February 28, 2020

VIA ECF

Honorable Pamela K. Chen
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Guan, et al. v. Wolf, et al.*, Civil No. 19-CV-6570 (PKC/JO)

Dear Judge Chen:

Plaintiffs in the above-captioned action file this letter in response to Defendants' letter of February 21, 2020, ECF No. 18, in which Defendants requested a pre-motion conference in anticipation of moving to dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1), (6). Plaintiffs intend to oppose any such motion filed by Defendants.

Plaintiffs are five U.S. citizens and professional photojournalists who each traveled to Mexico between November 2018 and January 2019 to document conditions at the border. *See* Complaint, ¶ 2, ECF No. 1. During this period, each of the Plaintiffs entered the United States via a port of entry. When they did so, border officers referred each of the Plaintiffs to secondary inspection and questioned them about their work as photojournalists, including their coverage of a "migrant caravan," their observations of conditions at the U.S.-Mexico border, and their knowledge of the identities of certain individuals. This questioning focused on what each Plaintiff had observed in Mexico in the course of working as a journalist, and did not relate to any permissible immigration or customs purpose. *Id*. Three of the Plaintiffs were sent to secondary inspection and questioned about their journalism work once during this time period. One Plaintiff was sent to secondary inspection on two separate occasions, and another Plaintiff was sent to secondary inspection on three separate occasions. *Id*. ¶ 3. One Plaintiff was also denied entry to Mexico to do her reporting work during this time period. *Id*. ¶¶ 112–117.

In March 2019, the media outlet NBC 7 San Diego revealed that each of the Plaintiffs was listed in a Department of Homeland Security database containing information about people working on issues related to conditions at the U.S.-Mexico border. *See id.* ¶¶ 27, 29–35. Some of the Plaintiffs were identified as members of the media in the database. *Id*. ¶ 35.

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Plaintiffs claim that Defendants impermissibly compelled each Plaintiff to disclose information about their journalism work and activities when they sought to enter the United States. Plaintiffs seek a declaratory judgment that such questioning and compelled disclosure of information violated the First Amendment. They also seek an injunction requiring Defendants to expunge any records they have retained regarding and as a result of the unlawful questioning, and to inform Plaintiffs whether those records have been disclosed to other agencies, governments, or individuals.

Plaintiffs have stated claims for relief under the First Amendment. Plaintiffs allege that U.S. border officials forced them to disclose information about their journalism work and activities by subjecting each Plaintiff to extended interrogation unrelated to any valid immigration or customs purpose. This compelled disclosure of information violated the First Amendment. Courts have long recognized that government demands for information revealing expressive activities burden First Amendment rights and must be subject to heightened scrutiny. *See, e.g.*, *Gibson v. Fla. Legislative Investigation Comm*., 372 U.S. 539, 544 (1963). The government must have a compelling interest in the information sought and use narrowly tailored means that do not capture more information than necessary. *See, e.g.*, *id.* at 546 (prohibiting a subpoena to the NAACP from a legislative committee); *United States v. Rumely*, 345 U.S. 41, 46 (1953) (holding that the First Amendment limited a congressional committee's power to issue a subpoena to a bookseller seeking names of those who had purchased political publications); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (requiring substantial and immediate government interests in the information sought by a grand jury about a newspaper, and a means of obtaining it that was "not more drastic than necessary"). The government failed to meet that standard here when border officers questioned the Plaintiffs about their sources and observations as journalists.

In addition, courts have recognized that a heightened standard must be met before a reporter can be compelled to provide information to a grand jury or via subpoena. *See Branzburg v. Hayes*, 408 U.S. 665 (1972) (applying the standard of *Gibson* in requiring a "compelling" government interest before a reporter could be forced to testify). Since *Branzburg*, lower courts have recognized that a "reporter's privilege" is necessary in certain circumstances to preserve the freedom of the press. *See, e.g., In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982) (noting "disclosure [of confidential information] may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources"); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) (citing Justice Powell's concurring opinion in *Branzburg* in finding that the qualified reporter's privilege applies especially where a reporter is not a party); *see also Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983). In this case, border officers forced Plaintiffs to disclose confidential information about their observations, sources of information, and/or work product, including the identities of individuals with whom they may have interacted in the course of their work as journalists. Complaint, ¶¶ 5, 90.

This heightened standard for compelling information from journalists applies at the border. Courts have recognized that constitutional limits apply to border questioning and searches, and in particular have imposed limits where such questioning and searches do not relate to customs and immigration matters. The First Circuit held in *United States v. Molina-Gómez*, 781 F.3d 13, 19 (1st Cir. 2015), that a line of questioning at the border about someone's "drug activity" was impermissible because it "had nothing to do with whether or not to admit [him] into the country" and was aimed at "eliciting an incriminating response." *Id*. at 24. A recent Ninth Circuit decision held that border searches of electronic devices are permissible only when limited to searches for digital contraband, and not for any generalized evidence-gathering purpose. *See United States v. Cano*, 934 F.3d 1002 (9th Cir. Aug. 16, 2019).

Furthermore, border officers' actions can substantially burden First Amendment rights, including when people are singled out for additional questioning or searches on the basis of their First Amendment-protected activity. *See Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (stating, in a case involving border officers' actions, that "when government action substantially penalizes members of a group for exercising their First Amendment rights, that penalty in itself can constitute a substantial burden, even if the government did not prevent the group from associating and regardless of any future chilling effect"); *House v. Napolitano*, No. CIV.A. 11-10852-DJC, 2012 WL 1038816, at *12 (D. Mass. Mar. 28, 2012) (recognizing a First Amendment claim where someone had been selected for a border search based on association with a group). In this case, Plaintiffs claim that Defendants targeted them on account of their professional identities, and further allege that their First Amendment rights were violated because they were asked questions about their journalism work and activities. *See* Complaint at ¶¶ 161, 162. Plaintiffs also claim that border officers' questioning of them would reasonably chill them and other journalists from traveling to Mexico to report on U.S.-Mexico border issues. *See id*. ¶ 6.

Lastly, Plaintiffs have standing to raise their claims. In addition to declaratory relief, Plaintiffs seek an injunction requiring Defendants to expunge any records they have retained regarding their unlawful questioning and to inform Plaintiffs whether those records have been disclosed to other agencies, governments, or individuals. When law enforcement improperly collects information about a person, the continued retention of that information is an ongoing injury, and a demand to expunge it supports standing. *See Tabbaa*, 509 F.3d at 96 n.2 ("[P]laintiffs possess Article III standing based on their demand for expungement."); *Hedgepeth v. WMATA*, 386 F.3d 1148, 1152 (D.C. Cir. 2004). Plaintiffs suffer an ongoing harm from the government's retention of information that it unlawfully obtained, because the government may continue to use and exploit that information or share it with other agencies that may do the same.

Accordingly, Plaintiffs intend to oppose Defendants' anticipated motion to dismiss their claims.

Respectfully submitted,

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