeyer with batons and sprayed him in the face at point-blank range with a chemical irritant. *Id.* ¶ 189. Plaintiffs Black Millennial Movement and Rose City Justice, Inc. have sued on behalf of their members who participated in the protests and were injured by the federal agents' alleged use of excessive force. *Id.* ¶¶ 16–17; 203–218.

Plaintiffs' suit asserts five claims against the Agency Defendants:

- **Second Claim for Relief (First Amendment)** – Defendants used force against plaintiffs based on viewpoint discrimination, in violation of the First Amendment.
- **Third Claim for Relief (Unlawful Agency Action) –** Pettibone's warrantless arrest, conducted pursuant to the Policy and a final agency action, exceeded the officers' authority pursuant to 40 U.S.C. § 1315.
- **Fourth Claim for Relief (Unlawful Agency Action)** – Defendants' use of excessive force against plaintiffs to suppress and retaliate against speech, done pursuant to the Policy and a final agency action, exceeded the officers' authority under 40 U.S.C. § 1315.
- **Fifth Claim for Relief (Fourth Amendment)** – Defendants unlawfully arrested and searched Pettibone without probable cause or any other exception that would permit a warrantless arrest, in violation of the Fourth Amendment.
- **Sixth Claim for Relief (*Ultra Vires* Action)** – Defendants' actions exceeded their statutory authority and were unconstitutional.

Resp. 6–7, ECF 105; *see also* Sec. Am. Compl. ¶¶ 226–276, ECF 80. All plaintiffs seek declaratory relief that the Agency Defendants' actions were unlawful and unconstitutional. *Id.*, Prayer ¶¶ 1–5, 9. Pettibone additionally seeks an injunction requiring the Agency Defendants to disclose what records they kept about his allegedly unconstitutional arrest and whether the Agency Defendants have disseminated information about his arrest, and to expunge "all records and information they have retained about [him] collected during his unlawful arrest, including any information collected from his cell phone." *Id.*, Prayer ¶¶ 6–8.

The Agency Defendants move to dismiss plaintiffs' claims against them on several grounds, including that the court lacks subject matter jurisdiction over the claims because

plaintiffs do not have standing to seek the requested relief or their claims have become moot, and that plaintiffs otherwise fail to state a claim for relief. Mot. Dismiss 5, ECF 26 (citing FED. R. CIV. P. 12(b)(1), 12(b)(6)). The court stayed decision on the motion while the parties conducted jurisdictional discovery. *See* ECF 86. In the time since the Agency Defendants filed their motion, several judges in this district have dismissed similar claims for equitable relief against federal entities and officials arising from the 2020 protests as moot. *See* Not. Supp. Auth., ECF 207; *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-01035-SI, 2022 WL 4466881, at *6–8 (D. Or. Sept. 26, 2022); *Wolfe v. City of Portland*, 566 F. Supp. 3d 1069, 1086–87 (D. Or. 2021); *Wise v. City of Portland*, 539 F. Supp. 3d 1132, 1144–47 (D. Or. 2021); *W. States Ctr., Inc. v. United States Dep't of Homeland Sec.*, No. 3:20-cv-01175-JR, 2021 WL 1896965, at *1 (D. Or. May 11, 2021). Largely, those decisions relied on the significant change in circumstances regarding protest activity in Portland since the cases were filed in the summer of 2020. The protests became much smaller and less frequent, and they moved away from downtown Portland. *Index Newspapers*, 2022 WL 4466881 at *6–7. The federal government changed its planning and approach in responding to the protests. *Wise*, 539 F. Supp. 3d at 1144–46. And given those changes, the plaintiffs' alleged future injuries that may result from protests and a federal response of similar intensity are not likely to reoccur. *Wolfe*, 566 F. Supp. 3d at 1086–87.

In light of those developments, the court ordered the parties to conduct limited discovery on mootness, and to submit supplemental briefing discussing the issue. ECF 229; *see also* Defs. Supp. Br., ECF 234; Pl. Supp. Br., ECF 239. After considering the parties' supplemental briefing, the undersigned initially issued Findings and Recommendations recommending that the Agency Defendants' motion be denied as to Pettibone's expungement claim but granted as to all other claims against the Agency Defendants. Findings and Recommendations (April 14, 2023),

ECF 247, *withdrawn by* Order (Aug. 14, 2023), ECF 278. After those Findings and Recommendations were issued, the Agency Defendants filed a Notice of Supplemental Authority alerting the court to *Phillips v. U.S. Customs & Border Prot.*, 74 F.4th 986, 988 (9th Cir. 2023), a new Ninth Circuit decision analyzing whether a group of plaintiffs had standing to seek expungement of records that were allegedly collected in violation of their constitutional rights and held by federal agencies. Not. Supp. Auth. 1–2, ECF 269. The initial Findings and Recommendations were thus withdrawn, and the court ordered supplemental briefing from the parties to analyze the effect of *Phillips*, if any, on the Agency Defendants' motion to dismiss Pettibone's expungement claims. *See* Order (Aug. 14, 2023), ECF 278. The following analysis is based on the parties' initial briefing on the Agency Defendants' motion, the numerous rounds of supplemental briefing, and the Ninth Circuit's recent decision in *Phillips*, as explained in more detail below.

II. Rule 12(b)(1) Standard

A motion to dismiss under Rule 12(b)(1) challenges the court's jurisdiction over the subject matter of the complaint. FED. R. CIV. P. 12(b)(1). One of the limits on federal courts' subject matter jurisdiction comes from Article III of the federal Constitution, which empowers federal courts to decide only "cases" or "controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). This limitation "precludes the exercise of jurisdiction by a federal court unless the plaintiff has suffered some actual injury or faces a threatened injury, and the injury is fairly traceable to the action challenged and is likely to be redressed by a favorable decision." *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 617 (9th Cir. 1999) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464,

472 (1982)). "All of these justiciability limitations are reflected in the doctrines of standing, mootness, and ripeness." *Id.* (citing *Lee v. State of Oregon,* 107 F.3d 1382, 1387 (9th Cir. 1997)).

"The party asserting federal subject matter jurisdiction bears the burden of proving its existence." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). Defendants may challenge subject matter jurisdiction either through a "facial attack" or through a "factual attack." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A facial attack "accepts the truth of the plaintiff's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction." *Id.* (internal quotation marks omitted). In contrast, a factual attack "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Id.*

III. Discussion

A. Plaintiffs' Claims for Declaratory Relief

To have standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 816 (9th Cir. 2017) (quoting *Spokeo*, 578 U.S. at 338). Standing is assessed based on the facts of the case at the time the action was commenced. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002). The plaintiff "must demonstrate standing separately for each form of relief sought." *Mattis*, 868 F.3d at 815.

The injury "must be both concrete and particularized," meaning it must be a "real, and not abstract" injury that is personal to the plaintiff. *Spokeo*, 578 U.S. at 340 (simplified). A plaintiff seeking prospective declaratory relief must show a realistic threat that the defendants will repeat the violation. *Armstrong v. Davis*, 275 F.3d 849, 860–61 (9th Cir. 2001); *Mayfield v.*

United States, 599 F.3d 964, 969 (9th Cir. 2010) (noting a declaratory judgment is a form of prospective relief); *see also In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) ("A plaintiff threatened with future injury has standing to sue if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.") (simplified). "The burden of showing a likelihood of recurrence is firmly on the plaintiff." *Nelsen v. King Cnty.*, 895 F.2d 1248, 1251 (9th Cir. 1990) (simplified).

The parties vigorously dispute whether plaintiffs had standing—either individually or associationally—when plaintiffs filed this case in August of 2020. Mot. Dismiss 6–19, ECF 26; Resp. 8–16, ECF 105. But even assuming without deciding that plaintiffs had standing, a more pressing question is whether plaintiffs still have a case to pursue or whether their claims for declaratory relief are now moot. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 66–67 (1997) (explaining that a court may evaluate mootness without first determining standing because both issues go to the court's "Article III jurisdiction [and] not to the merits of the case").

For a federal court to retain Article III jurisdiction, "an actual, ongoing controversy [must] exist at all stages of federal court proceedings." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017) (citation omitted); *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998) ("A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III[.]"). Generally, a case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (internal quotation marks omitted). The "central question" in analyzing mootness where a plaintiff seeks declaratory relief is "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d

1125, 1129 (9th Cir. 2005); *see also Cook v. Brown*, 364 F. Supp. 3d 1184, 1189 (D. Or. 2019), *aff'd,* 845 F. App'x 671 (9th Cir. 2021) ("The test for mootness in the declaratory judgment context is whether there is a substantial controversy between parties with adverse legal interests that are sufficiently immediate to warrant declaratory relief.") (citing *Biodiversity Legal Found.*, 309 F.3d at 1174–75). The party asserting mootness bears the burden of establishing it. *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).

The substantial change in circumstances around the protest activity in Portland and the federal approach to protest activity since plaintiffs filed this suit in August of 2020 have rendered plaintiffs' claims for declaratory relief moot.[3] *Clark v. City of Lakewood*, 259 F.3d 996, 1012 (9th Cir. 2001), *as amended* (Aug. 15, 2001) (analyzing whether plaintiffs' "future injuries are now too conjectural or hypothetical to satisfy the injury-in-fact requirement . . . to pursue injunctive relief"). First, the "number, size, and scope" of the protests have reduced significantly since plaintiffs initiated this suit. *Index Newspapers*, 2022 WL 4466881 at *4; *see also Wolfe*, 566 F. Supp. 3d at 1083 (describing "significant change" in protest activity between the summer of 2020 and summer of 2021); *Wise*, 539 F. Supp. 3d at 1147 (noting that the protests had decreased in size and frequency, and changed locations). Between November of 2020 and March of 2021, there were 65 protests near federal property, 8 of which were declared unlawful assemblies. Zitny Decl. ¶ 6, ECF 26-2. And there is no evidence in the record of any protest

[3] Plaintiffs' prayer for relief seeks several forms of declaratory relief and to "enjoin" the Agency Defendants to take certain actions related to the records of Pettibone's arrest. To the extent plaintiffs' complaint could be broadly read to as seeking other forms of injunctive relief, for example, to forbid the use of certain crowd control or other policing tactics, the mootness analysis would be the same. *See* Mot. Dismiss 15–17, ECF 26; *Bayer*, 861 F.3d at 864 ("[A] claim for injunctive relief becomes moot once subsequent events have made clear the conduct alleged as the basis for the requested relief could not reasonably be expected to recur.") (simplified).

directed at federal property in downtown Portland being declared an unlawful assembly since at least June of 2021. *See Wolfe*, 566 F. Supp. 3d at 1083. That is vastly different than the situation in the summer of 2020, when between May and October, protests occurred daily and regularly devolved into violence, vandalism, and destruction that led to the use of force by federal officers; over 1,000 people were arrested and 219 law enforcement officers were injured during that time. Zitny Decl. ¶¶5–7, ECF 26-2.

The federal law enforcement presence in Portland and the federal response to protests here have also significantly changed. The number of officers from Federal Protective Services and the U.S. Marshalls Service has returned to pre-2020 levels. Clenenden Decl., Ex. C at 7–9, ECF 235-3. Nor is there any evidence in the record that the Federal Protective Service ("FPS") has declared a protest in Portland to be an unlawful assembly since June 11, 2021, or that any federal officers have allegedly used excessive force or improperly dispersed protests since March of 2021. *See* Reply 5, ECF 127; Pl. Supp. Br. 2–3, ECF 237; *Index Newspapers*, 2022 WL 4466881 at * 4 ("No protests were declared unlawful from June 11, 2021 to August 11, 2021. By comparison, from May 26, 2020 to October 31, 2020, protests occurred daily that were declared unlawful.").

The Biden Administration has substantially departed from the policies and approach of former President Trump in responding to protest activity. *See Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 622 (1974) ("Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor."). On June 26, 2020, former President Trump issued Executive

Order 13,933 on "Protecting American Monuments, Memorials, and Statutes and Combating Recent Criminal Violence," which prioritized investigation and prosecution of individuals engaged "in efforts to incite violence or other illegal activity in connection with . . . the riots and acts of vandalism" that had occurred during some of the summer 2020 protests in Portland and around the country. Exec. Order No. 13933, 85 Fed. Reg. 40,081, 40,082–83 (June 26, 2020); *see also* Second Am. Compl. ¶ 56, ECF 80. The Order also directed cabinet officials and federal agency administrators, including defendant Chad Wolf, as then-Acting Secretary of the Department of Homeland Security, to provide "personnel to assist with the protection of Federal monuments, memorials, statues, or property." Exec. Order No. 13933 at 40,083. The provision regarding the additional deployment of federal agents expired in December of 2020, and President Biden revoked Executive Order 13933 in May of 2021.[4]

Although plaintiffs' claims here are not identical to those in the other 2020 protest cases in this district, the changed circumstances described above regarding protest activity in Portland and the federal response to it have still mooted plaintiffs' claims for declaratory relief against the Agency Defendants. Plaintiffs allege past harms in that they were injured by federal officers' alleged use of excessive force. Second Am. Compl. ¶¶ 119–218, ECF 80. But past harms are not sufficient to maintain a claim for prospective equitable relief, and the chain of circumstances that must exist for plaintiffs to be again subject to the conduct challenged in the complaint is too

[4] The court takes judicial notice of President Biden's "Executive Order on the Revocation of Certain Presidential Actions and Technical Amendment" pursuant to FED. R. EVID. 201(c)(1). *See Executive Order on the Revocation of Certain Presidential Actions and Technical Amendment* (May 14, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/14/executive-order-on-the-revocation-of-certain-presidential-actions-and-technical-amendment/; *see also Wise*, 539 F. Supp. 3d at 1146 n.11 (taking judicial notice of President Biden's same Executive Order).

attenuated to show that the conduct alleged as the basis for injunctive relief could "reasonably be expected to recur." *Wise*, 539 F. Supp. 3d at 1145 (quoting *Bayer*, 861 F.3d at 864). As Judge Simon explained in holding that other protestors' similar claims were moot in *Wolfe*, a showing that plaintiffs' alleged injuries would reoccur requires "attempting to anticipate whether and when these Plaintiffs might attend a social justice protest that is then declared an unlawful assembly. Then if such a protest is declared an unlawful assembly, it must result in a law enforcement response that includes the alleged excessive force, . . . or other misconduct. Finally, the Plaintiffs must be harmed by that alleged misconduct." 566 F. Supp. 3d at 1086 (simplified). The circumstances now are such that plaintiffs' speculation about the potential for future protests and how the federal government may respond are not sufficient to satisfy the injury-in-fact or legally cognizable interest requirement. *Id.* at 1086; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (explaining that a plaintiff may not rely "on mere conjecture about possible governmental actions" to demonstrate injury, and must instead present "concrete evidence to substantiate their fears"); *cf. Steffel v. Thompson*, 415 U.S. 452, 475 (1974) (holding that declaratory relief is appropriate where a plaintiff "demonstrates a genuine threat" of future injury).

Plaintiffs' Third, Fourth, and Sixth Claims assert in various ways that the Agency Defendants' actions exceeded their statutory authority under 40 U.S.C. § 1315. Animating these claims is the allegation that the Agency Defendants "adopted a policy to retaliate against and to deter the protesters because of their views and beliefs." Resp. 22, ECF 105 (internal quotation marks omitted); Second Am. Compl. ¶ 62, ECF 80. Even if such a "policy" existed, plaintiffs' claims for injunctive relief regarding that policy are moot because, as explained above, plaintiffs have failed to demonstrate that "there is a realistic danger or credible threat" that "a probabilistic

harm [to plaintiffs] will materialize" in the future as a result of that policy. *Wolfe*, 566 F. Supp. 3d at 1086 (quoting *Doe #1 v. Trump*, 335 F.R.D. 416, 429-30 (D. Or. 2020)) (simplified); *see also Wise*, 539 F. Supp. 3d at 1142–43 (rejecting similar allegations regarding a "policy of generalized anti-protest law enforcement" as too "nebulous and ill-defined [to] establish a substantial or certainly impending risk" of future harm).

Finally, the "capable of repetition yet evading review" exception to the mootness doctrine does not apply here. This exception is used where "(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992). With regard to the first factor, as previous cases in this district have demonstrated, it is possible for plaintiffs to seek and, in the proper case, for the court to enter an injunction or provide some other equitable relief against federal defendants using excessive force against protestors. *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1126 (D. Or. 2020); *see also Wise*, 539 F. Supp. 3d at 1148–49 (rejecting application of "capable of repetition, yet evading review" exception to mootness in protest case). But, secondly, as explained above, there is not a "reasonable expectation or a demonstrated probability" that the same confluence of circumstances will arise. *Wise*, 539 F. Supp. 3d at 1149 (citing *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 837 (9th Cir. 2014) ("The exception was designed to apply to situations where the type of injury involved inherently precludes judicial review, not to situations where review is precluded as a practical matter.")) (simplified).

Thus, plaintiffs' claims seeking various forms of declaratory relief are moot. Second Am. Compl., Prayer ¶¶ 1–5, 9, ECF 80.

B. Pettibone's Claim for Expungement

Pettibone's individual claim for relief against the Agency Defendants is distinct from those brought by the other plaintiffs because Pettibone seeks a different remedy—expungement of records related to his allegedly unconstitutional arrest that are maintained by the Agency Defendants. Pettibone requests the following relief for this specific claim:

> 6. Enjoin Defendants to inform Mr. Pettibone whether Defendants maintain records relating to his unlawful arrest, including without limitation, photographs, notes and/or records of the arrest, and any information collected from Mr. Pettibone's cell phone;
> 7. Enjoin Defendants to inform Mr. Pettibone whether Defendants disseminated records relating to Mr. Pettibone's arrest to other individuals and/or agencies;
> 8. Enjoin Defendants to expunge all records and information they have retained about Mr. Pettibone collected during his unlawful arrest, including any information collected from his cell phone[.]

Second Am. Compl., Prayer ¶¶ 6–8, ECF 80.

Primarily, the Agency Defendants assert that Pettibone lacks standing to seek expungement of records related to his arrest because the agencies "do not maintain any formal record of Pettibone's alleged arrest," or that Pettibone's expungement requests are moot in light of the limited jurisdictional discovery that the parties have completed in the time since the initial motion to dismiss has been pending. Mot. Dismiss 35, ECF 26; *see also* Reply Not. Supp. Auth. 2, ECF 281. As an initial matter, both sides assert in some fashion that the opposing party's arguments on the issue of standing raised in the court-ordered supplemental briefing are untimely or waived. *See* Resp. Not. Supp. Auth. 2–3, ECF 271; Reply Not. Supp. Auth. 4–6, ECF 281. Those arguments are rejected in light of the new authority from the Ninth Circuit in *Phillips*, discussed below, and also because the issue of standing goes to the court's subject matter jurisdiction, which cannot be waived. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.

1983) ("[L]ack of subject matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction.").

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). "[E]xpungement is a form of prospective relief" because "[a]n expungement order would compel the government to take action in the future to destroy a record." *Phillips v. United States*, No. 2:19-cv-06338-SVW-JEM, 2021 WL 2587961, at *8 (C.D. Cal. June 22, 2021) (citing *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007)). To establish standing for prospective injunctive relief, "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

The Ninth Circuit's decision in *Phillips* clarified and explained the law in this circuit regarding a plaintiff's standing to seek expungement of records held by a federal agency. The plaintiffs in *Phillips* sought expungement of records collected as part of a surveillance program conducted by the United States Customs and Border Protection ("CBP"), Immigration and Customs Enforcement, and Federal Bureau of Investigation, in conjunction with state, local, and Mexican law enforcement officials, among others. 74 F.4th at 988–89. This surveillance operation gathered information about the plaintiffs in connection with their apparent involvement in a migrant caravan comprised of tens of thousands of people that approached the southern border of the United States in 2018 and 2019. *Id.* at 989. As part of the operation, "CBP gathered information on individuals it believed were associated with the migrant caravan" using "both

open source information available to the public, such as media reports and social media pages, as well as preexisting law enforcement databases, which were not publicly available." *Id.* The three plaintiffs in *Phillips* were all "stopped by border officials in 2019 when attempting to cross the United States-Mexico border." *Id.* One of the plaintiffs was subject to an allegedly unreasonable search and seizure during an attempted crossing. *Id.* at 990. Each was subsequently able to cross the border, sometimes numerous times. *See id.* at 989–90.

The plaintiffs brought suit, alleging that the government violated their "First Amendment rights of free speech and free association because the government 'collected and maintain[s] records describing Plaintiffs' First Amendment-protected activity.' " *Id.* at 990 (alteration in original). The one plaintiff who had been subjected to a search alleged that the search and the collection and retention of information that resulted from it violated his Fourth Amendment rights. *Id.* The plaintiffs' suit "sought an injunction ordering the government 'to expunge all records unlawfully collected and maintained about plaintiffs, and any information derived from that unlawfully obtained information,' as well as other injunctive and declaratory relief." *Id.* (simplified).

The district court granted summary judgment in favor of the government on the basis that the plaintiffs lacked standing to seek expungement, and the Ninth Circuit affirmed. *Id.* at 988. The Ninth Circuit first rejected the plaintiffs' claim that the "government's unlawful collection and retention of records alone gives rise to a concrete injury for purposes of standing." *Id.* at 995. Rather, to have standing to seek expungement of records, a plaintiff must show that the retention of those records "gives rise to a tangible harm or material risk of future tangible harm, or bears 'a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts,' like 'reputational harms, disclosure of private information, and intrusion upon seclusion'

or those 'specified by the Constitution itself.' " *Id.* at 992 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021)) (additional citations omitted). That is true even where the plaintiff alleges that the "information at issue was collected in violation of a plaintiff's constitutional rights." *Id.* at 993.

The Ninth Circuit then found that the "government's retention of the records allegedly obtained in violation of [the plaintiffs'] First and Fourth Amendment rights" was not a "concrete and ongoing injury" sufficient to establish Article III standing. *Id.* at 995. First, there was no evidence that the government had used or would use the records "in the future to investigate plaintiffs or prevent them from crossing the border or that a third party will obtain the records and use them to plaintiffs' detriment." *Id.* Additionally, the types of information contained in the record, such as the plaintiffs' names, birthdays, addresses, and political associations, were not "so sensitive that another's access to that information 'would be highly offensive to a reasonable person . . . or otherwise gives rise to reputational harm or injury to privacy interests" that could support Article III standing. *Id.* at 995–96. Because the plaintiffs "fail[ed] to establish that the government's retention of the records constitutes a concrete harm," the Ninth Circuit held "that they lack standing to seek expungement of the records." *Id.* at 996.

In light of *Phillips*'s clarification and explanation of standing in the context of expungement of records held by a federal agency, Pettibone has failed to establish standing to seek expungement. As in *Phillips*, there is no indication that the continued existence of the records held by the Agency Defendants has caused or will imminently cause Pettibone harm.

Pettibone asserts that he has standing because a law enforcement agency's "retention of records of an unlawful arrest or the arrest of a person who was subsequently exonerated was long recognized as a basis for granting relief in American courts." Resp. Not. Supp. Auth. 6–7, ECF

271. Pettibone asserts that he has standing to seek expungement based on "the reputational harm of arrest records" and a "material risk of future tangible harm" that may accompany a disclosure of his "arrest record." Resp. Not. Supp. Auth. 8–10, ECF 271.

It is true that some historic cases have endorsed expunction of criminal convictions, "FBI criminal files," or arrest records to vindicate a violation of constitutional rights. *See* Resp. Not. Supp. Auth. 7 n.4, ECF 271 (collecting cases). And there is little doubt that an individual with an arrest record or conviction may encounter collateral consequences in seeking employment or in future encounters with the criminal justice system, among other things. *See id.* at 8–10. Pettibone's situation is distinguishable because the records held by the Agency Defendants are not the same types of "criminal files" or "arrest records" that are entered into a database system used by law enforcement agencies for recording arrests. *See* Reply Not. Supp. Auth. 2, ECF 281; Clendenen Decl., Ex. 1 at 3–5, ECF 129-1 (redacted) (describing nature and use of law enforcement databases used to record arrests). Rather, the records here are internal to the Agency Defendants; each of the Agency Defendants produced a declaration stating that a search of law enforcement databases does not return any records retrievable by Pettibone's name related to his arrest in July of 2020. Cajigal Decl. ¶ 11–16, ECF 26-1; CBP SOG-1 Decl. ¶ 5, ECF 26-3; Zitny Decl. ¶¶ 9–13, ECF 26-2. And notably, over three years have passed since Pettibone's arrest, and he has not proffered any facts showing that the existence of these records has caused him any difficulty in applying for a job, obtaining a security clearance, or seeking a scholarship, or has caused or imminently will cause him any of the other collateral consequences that might attend someone with an arrest record that is searchable or accessible to law enforcement agencies and other entities that might make use of such information. *See TransUnion*, 594 U.S. at 434 ("The standing inquiry in this case thus distinguishes between (i) credit files that consumer reporting

agencies maintain internally and (ii) the consumer credit reports that consumer reporting agencies disseminate to third-party creditors. The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."). Thus, just as in *Phillips*, there is no evidence that the government "is using or will use the records in the future to investigate" Pettibone or that "a third party will obtain the records and use them" to his detriment. *See Phillips*, 74 F.4th at 995.

Alternatively, Pettibone asserts that he has standing to pursue expungement based on the "close relationship" between the Agency Defendants' conduct and the common-law privacy tort of intrusion upon seclusion. Resp. Not. Supp. Auth. 10–12, ECF 271. Oregon has "long recognized a common-law cause of action for invasion of privacy, on four different theories, all of which protect the right of a person 'to be let alone.' " *Reed v. Toyota Motor Credit Corp.*, 301 Or. App. 825, 830–31 (2020) (quoting *Mauri v. Smith*, 324 Or. 476, 482 (1996)). One such theory is intrusion upon seclusion, under which a plaintiff must prove "three elements: (1) an intentional intrusion, physical or otherwise, (2) upon the plaintiff's solitude or seclusion or private affairs or concerns, (3) which would be highly offensive to a reasonable person." *Mauri,* 324 Or. at 483. But the type of information collected here about Pettibone—his name, date of birth, address, driver's license number, and so on—is essentially identical to the information collected in *Phillips* that the court ruled was not the type of information that could establish standing for expungement based on a violation of privacy. *See Phillips*, 74 F.4th at 995–96 ("Plaintiffs do not show that the type of information contained in the records—names, birthdays, social security numbers, occupations, addresses, social media profiles, and political views and associations—is so sensitive that another's access to that information 'would be highly offensive to a reasonable person[.]' ").

Nor is the alleged search of Pettibone's backpack or the agency's retention of a purported inventory of items that were found in it sufficient under *Phillips* to establish standing. Resp. Not. Supp. Auth. 11, ECF 271. There is no indication that any inventory list actually exists, and even if it did, Pettibone has not explained any imminent harm that may result from Agency Defendants' retention of such information. *See Mayfield*, 599 F.3d at 971 ("[A] Fourth Amendment violation occurs at the moment of the illegal search or seizure, and . . . the subsequent use of the evidence obtained does not *per se* violate the Constitution.") (citing *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998)). Taken to its logical extreme, Pettibone's position would essentially create standing to seek expungement for any plaintiff who alleged a violation of the Fourth Amendment, as anyone subject to an allegedly unconstitutional search could arguably assert that the encounter "bears a close relationship" to the tort of intrusion upon seclusion. But that would be plainly inconsistent with the direction from *Phillips* that even where the information sought to be expunged was "collected in violation of constitutional rights," a plaintiff must still identify a "concrete and ongoing injury" based on the retention of that information to establish Article III standing. *Phillips*, 74 F.4th at 994.

Because Pettibone has not shown that the Agency Defendants' retention of records related to his arrest creates a substantial risk of imminent harm, he lacks standing to pursue the remedy of expungement.

RECOMMENDATIONS

The Agency Defendants' Motion to Dismiss (ECF 26) should be granted as to all claims; plaintiffs' claims seeking declaratory relief against the Agency Defendants are moot because the conditions related to protest activity in Portland, and the federal response to any such activity, has drastically changed since this case was filed, and plaintiff Pettibone lacks standing to pursue

his claim for expungement because he has not shown that the Agency Defendants' retention of records related to his arrest creates a substantial risk of imminent harm.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Tuesday, January 30, 2024. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED January 16, 2024.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge