UNITED STATES DISTRICT COURT
FOR DISTRICT OF MASSACHUSETTS

DAVID HOUSE, Plaintiff, v. JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security; ALAN BERSIN, in his official capacity as Commissioner, U.S. Customs and Border Protection; JOHN T. MORTON, in his official capacity as Assistant Secretary of Homeland Security for U.S. Immigration and Customs Enforcement, Defendants.	Case No. 1:11-cv-10852-DJC (Leave to File Granted 12/06/2011)

PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

The sum and substance of Defendants' position

Plaintiff's electronic materials was "incidental" ignores the allegations of the Complaint that the government's actions were carried out for the purpose of inquiry into the activities of the Bradley Manning Support Network. Moreover, even if the original seizure could be justified, the retention and disclosure of the information to other agencies cannot.

Finally, it is well within this Court's power to order Defendants to reveal what they did with the data they copied from Mr. House's electronic devices, and to order the destruction of

mind, an invasion sufficiently deleterious to privacy that reasonable suspicion is the constitutional minimum. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, or in the Alternative, for Summ. J. ("Pl.'s Br.") 11-19. "What makes papers special-and the reason they are listed alongside houses, persons and effects-is the ideas they embody, ideas that can only be seized by reading the words on the page." *United States v. Seljan*, 547 F.3d 993, 1017 (9th Cir. 2008) (Kozinski, J. dissenting). Contrary to Defendants' suggestion, Defs.' Reply Br. 4-5, there is a constitutionally meaningful difference between expressive materials and non-expressive effects such as clothing and shoes.

Defendants argue that a reasonable suspicion requirement cannot apply to the search of Mr. House's electronics because that would involve "the kind of line-drawing that the Supreme Court has already rejected," Defs.' Reply Br. 3, but Defendants' assertion rests on a faulty reading of *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). In *Flores-Montano*, the Court held that removal and disassembly of a vehicle's gas tank at the border to examine its contents did not require reasonable suspicion, writing that:

> [T]he reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person-dignity and privacy interests of the person being searched-simply do not carry over to vehicles. Complex balancing tests to determine what is a "routine" search of a vehicle, as opposed to a more "intrusive" search of a person, have no place in border searches of vehicles.

Id. at 152. The Court was forbidding lower courts from subdividing the universe of vehicle searches at the border into those vehicle searches 7223int vi4r sel-Jw0.1845Jw77 0h ofco004 pTc 06 Tc 0.0994 -1

Nor did the Court's decision in *Flores-Montano* undermine the First Circuit's analysis in *Braks*, 842 F.2d 509, as Defendants suggest, Defs.' Reply Br. 3. In *Braks*, the Court held that the key factor in determining whether a search is non-routine is "[t]he degree of invasiveness or intrusiveness," 842 F.2d at 511. Other courts have continued to apply this test after *Flores-Montano*. *See, e.g.*, *United States v. Whitted*, 541 F.3d 480, 485 (3d Cir. 2008) ("Courts have focused on the privacy interest and the intrusiveness and indignity of the search to distinguish between routine and nonroutine searches."). There is no need for this Court to depart from the First Circuit's well-settled and binding precedent.

While Defendants maintain that the category of "personally invasive" searches only extends to searches such as strip searches and body cavity searches, nothing in Supreme Court or First Circuit case law suggests that only searches involving a physical intrusion into a person's body can trigger a reasonable suspicion requirement, and the Third Circuit has expressly rejected this argument, as should this Court. In *Whitted*, 541 F.3d at 489, the Third Circuit held that a search of a passenger's cruise ship cabin was a non-routine search requiring reasonable suspicion "because of the high expectation of privacy and

neither the Supreme Court nor the First Circuit has held that

Cf. Schmerber v. California, 384 U.S. 757, 770-71 (1966) (stating that a blood test had to satisfy Fourth Amendment reasonableness analysis, even when the search was conducted as part of a

the government are required to find a government agent to testify on their behalf, or an expert whose livelihood depends on having the government as a client, then plaintiffs would never be able to call upon expert testimony in lawsuits to vindicate their constitutional rights.[4]

Defendants' motion to dismiss Plaintiff's Fourth Amendment claim should be denied.

II. DEFENDANTS' ACTIONS VIOLATED THE FIRST AMENDMENT.[5]

A. The Seizure Of Plaintiff's Materials Was Not Incidental To A Valid Border Search.

Defendants meet Plaintiff's associational privacy claim first by arguing that the seizure of privileged information was simply incidental to a valid border search and the seizure of any information about the Support Network was serendipity, a course of events for which Plaintiff bears responsibility. Mr. House, they say, "chose" to bring his electronic devices with him when he crossed the border. Defs

had flagged his involvement with the Support Network. [6] *Id.* Thus, when he arrived in Chicago, the interrogation focused specifically on his involvement in political activities and, in particular, his affiliation with the Manning Support Network. Compl. ¶ 19. His materials were seized and detained for forensic examination and copying of their contents. Decl. of Robert Marten, Defs.' Concise Statement of Material Facts Pursuant to Local Rule 56.1 ("Defs.' Facts") Ex. 4, ¶¶ 5, 7, July 27, 2011, ECF No. 12-1. The extended detention happened for a reason, about which there is a dispute. And finally, the Complaint alleges, the information obtained from the devices by ICE has been disclosed to and retained by other government agencies.[7] Compl. ¶ 27. That too happened for a reason.

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[6] This watch list is described in Plaintiff's submission as the TECS II, which "the relevant government authorities" catalogued by Defendants identify as a record of any inspection conducted at the border. Other, and perhaps more relevant, government authorities not cited by Defendants show that the TECS II system is the vehicle for an expansive system of watch lists and monitoring of travelers by DHS. CBP tracks international airline passengers through the Advance Passenger Information System (APIS), which requires commercial carriers to provide CBP with passenger manifests prior to arrival in the United States. CBP, Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels, 72 Fed. Reg. 48320 (Aug. 23, 2007). Passenger manifests are screened using the Interagency Border Inspection System (IBIS), a multi-agency database of lookout information used by CBP to screen individuals entering the United States which combines lookout or watch list information from 27 agencies into the TECS II database. Participating agencies include the DOJ Office of the Inspector General. Immigration and Naturalization Service's Premium Processing Program, Report No. 03-14 (2003), *available at* http://www.justice.gov/oig/reports/INS/a0314/intro.htm. The information in TECS/IBIS identifies people, among others, "that may be of interest to the law enforcement community." DHS Background Check Services System of Records, 71 Fed. Reg. 70413, 70414 (Dec. 4, 2006). *See generally*, William J. Krouse, Cong. Research Serv., RL32366, Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6 (2004).

[7] Plaintiff notes again that the affidavits filed by Defendants do not address the issue of whether the information was disclosed to other agencies. Rather, they contend that the issue is "not material to Plaintiff's claims." Defs.' Reply Br. 16 n.14. For purposes of Defendants' Rule 12(b)(6) motion, it is, therefore, admitted. And it is material, both to the need to afford complete relief, see Point III, *infra,* and to the consideration of Plaintiff's First Amendment claims.

Under these circumstances, it is not sufficient to argue that customs and immigration officials were simply conducting a permissible border search. Where the alleged reason for the search was to intrude on areas protected by the First Amendment, that reason matters. While Defendants correctly cite *Whren v. United States*, 517 U.S. 806 (1996), for the proposition that the subjective motivation of government officials is not relevant to the consideration of a Fourth Amendment claim, that is not the case when a claim arises under the First Amendment. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 871 (1982) (whether school board's removal of books from school library violated the First Amendment depended on the motivation of the board members' actions); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*,

they argue, there is an "equally plausible" explanation for the course of events leading to the seizure of Mr. House's electronic devices. *Id.* at 15. This argument, unsupported by citation to any legal authority, would require the court to reach beyond the allegations of the complaint and to engage in speculation about the contested facts concerning the government's pursuit of information about the Support Network. This argument once again misrepresents the *Iqbal* standard and ignores the First Amendment context in which Mr. House was questioned.

Under *Iqbal*, a complaint must only state a claim that is plausible on its face. That another equally plausible explanation is conceivable does not warrant dismissal at the pleading stage. "[T]he plausibility standard is not akin to a probability requirement." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks and citation omitted). In this context, plausibility "does not imply that the district court should decide whose version to believe, or which is more likely than not . . . . In other words, the court will ask itself *could* these things have happened, not

Moreover, the government is wrong to state that this Court lacks the power to order destruction of information the government seized from Mr. House's devices, as there is ample precedent for this practice. By analogy, under Federal Rule of Criminal Procedure 41(g), courts can order the government to return seized property to criminal defendants and have discretion to decide whether it is reasonable for the government to retain copies.[10] Moreover, Mr. House's privacy interest in the seized data also weighs heavily in favor of requiring the government to return the data and destroy all copies. In *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1174 (9th Cir. 2010), the Ninth Circuit upheld an order requiring the government to return illegally seized data on Major League Baseball's drug testing program without retaining copies. The Court noted, "The risk to the players associated with disclosure, and with that the ability of the Players Association to obtain voluntary compliance with drug testing from its members in the future, is very high." *Id.* at 1174. The privacy interests cited by the Ninth Circuit parallel Mr. House's interests in preserving the privacy of information relating to his group's membership and fundraising.

Defendants mistakenly rely on *Illinois v. Krull*, 480 U.S. 340, 347-61 (1987), to suggest that even if this Court finds the search to be unconstitutional, the government should be able to retain the data because ICE agents relied on a policy they thought at the time was valid. Defs.' Reply Br. 16. The good faith exception to the exclusionary rule in *Krull* is not applicable to this situation. An inquiry regarding the return of seized items is different from an inquiry regarding their suppression in a criminal case. *See Comprehensive Drug Testing, Inc.*, 621 F.3d at 1172 (noting the "the crucial distinction between a motion to suppress and a motion for return of

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[10] The Advisory Committee notes to the 1989 amendments to Rule 41 make clear that in some cases, "equitable considerations might justify an order requiring the government to return or destroy all copies of records that it has seized."

property: The former is limited by the exclusionary rule, the latter is not.”). The two areas of law serve different interests: the exclusionary rule serves to deter unlawful behavior by law enforcement, while the return of seized property provides a remedy for the individual whose property interests were violated. *Id.* at 1173.

CONCLUSION

For the foregoing reasons, Defendants’ motion should be DENIED.

Respectfully submitted,

DAVID HOUSE
By his attorneys,

___/s/ *Catherine Crump*_____
Catherine Crump, Pro Hac Vice
ccrump@aclu.org
Speech, Privacy and Technology Project
American Civil Liberties Union
125 Broad Street, 17th floor
New York, New York 10004
(212) 549-2500

____/s/ *John Reinstein*_______
John Reinstein, BBO # 416120
jreinstein@aclum.org
p

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Catherine Crump
Catherine Crump
December 6, 2011