No. 19-56448

In the United States Court of Appeals
For The Ninth Circuit

HAISAM ELSHARKAWI
Appellant,
v.

UNITED STATES OF AMERICA, ET AL.
Appellees.

On Appeal from the United States District Court, Central District of California,
Case No. 8:18-cv-01971-JLS-DFM, Honorable Josephine L. Staton, Presiding

BRIEF FOR APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in this matter, on the questions of (1) whether the District Court improperly considered Defendant Doyle's Declaration in ruling on Defendants' Rule 12(b)(1) Motion to Dismiss; (2) whether this Court's holding in *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019) and the Supreme Court's ruling in *Riley v. California*, 573 U.S. 373 (2014) show that Defendants' actions were unlawful electronic searches at the border, supporting Appellant's Fourth Amendment claims; (3) whether *Cano* and *Riley* show that Defendants' actions were unlawful under the First Amendment; and (4) whether individual officers, if alleged to have operated outside the course and scope of their positions, can be held liable for interference with an individual's contractual rights, in violation of 42 U.S.C. § 1981.

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331, because Mr. Elsharkawi alleges claims arising under the Constitution and the laws of the United States. The District Court dismissed Mr. Elsharkawi's constitutional claims on August 8, 2019, but permitted his claims under the Federal Tort Claims Act ("FTCA") to proceed. Doc 57. On December 6, 2019, the District Court entered a final judgment in favor of Mr. Elsharkawi on the FTCA claims under Fed. R. Civ. P. 68, in accordance with the parties' settlement agreement. Doc. 63. Mr. Elsharkawi filed a timely notice of appeal on December 12, 2019, to seek review of the August 8, 2019 order dismissing his claims under the Fourth Amendment, the First Amendment, and 42 U.S.C. § 1981. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291, 1294.

STATEMENT OF ISSUES

1. Did the District Court improperly consider the Declaration from Defendant Doyle, in ruling on Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1)?

2. Does this Court's holding in *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019) and the Supreme Court's ruling in *Riley v. California,* 573 U.S. 373 (2014) show that Defendants' actions were unlawful electronic searches at the border given the circumstances, supporting Appellant's Fourth Amendment claims, contrary to the ruling by the District Court?

3. Does the guidance of this Court's holding in *Cano*, and the Supreme Court's ruling in *Riley* show that Defendants' actions were unlawful under the First Amendment, contrary to the ruling without separate analysis by the District Court?

4. May individual federal officers, if alleged to have operated outside the course and scope of their positions, be held liable for interference with contractual rights in violation of 42 U.S.C. § 1981, because its source is more akin to § 1982 than § 1983, as long recognized by this Court since *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974)?

PERTINENT CONSTITUTIONAL PROVISIONS

- The First Amendment to the U.S. Constitution provides:

  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

  U.S. Const. amend. I.

- The Fourth Amendment to the U.S. Constitution provides:

  The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

  U.S. Const. amend. IV.

PERTINENT STATUTORY PROVISIONS

- 42 U.S.C. § 1981 (also referred to as "Section 1981" in Appellant's Brief), provides:

> **(a) Statement of equal rights.** All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined.** For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (**c) Protection against impairment.** The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.
>
> 42 U.S.C. § 1981.

PERTINENT REGULATIONS

- U.S. Customs & Border Protection Directive No. 3340-049A, *Border Search of Electronic Devices 5* (2018) (also referred to as "2018 Policy" in Appellant's Brief) provides, in relevant part, that:

> 5.1.3 Basic Search. Any border search of an electronic device that is not an advanced search, as described below, may be referred to as a basic search. In the course of a basic search, with or without suspicion, an Officer may examine an electronic device and may review and analyze information encountered at the border, subject to the requirements and limitations provided herein and applicable law.
>
> 5.1.4 Advanced Search. An advanced search is any search in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents. In instances in which there is reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern, and with supervisory approval at the Grade 14 level or higher (or a manager with comparable responsibilities), an Officer may perform an advanced search of an electronic device. Many factors may create reasonable suspicion or constitute a national security concern; examples include the existence of a relevant national security-related lookout in combination with other articulable factors as appropriate, or the presence of an individual on a government-operated and government-vetted terrorist watch list.
>
> U.S. Customs & Border Protection Directive No. 3340-049A, *Border Search of Electronic Devices 5* (2018), §§ 5.1.3 - 5.1.4, *available at* https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf (last visited Feb. 6. 2020).

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History

This appeal centers on violations of Appellant Haisam Elsharkawi's constitutional rights against the Official Capacity Defendants, as well as his rights under 42 U.S.C. § 1981 against the individual officer Defendants, in their individual capacities. These claims arose from the treatment suffered by Mr. Elsharkawi as he attempted to travel out of the country for a religious pilgrimage. This treatment including detention, false imprisonment, invasion of privacy and violations of his rights under the First and Fourth Amendments to the U.S. Constitution, as well as individual interference with his right to contract.

The District Court dismissed Appellant's claims under the First and Fourth Amendments, based on its interpretation that Ninth Circuit precedent differs from recent Supreme Court precedent, and also dismissed Appellant's claims under 42 U.S.C. § 1981 against the individual officers based on a blanket determination that federal actors cannot be sued in any capacity under that statute. Appellant's tort claims against the United States proceeded, and the District Court later entered judgment in favor of Appellant based on the Offer of Judgment by Defendant United States.

II. Mr. Elsharkawi's Allegations

Appellant Haisam Elsharkawi initiated this action by alleging violations of the First and Fourth Amendments of the U.S. Constitution, in relevant part. As set forth in his Complaint, Defendant Kevin K. McAleenan,[1] Acting Secretary of the U.S. Department of Homeland Security ("DHS"), and Defendant John P. Sanders, Acting Commissioner of U.S. Customs and Border Protection ("CBP"), both sued in their official capacities (the "Official Capacity Defendants"), violated Appellant's rights under the First and Fourth Amendments of the U.S. Constitution. These acts occurred when the Defendants authorized searches of Mr. Elsharkawi's electronic devices, which he carried as he was exiting the United States for a religious pilgrimage, without a warrant or probable cause that the devices contained contraband or evidence of a violation of customs law, and without reasonable suspicion that they contained any contraband. Doc. 1 at ¶¶ 19-21, 26. Mr. Elsharkawi also alleges that the Official Capacity Defendants violated the Fourth Amendment of the United States Constitution by confiscating the data located on and/or accessible through his electronic devices, as he was exiting the United States, without probable cause or reasonable suspicion that the data contained contraband

[1] Chad Wolf replaced Kevin McAleenan as the Acting Secretary of the Department of Homeland Security on November 13, 2019, and is now substituted as a party in this appeal, pursuant to Fed. R. Civ. P. 25(d).

or evidence of a violation of customs law. These confiscations were unreasonable from their inception, and thereafter, in both scope and duration. *Id.* at 20-21, 27.

As further pled in his Complaint, Defendants Lazaro Rivas, Eduardo Rodriguez, John Stevenson and Jennifer Doyle (hereinafter the "Individual Capacity Defendants") are sued in their individual capacities for violating Section 1981 of the Civil Rights Act of 1866, by interfering with the contract which Appellant had for his airline ticket on Turkish Airlines, and interfering with his right to enjoy the contractual benefits of that ticket, based on his national origin. *Id.* at 22. Mr. Elsharkawi alleges that the Individual Capacity Defendants "interfered with Mr. Elsharkawi's right to exercise and enforce a contract, namely Mr. Elsharkawi's contract with Turkish Airlines to fly as scheduled with his purchased ticket to Saudi Arabia." *Id.* at ¶ 82; *see also id*. at ¶¶ 80-84.

SUMMARY OF THE ARGUMENT

The issues in this case center on "the privacies of life." *Riley v. California*, 573 U.S. at 373, 403 (2014). A United States citizen packed and went to LAX airport for a flight he had planned, in accordance with his sincerely held religious beliefs and practices, to another country. But it was while still in the boundaries of the United States that his civil rights were violated, and he found himself searched, detained, and handcuffed, and his electronics seized and searched. He had no "contraband" on him and no history of any behavior related to contraband – no illegal drugs, no child pornography, and no history of suspicious behavior. He had no criminal record at all. He was simply a traveler, wearing the traditional religious garb of his Islamic faith, headed out of the country on a religious pilgrimage. He was brought in handcuffs to a detention room in the basement of LAX, and detained for several hours until he agreed to surrender the passwords to his electronics (one of which was never locked). He missed his flight, not making it out of the country at all that day. And, ever since, he fears the same violations may happen any time he travels again.

Haisam Elsharkawi filed suit in the District Court, alleging violations of the First and Fourth Amendments, as well as tort claims under the Federal Tort Claims Act ("FTCA"), and violations by the individual officers of 42 U.S.C. § 1981. The District Court dismissed all but the FTCA claims, on which judgment of $20,001 for

Mr. Elsharkawi was entered pursuant to an Offer of Judgment. He now appeals the dismissal of his claims under the First and Fourth Amendments, and Section 1981.

A. Subject Matter Jurisdiction Exists Over Claims For Retrospective Relief

The District Court erred in its consideration and weight given to a Declaration by one of the Individual Capacity Defendants as dispositive on the issue of whether subject matter jurisdiction exists for the retrospective relief Mr. Elsharkawi seeks, regarding data from the searches of his phones. While courts may consider outside materials in determining subject matter jurisdiction, where jurisdiction and substance mingle, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

The Declaration of Defendant Jennifer Doyle speaks only to her personal knowledge of whether she forensically searched and copied any data from one of Mr. Elsharkawi's phones; it does not speak to what happened during his detention, while his phones were away from him, prior to her arrival. Nor does her Declaration speak definitely to whether any other agent or officer copied or forensically searched Mr. Elsharkawi's phones, stating only that "to [her] knowledge" no other searches occurred and no data was retained. Contrary to the determination of the District Court, this statement does not address all facts relevant to Mr. Elsharkawi's claims for retrospective relief, and as such does not "moot" his claim for that relief.

B. Violations of the Fourth Amendment Are Properly Pled

The searches which occurred of Mr. Elsharkawi's cell phones violated Mr. Elsharkawi's Fourth Amendment rights, and run counter to the holding of this Court in *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019). The District Court did not have the benefit of this Court's *Cano* analysis when it dismissed Mr. Elsharkawi's Fourth Amendment claims. Applying that analysis to the facts here, Mr. Elsharkawi properly pled his claims for violations of his Fourth Amendment rights.

The government allows itself too much discretion in its interpretation and application of the border search exception, which the District Court erroneously adopted. While general national security interests carry some weight, the border search exception "does not mean, however, that at the border 'anything goes.'" *Cano*, 934 F.3d at 1013. And, "there is no 'suspected terrorist activity exception' to the probable cause requirement of the Fourth Amendment," that justifies prolonged detainments and invasive pat-downs of those on any watchlists. *Hebshi v. United States*, 32 F. Supp. 834, 848 (E.D. Mich. 2014). Mr. Elsharkawi properly pled violations of the Fourth Amendment based on both manual and forensic searches of his cell phones. Furthermore, the District Court improperly discounted the relevance that Mr. Elsharkawi was attempting to exit the country at the time the relevant searches occurred, not enter it. As the primary concern relevant to the border search exception is whether contraband is being brought into the country,

there was no compelling interest or reasonable suspicion which properly outweighed Mr. Elsharkawi's Fourth Amendment rights. Accordingly, his claims for violations of the Fourth Amendment should not have been dismissed.

C. Violations of the First Amendment Are Properly Pled

The searches of his cell phones which occurred also violated Mr. Elsharkawi's First Amendment rights, contrary to the holdings of this Court. The District Court allotted only a cursory analysis of Mr. Elsharkawi's claims for violations under the First Amendment, effectively stating that these claims failed for the same reasons the District Court believed his claims under the Fourth Amendment failed.

The District Court relied generally on its holding that the First Amendment provides no broader protections to Mr. Elsharkawi than the Fourth Amendment does. However, this Court properly held that "border officials are limited to searching for contraband only; they may not search in a manner untethered to the search for contraband." *Cano*, 934 F.3d at 1019. There is no argument that Mr. Elsharkawi had any contraband within his cell phones, nor does anyone in this case argue that there was reasonable suspicion to believe that he did. These facts distinguish the instant case from those considered by this Court in *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008). In *Arnold*, the individual had a criminal history relating to child pornography, and the searches at issue resulted in identification of additional child pornography. *Id*. at 1010. The concern identified by this Court in *Arnold*, that

government agents "would have to decide—on their feet—which expressive material is covered by the First Amendment" if greater protections were granted under the First Amendment than are available under the Fourth Amendment, does not apply here; these searches failed under the Fourth Amendment's protections as well. Therefore, the relief sought by Mr. Elsharkawi places no burdens on agents other than adherence to the constitutional protections recognized by this Court.

D. Violations of 42 U.S.C. §1981 Are Properly Brought Against the Individual Agents

The individual officers interfered with Mr. Elsharkawi's rights and ability to form contracts, specifically his purchase of his airline ticket which he was not able to use and for which he did not receive a refund, despite the officers telling him not to worry and that he would. Consistent with the precedent of this Court and the holdings of the Supreme Court, these actions violated 42 U.S.C. § 1981.

Like Section 1982, Section 1981 derives from the Thirteenth Amendment and the Civil Rights Act of 1866. Those sources have consistently been viewed by the Supreme Court, and this Court, as applicable to both federal and state action, unlike their counterparts in Section 1983 and 1985 which derive from the Fourteenth Amendment. This Court's decision in *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974), subsequently cited as good authority in *Gonzalez v. Dept. of Army*, 718 F.2d 926, 929 and n. 3 (9th Cir. 1983) and *Sprewell v. Golden State Warriors*, 266 F.3d 979, 989 (9th Cir. 2001), recognizes that federal actors may be held accountable

under Section 1981. The District Court failed to even evaluate Mr. Elsharkawi's well-pled claims against the Individual Capacity Defendants, instead applying a blanket determination that "that Individual-Capacity Defendants' federal status bars these claims." Doc. 57 at 13. These claims should not have been dismissed, and the District Court erred in doing so.

Mr. Elsharkawi properly pled retroactive harm, which the Declaration of one individual Defendant cannot negate. He pled appropriate claims under the Fourth Amendment, specifically addressing the unique nature of cell phones and how the government's searches of his phones are not, in fact, "materially indistinguishable" from other searches (*Riley*, 573 U.S. at 393 ("[t]hat is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together")). He properly pled violations of the First Amendment, which are not outweighed by any generalized "national security" concern in light of the complete lack of any reasonable suspicion that he possessed any contraband. And he claims violations of his right to contract by the Individual Capacity Defendants, which are not negated by their federal actor status. In accordance with the holdings of this Court, Mr. Elsharkawi requests the dismissal by the District Court be reversed, and his claims remanded for further proceedings.

ARGUMENT

I. Standards of Review.

This Court reviews the grant of a motion to dismiss *de novo*. *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016); *King County v. Rasmussen*, 299 F.3d 1077, 1088 (9th Cir. 2002) (reviewing motions to dismiss under rules 12(b)(1) and 12(b)(6) *de novo*). A district court's ruling on the legality of a border search is also reviewed *de novo*. *United States v. Seljan*, 547 F.3d 993, n. 6 (9th Cir. 2008) (citing *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998)).

A. Fed. R. Civ. P. 12(b)(1)

The Supreme Court holds that in reviewing a motion to dismiss brought under Fed. R. Civ. P. 12(b)(1), "it is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1979) (quoting *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957)). When a defendant brings a jurisdictional challenge under Rule 12(b)(1), courts may usually consider evidence outside the complaint. *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1151 (9th Cir. 2019). In evaluating the evidence, though, courts must resolve any factual disputes "in favor of Plaintiffs." *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). When jurisdictional questions intertwine with the merits, however, courts cannot consider

the evidence without converting the motion to one for summary judgment. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *see also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (unless controverted facts in the record are present, when jurisdiction is intertwined with the merits, reviewing courts must "assume the truth of the allegations in a complaint").

B. Fed. R. Civ. P. 12(b)(6)

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (citing *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003)). In order to survive a Rule 12(b)(6) challenge, "a complaint's factual allegations need not be detailed." *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d 946, 951 (9th Cir. 2019) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In fact, dismissal pursuant to this Rule is only proper in extraordinary circumstances when it appears beyond doubt that no set of facts can be proven entitling a claimant to relief. *United States v. City of Redwood City,* 640 F.2d 963, 966 (9th Cir. 1981) (internal citations omitted). Generally, "courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). The only exceptions

to this rule are when a plaintiff has incorporated or referenced outside documents in the complaint or judicial notice. *Id.*

Unlike when deciding a motion under Fed. R. Civ. P. 12(b)(1), where outside evidence such as sworn declarations may be properly considered solely to determine jurisdiction, the purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint before proceeding to trial. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). Granting dispositive weight to an affidavit or declaration at the pleading stage would improperly constitute "trial by affidavit." *See Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) ("Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'") (internal quotation omitted).

C. Fourth Amendment

The Supreme Court holds that "[t]he ultimate touchstone of the Fourth Amendment is reasonableness." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). In weighing reasonableness, reviewing courts determine "the permissibility of a particular law enforcement practice ... by 'balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests.'" *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)).

D. First Amendment

When the government "attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Expressive associational rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). When the government seeks information protected by the First Amendment, it must have a compelling interest in the information, and use narrowly tailored means that do not seek more information than necessary. *See, e.g.*, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) (prohibiting a subpoena to the NAACP from a legislative committee).

E. Section 1981

Pursuant to Section 1981 of the Civil Rights Act of 1866, claimants may seek relief "when racial discrimination blocks the creation of a contractual relationship" or when it "impairs an existing contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). This Act was designed "to prohibit all racial discrimination, whether or not under color of law." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). Section 1981's protections extend to national origin discrimination claims. *Saint Francis Coll v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

II. The Trial Court Erred in Dismissing Mr. Elsharkawi's Retrospective Relief Claims Against the Official Capacity Defendants for Lack of Jurisdiction.

A. The Trial Court Erred In Concluding It Had No Jurisdiction To Grant Retrospective Relief As Pled

Mr. Elsharkawi has standing to seek relief in this case based on his past and likely future injuries. After correctly concluding that Mr. Elsharkawi has standing to seek prospective relief to enjoin the 2018 Policy, the District Court erroneously held that Mr. Elsharkawi lacked standing to pursue relief based on the past injuries. In doing so, the District Court reasoned that because the Declaration of Defendant Doyle asserted that "to [her] knowledge" neither DHS nor CBP has retained copies of Mr. Elsharkawi's electronic data, the issue was moot and Appellant had no standing. The District Court erred in its holding, because (1) the District Court could not properly consider Defendant Doyle's Declaration for the purpose it did, as it goes to the merits of Appellant's allegations, under Rule 12(b)(1); and (2) even if the District Court could consider the Declaration, Defendant Doyle's Declaration provides no definitive resolution.

Under Fed. R. Civ. P. 12(b)(1), a district court may not consider jurisdictional evidence when that jurisdictional evidence is intertwined with the merits. *Roberts*, 812 F.2d at 1177 ("The relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction ... where issues of jurisdiction and substance are intertwined"). When jurisdiction and substance mingle, "the jurisdictional

determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

Contrary to the District Court's holding, the relevant standing inquiry here, of whether the government copied and retained Mr. Elsharkawi's electronic data, is inextricably tied up with the merits question of whether Defendants improperly forensically searched Appellant's two phones in the first place. Further, determining the answer to that question requires determination of a fact issue, which is not appropriate when ruling on a Rule 12 motion. Though the parties do not dispute that Defendant Doyle "searched and temporarily seized [Appellant's] phone,"[2] the parties do dispute whether Defendants conducted a *forensic* search as to either phone. For this reason, Officer Doyle's Declaration focuses on her individual assertion that she did not personally perform a forensic search of Appellant's phone at all. Furthermore, the Declaration only speaks to one of the two phones Mr. Elsharkawi had with him when he traveled that day, and does not address the unlocked phone at all. Thus, the District Court's reasoning that "the merits inquiry focuses on the legal question of whether the search and seizure were constitutionally permissible" is misplaced.[3]

[2] Doc. 57 at 7.
[3] *Id.*

Defendant Doyle's Declaration does not state that *no one* copied, shared, or forensically examined Mr. Elsharkawi's phones. Nor could it. By her own admission, Defendant Doyle was not present until hours into Mr. Elsharkawi's detention, and she does not assert that she had custody of Mr. Elsharkawi's phones the entire time they were seized. She declares only that "[t]o *my* knowledge, neither [DHS] nor [CBP] has any copies of the contents of [Appellant's] phone or any of his electronic devices."[4] And, Defendant Rivas would have more likely than not found Mr. Elsharkawi's second phone well before Defendant Doyle arrived, because it was in Mr. Elsharkawi's carry-on, which Defendant Rivas searched. Defendant Doyle's Declaration merely shows that she lacks personal knowledge as to many of the facts at issue. But it does not address what other people did, or when they may have committed the alleged acts.[5] Her Declaration fails to "moot" the issues relevant to Appellant's Fourth Amendment claims against the Official Capacity Defendants.[6]

Because the District Court erred in its consideration of and weight afforded to Defendant Doyle's Declaration, and because her Declaration does fully not resolve

[4] Doc. 57 at 7 (emphasis added). Notably, Defendant Doyle's Declaration also does not assert that DHS and CBP *never* made copies of Appellant's data, or that no government agencies retained copies of the data. The Declaration simply states that *she* did not, and is not personally aware of anyone having done so.

[5] The District Court also speculated that Defendants could not have possibly copied, retained, or shared the data on Mr. Elsharkawi's phones under the facts he alleged. Doc. 57 at 8 ("Plaintiff's phone apparently remained locked throughout the ordeal but for the time he unlocked it for inspection by Officer Doyle, and she attests that she did not copy or store any data."). This factual conclusion, however, overlooks

the issue of jurisdiction even if appropriate to consider, Appellant respectfully requests that this Court reverse the District Court's holding that it had no jurisdiction to grant the retrospective relief which Appellant appropriately pled in his Complaint.

III. This Court's Holding in *Cano* and the Supreme Court's Ruling in *Riley* Show that Defendants' Actions Were Inappropriate, Supporting Appellant's Fourth Amendment Claims.

A. Mr. Elsharkawi Sufficiently Alleges Unlawful Electronic Searches Beyond The Scope Of The Border Exception

The District Court erred in dismissing Mr. Elsharkawi's Fourth Amendment claims against the Official Capacity Defendants under Fed. R. Civ. P. 12(b)(6), because the reach of the border search exception to the Fourth Amendment's warrant requirement is far more limited than the District Court's application of it. *See generally United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019) (clarifying limitations on warrantless border searches); *see also Riley v. California*, 573 U.S. 373, 401 (2014) (holding that cell phones seized incident to arrest generally require a warrant).

Mr. Elsharkawi's pleadings in his Complaint that the government copied his cellphone data from his phones while the phones were away from him during his detention, and not just that this occurred after Defendant Doyle appeared. His second phone, which was never locked, was in his carry-on bag and accessible the whole time he was detained. Doc. 1 at ¶ 66. No basis exists in the record for a factual determination that Defendants could not have copied Mr. Elsharkawi's phones when they were away from him. At the very least, the issue is more appropriate for summary judgment, and is inappropriate to decide in the context of a motion to dismiss.

[6] Doc. 57 at 8.

Mr. Elsharkawi alleges that he was subject to a manual search which exceeded both limitations on warrantless border searches recognized by the Ninth Circuit. In *Cano*, decided after the District Court's ruling in this matter, this Court recognized the constraints of the border search exception, stating that "[f]irst, any search conducted under an exception must be within the scope of the exception" and "[s]econd, some searches, even when conducted within the scope of the exception, are so intrusive that they require additional justification, up to and including probable cause and a warrant." *Cano,* 934 F.3d at 1011-12. The *Cano* holding requires that warrantless border searches must only be conducted to "enforce importation laws," and not for "general law enforcement purposes." *Id.* at 1013 (quoting *United States v. Soto-Soto*, 598 F.2d 545, 549 (9th Cir. 1979)).

Appellant alleges that CBP agents "stopped [him] for an extensive, non-routine search as he boarded his outbound flight."[7] When Appellant eventually unlocked his second phone[8] for Defendant Doyle, she questioned him "regarding his eBay and Amazon accounts, where he got merchandise for his ecommerce business, and what swap meets he frequents" instead of merely searching for digital contraband.[9] While eBay and Amazon apps might conceivably contain *evidence* of a crime, they could not conceivably contain any *actual* contraband. *See Cano*, 934

[7] Doc. 1 at ¶ 2.
[8] One of his phones was never locked. *Id*. at ¶¶ 59, 66.
[9] *Id.* at ¶ 65.

F.3d at 1019 (border patrol officers recording phone numbers, and photographing messages, has "no connection whatsoever to digital contraband"). Accordingly, the manual search Mr. Elsharkawi complains of is unconstitutional under this Court's holding in *Cano*.

Mr. Elsharkawi also alleges that the government conducted an advanced search without reasonable suspicion, as the 2018 Policy permits under its vague "national security" exception. In his Complaint, Mr. Elsharkawi explains that he "did not have his cellphone in his possession or sight during his detention."[10] He further alleges that during this time, "CBP and DHS forensically examined Plaintiff's cellphone, made copies of Plaintiff's cellphone for later forensic examination, and/or transmitted such copies to other agencies for either technical or subject matter assistance." *Id.* Defendants did so without probable cause, or even reasonable suspicion. *Id.* They did this advanced search "pursuant to DHS policies regarding search of electronic devices at the border."[11]

Therefore, the 2018 Policy which Mr. Elsharkawi seeks to enjoin is inconsistent with both of the limitations on warrantless searches articulated by this Court. The Policy does not narrowly circumscribe the scope of a basic search "to searches for contraband," as this Court requires in *Cano*. The 2018 Policy defines a

[10] Doc. 1 at ¶ 76.
[11] *Id.* at ¶ 3.

basic search as "[a]ny border search of an electronic device that is not an advanced search."[12] An advanced search, then, encompasses "any search in which an Officer connects external equipment, though a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents."[13] Though an officer may perform an advanced search only with reasonable suspicion or when "there is a national security concern," the officer may perform a "basic" search "with or without suspicion." By its plain language, the 2018 Policy fails to limit basic searches to searches for contraband.

The 2018 Policy also improperly allows advanced searches without individualized suspicion. Under the 2018 Policy, DHS permits its officers to perform advanced searches without individualized suspicion "[i]n instances in which ... there is a national security concern."[14] This vague standard provides no useful guidance and, unlike reasonable suspicion, does not correspond to any identifiable legal standard. Under the language of the Policy, officers may have a "concern" for "national security" in any situation. That's the reason for the existence of the border search exception in the first place. *See United States v. Cotterman*, 709 F.3d 952, 971 (9th Cir. 2013) (recognizing that the border search exception arose out of the

[12] *See id.* at ¶¶ 15-17.
[13] *Id.* at ¶ 16.
[14] *Id.*

United States' "paramount interest" in "national self-protection").[15] But under this Court's holding in *Cano*, mere generalized concern, even as to national security, is insufficient to justify forensic search of a cell phone in the absence of individualized, reasonable suspicion. *Cano,* 934 F.3d at 1016 (holding that "the forensic examination of a cell phone requires a showing of reasonable suspicion") (internal citation omitted). Mr. Elsharkawi therefore properly alleges that these manual and advanced searches violated his Fourth Amendment rights.

B. The Supreme Court's *Riley* Decision Demonstrates Defendants' Actions Required A Warrant

The District Court held that *Cotterman* applies to Mr. Elsharkawi's claims. In that case, this Court held that warrantless manual or routine searches do not require any suspicion at all. *Cotterman*, 709 F.3d at 937. The Ninth Circuit additionally found that forensic or non-routine searches are permissible when the reasonable

[15] *See also Alasaad v. Nielsen,* __ F. Supp. __, No. 17-cv-11730, 2019 U.S. Dist. LEXIS 195556, *52 (D. Mass. Nov. 12, 2019): "The concerns laid out in *Riley* of unfettered access to thousands of pictures, location data and browsing history (which, applying the definition under the CBP and ICE policies would have qualified as a 'basic search,' *Riley*, 573 U.S. at 379-80), apply with equal force to basic and advanced searches, particularly as a device's native operating systems become more sophisticated and more closely mirror the capabilities of an advanced search. In light of this record, case law, and in conjunction with the lack of meaningful difference between basic and advanced searches, the Court concludes that agents and officials must have reasonable suspicion to conduct any search of entrants' electronic devices under the 'basic' searches and 'advanced' searches as now defined by the CBP and ICE policies. This requirement reflects both the important privacy interests involved in searching electronic devices and the Defendant's governmental interests at the border" (citing *Cano* and *Cotterman* with approval).

suspicion standard is met. *Id.* at 962-68. Neither standard, however, distinguished between cell phones and other containers.

In *Riley*, which the Ninth Circuit did not have need to address in its holding in *Cotterman*, the Supreme Court departed from the incident-to-arrest exception to the Fourth Amendment's warrant requirement, based on the intrusiveness of digital data searches. *See Riley*, 573 U.S. at 391-99 (finding that the quantitative and qualitative differences between cell phones and other containers make digital data searches particularly intrusive, because individuals maintain a reasonable expectation of privacy in their cell phones even upon arrest); *see also id.* at 391-98 (recognizing that cell phone searches implicate privacy concerns far greater than those of other containers); *id.* at 394 (the "sum of an individual's private life" can be reconstructed through a cell phone search); *id.* at 385 (modern cell phones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy"). Therefore, this Court should reverse the District Court's Order in light of Supreme Court precedent established after the *Cotterman* opinion, which also recognizes that the unique nature of cell phones generally requiring warrants.

C. This Court's Holding in *Cano* Also Supports Reversal Of The District Court's Grant Of Dismissal

The District Court issued its opinion dismissing the claims at issue in this appeal prior to this Court's decision in *Cano*, and therefore did not have the benefit

of this Court's *Cano* analysis. As stated above, this Court's holding in *Cano* found that "the border search exception is restricted in scope to searches for contraband." *Cano*, 934 F.3d at 1016, 1019. This Court also affirmed that a "forensic examination of a cell phone requires a showing of reasonable suspicion" and clarified that officers must have a reasonable suspicion that the phone contains contraband in order to justify this type of search. *Id.* at 1016. This Court's *Cano* limitation on border searches, to searches for contraband itself, directly impacts this matter. This Court in *Cano* observed that officials may only seize "*merchandise* which ... shall have been introduced into the United States in any manner contrary to law." *Id.* at 1017 (quoting 19 U.S.C. § 482(a)) (emphasis added in *Cano* opinion). So, while the "photos on [a traveler's] laptop computer" are fair game, "border officials have no general authority to search for crime." *Cano*, 934 F.3d at 1017. This Court's *Cano* opinion used the example that "[e]vidence of price fixing—[such as] texts or emails"—would not be "contraband" subject to a warrantless search at the border. *Id.* This Court also disagreed with a Fourth Circuit holding permitting a warrantless search for evidence of illegal arms which were not present at the border. *Id.* (declining to follow *United States v. Kolsuz*, 890 F.3d 133, 138-39 (4th Cir. 2018)). In doing so, this Court emphasized that "every border-search case the Supreme Court has decided involved searches to locate *items being smuggled*." *Cano*, 934 F.3d. at 1017 (quoting *United States v. Molina-Isidoro*, 884 F.3d 287, 295 (5th Cir. 2018)

(Costa, J., specially concurring)) (emphasis added in *Cano* opinion); *see also Cano*, 934 F.3d at 1018 ("[t]he search for and seizure of stolen or forfeited goods … are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo.") (quoting *Boyd v. United States*, 116 U.S. 616, 722-23 (1886)). Therefore, this Court's *Cano* opinion supports reversing the District Court's Order and remanding Appellant's Fourth Amendment claims.

D. Outbound Travel Requires Additional Limitations Of The Border Search Exception

The border search doctrine is a "narrow exception" to the Fourth Amendment warrant requirement. *Seljan*, 547 F.3d at 999. In assessing Fourth Amendment violations, the required balancing of reasonableness "is qualitatively different at the international border **than in the interior**." *Montoya De Hernandez*, 473 U.S. at 538 (emphasis added). Put another way, "[t]he border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may **enter** the country." *United States v. Ramsey*, 431 U.S. 606, 620 (1977) (emphasis added). Congress therefore "granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant" in order to "prevent the introduction of contraband **into** this country." *United States v. Flores-Montano*, 541 U.S. 149, 153

(2004) (emphasis added) (quoting *Montoya De Hernandez*, 473 U.S. at 537) (citing *Ramsey*, 431 U.S. at 616-17).

In this case, the District Court rejected Appellant's argument that the border search exception does not apply equally to travelers exiting the United States.[16] That holding directly contradicts this Court's express connection between the border search exception and the importation of contraband articulated in *Cano*, and also ignores the relevance highlighted in several Supreme Court holdings on searches for incoming travelers. *See, e.g., Montoya De Hernandez*, 541 U.S. at 544 (in assessing if prolonged detention of an incoming traveler is reasonable, finding that customs officers are charged "with protecting this Nation from entrants who may **bring anything harmful into** this county") (emphasis added); *Flores-Montano*, 541 U.S. at 154 (holding that the search of gas tanks of persons driving into the country is reasonable, in order to ensure a person's effects "may be lawfully **brought in**") (emphasis added)*; see also Cano*, 934 F.3d at 1019 ("border officials are limited to searching for contraband only; they may not search in a manner untethered to the search for contraband"). Therefore, the District Court's dismissal of Plaintiff's Fourth Amendment claims should be reversed.

E. In The Alternative, The District Court Should Have Granted Leave To Amend

Finally, even if this Court finds that Mr. Elsharkawi did not adequately plead

[16] Doc. 57 at 11.

improper manual and advanced phone searches, the District Court abused its discretion by not granting him leave to replead. Courts are free to grant a party leave to amend whenever "justice so requires," and requests for leave should be granted with "extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)); Fed. R. Civ. P. 15(a)(2). "`Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.'" *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991)); *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009).

Defendants do not, and cannot, dispute that (1) the 2018 Policy allows a forensic search without reasonable suspicion whenever there is a "national security concern;" (2) this Court's holdings require at least reasonable suspicion for a forensic search; and (3) Mr. Elsharkawi pled that, in accordance with their Policy, "CBP and DHS forensically examined [his] cellphone" without reasonable suspicion.[17] Mr. Elsharkawi also pled that Defendants' manual searches were unreasonable.[18] Therefore, the District Court should have permitted Mr. Elsharkawi leave to amend his Complaint, rather than dismissing his claims entirely, as amendment would allow

[17] *See* Doc. 1 at ¶ 76.
[18] *Id.* at ¶¶ 73-74.

Mr. Elsharkawi to plead additional details with more particularity as to how Defendants conducted the searches of his phones.

Even if Mr. Elsharkawi did not adequately plead unlawful searches, the District Court erred in dismissing Appellant's Complaint, since "amendment may not have been futile." *Bozzio v. EMI Grp. Ltd.*, 811 F.3d 1144, 1154 (9th Cir. 2016). In its Order, the District Court reasoned that repleading would be futile, because reasonable suspicion is unnecessary for a routine, basic search.[19] However, Mr. Elsharkawi pleads that the searches he experienced were neither routine nor basic, and further alleges that Defendants did not have reasonable suspicion to conduct the advanced searches.[20] This Court does not permit advanced searches without reasonable suspicion, and has ruled that even manual searches must be restricted to looking for contraband. *Cano*, 934 F.3d at 1019. Accordingly, even assuming that Mr. Elsharkawi's allegations are not adequate as currently pled, the District Court erred in concluding that repleading would be futile and denying Appellant the opportunity to replead.

[19] Doc. 57 at 15 ("Because the legal theories underlying Plaintiff's dismissed claims are . . . squarely foreclosed by Ninth Circuit precedent ... no amount of further factual development could save those claims, and amendment would therefore be futile").
[20] Doc. 1 at ¶¶ 76, 77.

IV. This Court's Holding in *Cano* and the Supreme Court's Ruling In *Riley* Show Defendants' Actions Violated the First Amendment.

A. Mr. Elsharkawi Sufficiently Alleges First Amendment Violations, Which Are Likely To Occur Again

Mr. Elsharkawi alleges that Defendants infringed on his First Amendment "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 662 (1984). Government demands for information which reveals expressive activities burden citizens' First Amendment rights, and therefore require greater protections. *Gibson*, 372 U.S. at 544. When the government seeks "to inquire about an individual's beliefs and associations[,] a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird*, 401 U.S. at 6-7.

The District Court rejected Mr. Elsharkawi's First Amendment claims with no more than a cursory analysis, because it concluded that "the First Amendment does not provide any greater protections in the border search context than does the Fourth Amendment." Doc. 57 at 13 (citing *United States v. Arnold*, 533 F.3d 1003, 1010 (9th Cir. 2008)). The *Arnold* decision, however, does not support dismissal of Mr. Elsharkawi's First Amendment claims. The *Arnold* court worried that a First Amendment exception to the border search doctrine would "protect terrorist communications which are inherently expressive." *Arnold*, 533 F.3d at 1010

(internal quotations removed). But in *Cano*, this Court elaborated that "border officials are limited to searching for contraband only; they may not search in a manner untethered to the search for contraband." *Cano*, 934 F.3d at 1019; *see also Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("[t]he scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.") (internal quotations omitted). "Terrorist communications" may be evidence, but they are not contraband. *Cf. Cano*, 934 F.3d at 1017 ("Such emails may be evidence of a crime, but they are not contraband, and there is no law prohibiting the importation of mere evidence").

Further, as discussed at length above and incorporated herein, this Court requires reasonable suspicion for an advanced search under the Fourth Amendment, and has limited manual searches to searches for contraband. *See Cano*, 934 F.3d at 1019. Mr. Elsharkawi alleges a search violating both of these limitations. Therefore, even applying the District Court's reasoning, Appellant's First Amendment claims should have survived Defendants' challenge under Fed. R. Civ. P. 12(b)(6), as violations of the Fourth Amendment are rarely if ever the least restrictive means of maintaining border security. *See Gibson*, 372 U.S. at 546.

Mr. Elsharkawi sufficiently alleges conduct that would violate his rights which are protected by the First Amendment of the U.S. Constitution. Accordingly, the District Court erred in dismissing his First Amendment claims.

B. In The Alternative, The District Court Further Erred in Holding That Amendment Would Be Futile

As with his claims under the Fourth Amendment, even if Mr. Elsharkawi's Complaint was unclear about how Defendants violated his First Amendment rights, the District Court should have granted him alternative relief of leave to replead those claims with more clarity. *See Bozzio*, 811 F.3d at 1154 (finding an abuse of discretion in failing to allow an amendment when "amendment may not have been futile"). Because the District Court failed to address Mr. Elsharkawi's allegations that the search of his cell phones was neither routine nor basic, this Court should reverse the dismissal by the District Court and remand, so that Mr. Elsharkawi may be given leave to replead his claims against the Official Capacity Defendants.

V. The Trial Court Erred in Dismissing Mr. Elsharkawi's Claims Against the Individual Capacity Defendants.

A. Section 1981 Applies To Nongovernmental Conduct, Including Conduct By Federal Agents Acting Outside The Scope Of Their Authority

The District Court erred in dismissing Mr. Elsharkawi's claims under 42 U.S.C. § 1981 against the Individual Capacity Defendants. The District Court dismissed Mr. Elsharkawi's Section 1981 claims on the ground that this provision does not reach actions taken under color of federal law. The District Court cited the text of Section 1981(c), which provides that the rights articulated in Section 1981 "are protected against impairment by nongovernmental discrimination and

impairment under color of State law."[21] Mr. Elsharkawi, however, sued these Defendants in their individual capacities, alleging that they acted outside the scope of their duties and therefore essentially as private actors. Although this Court has held previously that Section 1981 does not apply to federal agents acting within the course and scope of their federal duties, Section 1981 does apply to defendants acting as private actors, by its plain language. This Court has previously recognized this applicability, in a holding which remains good law in this Circuit.

B. Legislative History Of Section 1981 Shows That It Applies To Federal Actors

Section 1 of the Civil Rights Act of 1866 serves as the source for both 42 U.S.C. § 1981 and § 1982. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 196 (1989) ("[T]he language of both § 1981 and § 1982 appeared traceable to § 1 of the Civil Rights Act of 1866"); *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) ("both § 1981 and § 1982 derive" from Section 1 of the 1866 Act); *Jones*, 392 U.S. at 422 n.28; *Georgia v. Rachel*, 384 U.S. 780, 789 n.12 (1966). In interpreting Section 1, the Supreme Court held that it applies to conduct under color of federal law as well as color of state law, in addition to private conduct. *District of Columbia v. Carter*, 409 U.S. 418, 422 (1973) (stating that Section 1 of the Civil Rights Act of 1866 is "an 'absolute' bar to all such [racial] discrimination, private as well as public, *federal* as well as state") (emphasis added); *id.* ("the same considerations that led Congress

[21] *Id*.

to extend the prohibitions of § 1982 to the Federal Government apply with equal force to the District [of Columbia], which is a mere instrumentality of that Government"). Before the enactment of the amendments to Section 1981 via the Civil Rights Act of 1991, many Circuit courts (including this Court) specifically found Section 1981 to apply to federal actors. *See, e.g.*, *Baker v. F&F Investment Co.*, 489 F.2d 829, 833 (7th Cir. 1973) ("both present Sections 1981 and 1982 were originally part of Section 1 of the 1866 Act, but were broken into two Sections in the 1870 reenactment. Thus they are not to be construed differently" and "[b]linding itself to landmark decisions of the Supreme Court, the Government urges that neither it nor its instrumentalities are subject to suits for damages under 42 U.S.C. § 1981 and 1982 for violations of the Fifth and Thirteenth Amendments. We cannot turn back the clock to accept such a position"); *Bowers v. Campbell*, 505 F.2d 1155, 1158 (9th Cir. 1974) ("Section 1981, like section 1982, is based on the Thirteenth Amendment and the Civil Rights Act of 1866. Both sections on their face prohibit all racial discrimination regardless of source, in contrast to 42 U.S.C. § 1983, based on the Fourteenth Amendment, which deals only with those deprivations of rights that are accomplished under the color of the law 'of any State or Territory.' The Supreme Court's reasons for its broad, literal construction of section 1982 apply with equal force to section 1981") (internal citations omitted); *Petterway v. Veterans Admin. Hospital, Houston, Tex.*, 495 F.2d 1223, 1225 (5th Cir. 1974) (claims against

federal officials under Section 1981 dismissed only insofar as sovereign immunity would prohibit them); *Young v. Pierce*, 544 F. Supp. 1010, 1019 (E.D. Tex. 1982) ("Actions under [Section 1981] may properly be brought against federal agencies which have allegedly contravened the guarantee of equal treatment").

The Civil Rights Act of 1991 added Section 1981(c) to the statute. When adding Section 1981(c), Congress expressed no intent to repeal any of Section 1981's broad protections, and certainly not its protections against private conduct. Instead, the legislative history demonstrates that the addition of Section 1981(c) was intended to insure the reach of Section 1981 extended to private conduct. *See, e.g.*, H.R. Rep. 102-40 (II) at 35-37, 1991 U.S.C.C.A.N. 694, 728-31 (interpreting Section 12 of H.R. 1, as introduced, substantively identical to Section 101 of the final bill that amended Section 1981); *id.* at 37, 1991 U.S.C.C.A.N. at 731 ("The Committee intends to prohibit discrimination in all contracts, public and private."); H.R. 1H, 102nd Congress, § 12 (1991), *available at* http://thomas.loc.gov/cgi-bin/query/z?c102:H.R.1; *see also Arendale v. City of Memphis*, 519 F.3d 587, 598 (6th Cir. 2008).

There exists no evidence that Congress ever decided to reduce the scope of this substantial Reconstruction-era civil rights statute with the 1991 amendments, and certainly not to the extent found by the District Court. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 396 and n.23 (1991) (holding that amendments to Section 2

of the Voting Rights Act, designed to expand liability under that provision by adding a "results" test, and that used the word "representative" in describing elections covered under the section, did not *sub silentio* amend the statute to remove coverage of judicial elections); *id.* ("we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment … Congress' silence in this regard can be likened to the dog that did not bark").

Multiple courts and well-respected scholars have likewise concluded that Section 1981 applies, and can be brought, to challenge actions taken under color of federal law. *Fernando Palma Carias v. Harrison*, No. 5:13-CT-3264-FL, 2016 WL 1171544, *11 (E.D.N.C. March 23, 2016) (denying federal defendants' motion to dismiss Section 1981 claim even though "plaintiff challenges federal and not state action"); *La Compania Ocho, Inc. v. U.S. Forest Service*, 874 F. Supp. 1242, 1251 (D.N.M. 1995) ("No authority of which the Court is aware exists for the proposition that section 1981 is inapplicable against the federal government for non-employment racial discrimination and in fact, the law has been otherwise for 20 years or more").

C. Appellant Properly Pleads His Section 1981 Claims Against The Individual Capacity Defendants

Defendants assert, and the District Court agreed, that Mr. Elsharkawi cannot bring an action against the Individual Capacity Defendants under 42 U.S.C. § 1981

because they are federal agents, and that Section 1981 does not permit actions against federal actors. Doc. 57 at 13. But this ignores the Supreme Court's equivalence of Section 1981 to Section 1982, which does permit actions against federal actors, and distinguishing it from Section 1983, which is limited solely to state actors. *See Jones*, 392 U.S. at 441-42 n.78 (finding that Section 1982 "closely parallels" Section 1981);. *Carter*, 409 U.S. at 422 (finding Section 1982 to apply to "federal as well as state" discrimination); *see also Xia v. Tillerson*, 865 F. 3d 643, 658-60 (D.C. Cir. 2017) (recognizing the parallels between Sections 1981 and 1982, and acknowledging the Supreme Court's "federal as well as state" language). "Section 1981 derives from the Civil Rights Act of 1866 and its purpose was to implement the Thirteenth Amendment. It was designed as an absolute bar to 'all such discrimination, private as well as public, federal as well as state.'" *Simmons v. State of Cal., Dept. of Indus. Rel.*, 740 F. Supp. 781, 788 (E.D. Cal. 1990), citing *Carter*, 409 U.S at 422, and *Jones*, 392 U.S. at 441.

Furthermore, Appellant brings his claims under Section 1981 against the Individual Capacity Defendants in their individual, not official, capacities. Doc. 1 at ¶¶ 82-84. Authority exists for bringing such claims against individuals. To state a claim under Section 1981, a plaintiff must allege "that (1) [he is a member] of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the

statute." *Morris v. Office Max, Inc.*, 89 F.3d 411, 413-14 (7th Cir. 1996). Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts," which "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981 (a) and (b); *cf. Unimex, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979) (holding that claims under Sections 1981, 1982, and 1986 against a U.S. government agency are barred by sovereign immunity, without ruling on claims against individuals); *see also Taylor v. Jones*, 653 F.2d 1193, n. 10 (8th Cir. 1981) ("[t]he language, purpose and legislative history of section 1981 are not entirely comparable to that of section 1983; thus, its effect and scope must be separately examined"); *see also Mahone v. Waddle*, 564 F. 2d 1018 (3d Cir. 1977); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

Here, Mr. Elsharkawi alleges sufficient facts to support his claim against the Individual Capacity Defendants. He articulates that he is a member of a protected class based on his national origin. Doc. 1 at ¶ 81. He describes the acts which the Individual Capacity Defendants specifically took, which interfered with Plaintiff's protected contractual rights. *Id.* at ¶¶ 82-84. And, he asserts that he believes the Individual Capacity Defendants took these actions because of his national origin. *Id.*

at ¶¶ 83-84. Accordingly, Mr. Elsharkawi meets the pleading requirements of the Federal Rules of Civil Procedure, and the District Court erred in granting Defendants' Motion to Dismiss.

D. The Cases Cited By The Individual Defendants Do Not Apply To Appellant's Section 1981 Claims In This Lawsuit

None of the authority cited at the District Court level alters the analysis above. The Individual Capacity Defendants relied on numerous cases which are not controlling on this Court, and which incorrectly applied the analysis of a Section 1983 action to claims brought under Section 1981. *Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005) ("[a]n action brought pursuant to 42 U.S.C. § 1983 cannot lie against federal officers") (internal citations omitted); *Gottschalk v. City & Cnty. of San Francisco*, 964 F. Supp. 2d 1147, 1162-63 (N.D. Cal. 2013) (recognizing that "it does not appear that the Ninth Circuit has explicitly extended this holding [that §§ 1983 and 1985 do not apply to federal actors] to claims under § 1981" yet predicting that "[a]s the Ninth Circuit has used similar reasoning in rejecting § 1983 claims against federal government actors, it seems likely that it would follow other circuits in finding § 1981 inapplicable to federal government actors"); and *Davis-Warren Auctioneers, J.V. v. FDIC*, 215 F.3d 1159, 1161 (10th Cir. 2000) (holding, in dismissing claim against government agency, that the Section 1983 analysis applies to Section 1981 claims as well, despite recognizing the contrary view

"finding that Congress intended the 1991 amendments 'to expand the scope of civil rights protection, not limit it'").

The only holdings of this Court on which the Individual Capacity Defendants did rely at the District Court level, to support their assertion that they cannot be liable under Section 1981, were cases analyzing claims brought under Sections 1983 and 1985. *See Jachetta v. United States,* 653 F.3d 898, 908 (9th Cir. 2011) (analyzing claims under Sections 1983 and 1985, but not 1981); *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) (finding the "complaint is invalid on its face in its reliance upon § 1983 as a cause of action against alleged federal government actors"). Beyond those cases, the Individual Capacity Defendants rely on older holdings out of the D.C. Circuit, which predate that circuit's holding in *Xia v. Tillerson.* 865 F. 3d at 658-60 (recognizing that, unlike Sections 1983 and 1985, claims brought under Section 1981 derive from broad language which includes applicability to federal actors, like claims brought under Section 1982).

As cited above, this Court has previously found Section 1981 to apply to federal actors. *Bowers*, 505 F.2d at 1158 ("Section 1981, like section 1982, is based on the Thirteenth Amendment and the Civil Rights Act of 1866. Both sections on their face prohibit all racial discrimination regardless of source, in contrast to 42 U.S.C. § 1983, based on the Fourteenth Amendment, which deals only with those

deprivations of rights that are accomplished under the color of the law 'of any State or Territory.' The Supreme Court's reasons for its broad, literal construction of section 1982 apply with equal force to section 1981") (internal citations omitted). And, this Court continues to cite *Bowers* as authority when it has since considered Section 1981 claims in other contexts. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 989 (9th Cir. 2001). In fact, to the extent the opportunity to address Section 1981's applicability to federal actors has arisen, this Court specifically reiterated that *Bowers* remains good law. *Gonzalez v. Dept. of Army*, 718 F.2d 926, 929 and n. 3 (9th Cir. 1983) (dismissing Section 1981 claims because they were unreviewable in the military context, but noting that "[a]lthough we find it unnecessary to address the district court's dismissal of appellant's section 1981 claim on immunity grounds, we note that our prior decision in *Bowers v. Campbell*, 505 F.2d 1155, 1158 (9th Cir. 1974), suggests that the district court may have taken too broad a view in this case of the bar posed by the doctrine of sovereign immunity"). Therefore, the law of this Circuit supports Mr. Elsharkawi's claims under Section 1981 against the Individual Capacity Defendants, and the District Court erred in finding otherwise.

E. Qualified Immunity Does Not Protect Agents Acting In Their Individual Capacities

The Individual Capacity Defendants claimed at the District Court level that, to the extent they may be subject to claims under Section 1981, they are entitled to qualified immunity for their actions. This Court considers the applicability of

qualified immunity *de novo*. *Entler v. Gregoire*, 872 F.3d 1031, 1038 (9th Cir. 2017); *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019). While the District Court did not reach the issue raised by the Individual Capacity Defendants of qualified immunity for their actions, because it determined that Section 1981 categorically does not apply to federal actors, the Individual Capacity Defendants are not entitled to qualified immunity as to the claims brought against them in this matter.

Because these Defendants are alleged to have acted outside the scope of their employment and therefore in their private capacities, they would not be entitled to qualified immunity for those actions. Determining whether a defendant is entitled to qualified immunity involves a two-pronged analysis. First, courts examine whether "[t]aken in the light most favorable to the party asserting the injury, [] the facts alleged show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001), overruled in part by *Pearson v. Callahan*, 555 U.S. 223, 235–36 (2009). Second, courts evaluate "whether the right was clearly established." *Id*. A right is clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 202; *see also Lacey v. Maricopa Cnty*., 693 F.3d 896, 915 (9th Cir. 2012) (finding, on a Section 1983 claim, that qualified immunity was not available for the officer where the allegations, if proven, would constitute clearly

established First Amendment rights of the plaintiff). Whether any of the Individual Capacity Defendants is entitled to qualified immunity in this matter turns on whether the individuals engaged in "legitimate" activities while in the course and scope of their position and authority. *See United States v. Brewster*, 408 U.S. 501 (1972).

Mr. Elsharkawi alleges that Defendants conducted manual and forensic searches of his devices without reasonable suspicion. In *Cotterman*, this Court expressly required reasonable suspicion to conduct a forensic search of an electronic device. *Cotterman,* 709 F.3d at 962-68. If any doubt remained that *Cotterman*'s reasoning applied to cell phones, the Supreme Court's *Riley* decision resolved that question. *Riley*, 573 U.S. at 385, 393 (describing cell phones as "a pervasive and insistent part of daily life" that, "as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse"); *see also Cano*, 934 F.3d at 1015 (citing *Riley* to conclude "that *Cotterman*'s reasoning applies equally to cell phones"). In light of *Riley* and *Cotterman*, Mr. Elsharkawi's allegations would, if proven, establish violations of his clearly established constitutional rights. Qualified immunity is therefore not available to the Individual Capacity Defendants as to the claims brought against them.

For this reason and those set forth above, the District Court erred in dismissing Mr. Elsharkawi's claims against the Individual Capacity Defendants.

CONCLUSION

For the reasons stated herein, Appellant Haisam Elsharkawi respectfully requests that this Court find that Appellant's First and Fourth Amendment claims against the Official Capacity Defendants, as well as Appellant's Section 1981 claims against the Individual Capacity Defendants, should not have been dismissed, and accordingly reverse the District Court's Order and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by CM/ECF delivery on February 11, 2020, on all counsel or parties of record on the service list.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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