

1 BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
2 ELIZABETH J. SHAPIRO
Deputy Branch Director
3 EMILY B. NESTLER, D.C. Bar No. 973886
Trial Attorney
4 United States Department of Justice
5 Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
6 Washington, D.C. 20530
7 Telephone: (202) 616-8489
Facsimile: (202) 616-8470
8 Email: emily.b.nestler@usdoj.gov

9 *Attorneys for Defendants*
10 *United States Customs and Border Protection*
and United States Department of Homeland Security

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO / OAKLAND DIVISION**

14
15 Meredith R. BROWN; Jorge RODRIGUEZ-)
CHOI; Lizz CANNON; Kelly RYAN; Jeri)
16 FLYNN; Arturo DOMINGUEZ COBOS;)
Isidro de Jesus RODRIGUEZ SANCHEZ;)
17 Nelida ORNELAS RENTERIA; Manuel)
CRUZ RENDON; Orlanda URBINA; Juan de)
18 DIOS CRUZ ROJAS; Maria de Jesus)
CALDERON RUIZ; Cristina Lucero)
19 RAMIREZ; Carolina CASTOR-LAURA;)
Efren ESCOBEDO; Delmy GONZALEZ-)
20 ORDENEZ; Artemio Alejandro PICHARDO-)
DELGADO; and Farook ASRALI)

21 Plaintiffs,)
22)
23 v.)

24 UNITED STATES CUSTOMS AND)
BORDER PROTECTION; and)
25 DEPARTMENT OF HOMELAND)
SECURITY,)

26 Defendants.)
27)
28 _____)

Case No.: 3:15-cv-01181-JD

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Date: July 8, 2015
Time: 10:00 a.m.
Place: Courtroom 11, 19th Floor
Judge: Hon. James Donato

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. The FOIA’s Timeline Does Not Create a Cause of Action 1

II. Plaintiffs Have not Alleged a Pattern or Practice of Violating the FOIA 4

III. Plaintiffs Do Not Have Standing to Bring a Pattern and Practice Claim..... 9

IV. Plaintiffs’ Claim Fails because they do not Challenge a Discrete Policy or Practice 9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITES

CASES

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)..... 4

Citizens for Responsibility & Ethics in Wash. v. FEC, 711 F.3d 180 (D.C. Cir. 2013)..... 1, 2, 3, 10

Del Monte Fresh Produce N.A., Inc. v. United States, 706 F. Supp. 2d 116 (D.D.C. 2010) 10

Hajro v. USCIS, 832 F. Supp.2d 1095 (N.D. Cal. 2012) 4

Kissinger v. Reporters Comm. For Freedom of the Press, 445 U.S. 136 (1980)..... 1, 5, 6

Long v. IRS, 639 F.2d 907 (9th Cir. 1982).....7

Lujan v. Nat’l Wildlife Fed., 497 U.S. 871 (1990) 10

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) 10

Papa v. United States, 281 F.3d 1004 (9th Cir. 2002) 2

Payne Enterprises v. U.S., 837 F.2d 486 (D.C. Cir. 1988) 5, 7, 9

Renegotiation Bd. v. Bannercoft Clothing Co., 415 U.S. 1 (1974)..... 6

U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989) 2, 5

STATUTES

5 U.S.C. § 552 1, 2, 3, 4, 5

OTHER

DHS FOIA Efficiency Act of 2015, H.R. 1615 (introduced on May 25, 2015) 8

1 Plaintiffs' case is based on the faulty premise that federal agencies must respond within 20
2 days to each of the thousands of FOIA requests they receive – or else risk contempt of court.
3 Plaintiffs take this position, even though the statute itself states that its 20-day timeline is an
4 exhaustion requirement, and Congress demonstrably understood that agencies would not be able to
5 process all requests within such a short period. Plaintiffs' single paragraph addressing this
6 dispositive issue – in which they selectively quote parts of the relevant FOIA provisions, and do
7 not even mention the D.C. Circuit's contrary decision in *Citizens for Responsibility & Ethics in*
8 *Wash. ("CREW") v. FEC*, 711 F.3d 180 (D.C. Cir. 2013) – provides no meaningful response to the
9 arguments set forth in Defendants' Motion to Dismiss. *See* Pls.'s Opp. at 3-4. Nor can Plaintiffs
10 explain how their claim that CBP has a "pattern and practice" of violating the FOIA is viable,
11 where they have not even identified an underlying FOIA cause of action in the first place.
12 Plaintiffs also fail to demonstrate standing to bring their FOIA pattern and practice claim, or even
13 to identify what discrete CBP policy they challenge here.

14
15
16 In sum, FOIA's timeline does not give Plaintiffs carte blanche to obtain a "nationwide
17 injunction" divorced from the clear terms of the statute, nor does it provide a basis for any other
18 cognizable FOIA claim under the circumstances here. This case should be dismissed with
19 prejudice.

20
21 **I. The FOIA's Timeline Does Not Create a Cause of Action**

22 Plaintiffs insist that they have established a FOIA violation solely because their requests
23 "have been pending for more than 20 days." Pls.' Opp. at 3. But, the FOIA empowers district
24 courts only to "enjoin the agency from withholding agency records and to order the production of
25 any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). This
26 limitation on the reach of FOIA jurisdiction was affirmed by the Supreme Court in *Kissinger v.*
27 *Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 155 (1980) (withholding of documents
28

1 is an “indispensable prerequisite” to FOIA jurisdiction.”).¹ Conversely, there is no independent
 2 cause of action under the FOIA merely for “taking too long” in responding to requests. *See CREW*,
 3 711 F.3d at 189-90 (holding that the only “penalty” if an agency does not adhere to FOIA’s
 4 timelines “is that the agency cannot rely on the administrative exhaustion requirement to keep
 5 cases from getting into court.”); *cf Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002) (“[T]he
 6 production of all nonexempt material “however belatedly,” moots FOIA claims) (emphasis added).

8 Plaintiffs’ reliance on 5 U.S.C. § 552(a)(6)(A) (providing a 20-day timeline for an agency
 9 to respond to FOIA requests) is misplaced, as they fail to recognize that it is just one part of the
 10 statute’s three-tier scheme for resolution of FOIA requests. FOIA’s comprehensive scheme
 11 contemplates and authorizes agencies to take longer than 20 days to respond to FOIA requests. *See*
 12 *CREW*, 711 F.3d at 184 (“FOIA’s 20-working-day timeline is not absolute.”). First, an agency
 13 may have “20 working days to make a ‘determination’ with adequate specificity, such that any
 14 withholding can be appealed administratively.” *Id.* at 189 (quoting 5 U.S.C. § 552(a)(6)(A)).
 15 Second, “an agency can extend that 20-day working-day timeline to 30 working days if unusual
 16 circumstances delay the agency’s ability to search for, collect, examine and consult about the
 17 responsive documents.” *Id.* (citing 5 U.S.C. § 552(a)(6)(B)). Third, the FOIA dictates what
 18 happens if an agency needs additional time to respond beyond those 20 or 30-day timelines:
 19

20
 21 Any person making a request to any agency for records under [the
 22 FOIA] shall be deemed to have exhausted his administrative
 23 remedies with respect to such request if the agency fails to comply
 24 with the applicable [20 or 30-day] time limit provisions of this
 paragraph. If the Government can show exceptional circumstances
 exist and that the agency is exercising due diligence in responding to

25 ¹ A failure to adhere to the FOIA timeline is not a “withholding” under *Kissinger*. *See U.S.*
 26 *Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 149 (1989) (finding no “withholding” of documents
 27 because the agency did not deny or a “refuse to comply with” a request). Plaintiffs’ requests have
 28 not been denied, and are being processed. In fact, some of them have received responses and/or
 documents since this case was filed. Unable to dispute this point, Plaintiffs instead (incorrectly)
 argue that the failure to adhere to FOIA’s timeline constitutes its own independent cause of action.

1 the request, the court may retain jurisdiction and allow the agency
2 additional time to complete its review of the records.

3 5 U.S.C. § 552(a)(6)(C)(i) (emphasis added). In other words, “the 20-working-day period (actually
4 30 working days with the unusual circumstances provision) is the relevant timeline that the agency
5 must adhere to if it wants to trigger the exhaustion requirement before suit can be filed.” *CREW*,
6 711 F.3d at 189. “If the agency does not adhere to the FOIA’s explicit [20 or 30-day] timelines,
7 the ‘penalty’ is that the agency cannot rely on the administrative exhaustion requirement to keep
8 cases from getting into court.” *Id.* If a requestor opts to file a lawsuit once his administrative
9 remedies are deemed exhausted, “the agency may continue to process the request” under the
10 court’s supervision, to accommodate exceptional circumstances, such as “broad time-consuming
11 requests (or justifiable agency backlogs).” *Id.* In sum, this means that when a FOIA requestor is
12 concerned that his request is taking too long, the remedy is to file a lawsuit in district court, seeking
13 judicial supervision to resolve his specific request for information.²

14
15 Plaintiffs try to craft a substantive claim out of the procedural rule set forth in 5 U.S.C. §
16 552(a)(6)(A), by taking it out of context. Plaintiffs fail to acknowledge – much less rebut the
17 significance of – the FOIA’s full comprehensive scheme, and they do not address any of the
18 relevant language from *CREW*.³ Indeed, Plaintiffs do not even mention the FOIA’s “unusual
19

20
21 ² This does not mean, as Plaintiffs suggest, that all FOIA requestors should, or will, “flood
22 the district courts with individual lawsuits” once the 20 or 30 day exhaustion period has run. *See*
23 *Pls.’ Opp.* at 7. Not all FOIA requestors file lawsuits, and CBP continues to process requests
24 regardless of whether requestors file lawsuits. This means that FOIA requests to CBP typically are
25 answered, without any need for judicial intervention. Plaintiffs also argue that such “individual
26 FOIA actions are not an adequate remedy,” relying on irrelevant case law that has nothing to do
27 with FOIA. *Id.* at 7. Plaintiffs’ subjective opinion about whether individual FOIA lawsuits are
28 “adequate” is irrelevant. What matters is that individual lawsuits, seeking supervision of specific
 requests for documents, is the statutorily prescribed remedy under the FOIA.

³ Plaintiffs incorrectly state that the “only issue before the D.C. Circuit in CREW was ‘what
 kind of agency response qualifies as a determination under FOIA before a requestor may sue in
 federal court.’” *Pls.’ Opp.* at 7.³ In fact, *CREW* arose out of the far broader question of “when a

1 circumstances” provision, and they bury the “exceptional circumstances” provision in a footnote.
2 *See* Pls.’ Opp. at 4 n.4.⁴ In Footnote 4, Plaintiffs concede that some responses to FOIA requests
3 may take longer than 20 days, but argue that the Court should disregard this fact because
4 “Defendants have not attempted to make such a showing [of exceptional circumstances] here.” *Id.*
5 This argument fails as a matter of fact and law. First, the FOIA does not require any notice of
6 “exceptional circumstances” to a requestor.⁵ Second, it is Plaintiffs’ burden to plead their case in
7 the first instance. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Complaint does
8 not provide details about Plaintiffs’ specific FOIA requests, much less plead facts that could
9 establish whether “exceptional circumstances” arise from their specific requests. And, in any
10 event, the Complaint supports a finding that there are other exceptional circumstances here, such as
11 CBP’s justifiable FOIA backlog. For example, Plaintiffs concede that CBP received 47,261 FOIA
12 requests in FY 2014 alone (a 50% increase from just three years earlier) and that CBP reduced its
13 backlog in 2014 by nearly 10%. *See* First Am. Compl. ¶¶ 35-36 (“Compl.”).

16 **II. Plaintiffs Have not Alleged a Pattern or Practice of Violating the FOIA**

17 Plaintiffs concede that their pattern and practice claim “turns [only] on whether CBP’s
18 pattern and practice of routinely failing to timely respond [within 20 days] . . . constitutes a
19 systemic violation of 5 U.S.C. § 552(a)(6)(A)(i).” Pls.’ Opp. at 4. It is, thus, dispositive that, as

20 FOIA requester must exhaust administrative remedies before filing suit.” 711 F.3d at 184. Thus,
21 the meaning of the 20-30 day timeline under the FOIA was central to the ultimate issue in *CREW*.
22 Indeed, the Court repeated its relevant holding several times for emphasis. *See, e.g., id.* at 189-90.

23 ⁴ Plaintiffs also do not cite *Hajro v. USCIS*, 832 F. Supp.2d 1095 (N.D. Cal. 2012), which,
24 among other things, addressed a claim for delay in responding to FOIA requests, but was decided
25 before *CREW*. *Hajro* currently is pending on appeal, and the Ninth Circuit heard oral argument on
February 3, 2015. *Hajro v. USCIS*, Nos. 11-17948,12-17765 (9th Cir. filed on Dec. 17, 2012).

26 ⁵ Compare 5 U.S.C. § 552(a)(6)(B)(i) (“In unusual circumstances . . . the time limits . . .
27 may be extended by written notice.”), with 5 U.S.C. § 552(a)(6)(C)(i) (containing no written notice
28 requirement for exceptional circumstances).

1 detailed *supra* in Part I, the running of the 20-day timeline does not create a cognizable FOIA
2 violation. Plaintiffs’ “pattern and practice” claims should be dismissed out of hand for that reason
3 alone. But Plaintiffs fashion several auxiliary theories in an attempt to circumvent this fatal flaw.

4
5 First, Plaintiffs seem to suggest that, by styling their case as a “pattern and practice” claim
6 and thereby alleging that CBP “routinely fail[s] to timely respond,” they somehow can convert this
7 alleged “delay” into a cognizable FOIA cause of action. Pls.’ Opp. at 4. It is well-settled that the
8 withholding of documents is an “indispensable prerequisite” to FOIA jurisdiction and, thus, that
9 any alleged pattern and practice claim must (among other things) claim a systematic withholding.
10 *Kissinger*, 445 U.S. at 155 (1980); *see also Payne Enterprises v. U.S.*, 837 F.2d 486, 488 (D.C. Cir.
11 1988). Thus, since there is no cause of action for “failure to respond to FOIA requests within the
12 statutory time period,” there cannot be any illegal “pattern” or “practice” of “violating” that
13 timeframe. *See Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (“Unless each of these
14 criteria [for a FOIA claim] is met, a district court lacks jurisdiction to devise remedies to force an
15 agency to comply with the FOIA’s disclosure requirements.”).

16
17 Second, Plaintiffs suggest that their “pattern and practice” claim should go forward
18 regardless of whether they state an underlying FOIA cause of action – based on the Court’s “broad
19 equitable powers.” Pls.’ Opp. at 5. The fact that the Court has equitable power under the FOIA, is
20 both true and irrelevant to the issues presented here. The Court has the equitable power defined by
21 the statute – “to order the production of any agency records improperly withheld.” 5 U.S.C. §
22 552(a)(4)(B). The issue here is not whether the Court has the power to order the production of
23 documents withheld. Indeed, Plaintiffs do not allege that CBP has denied any of their FOIA
24 requests, or otherwise has withheld documents. FOIA “pattern and practice” claims are not a blank
25 check for any and all equitable relief against an agency, much less relief that is divorced from a
26 cause of action authorized by the statute.
27
28

1 Plaintiffs do not – and cannot – point to a single case that supports their position (*i.e.*, that a
2 FOIA “pattern and practice” claim allows courts to grant equitable relief absent a document
3 withholding). They rely primarily on *Renegotiation Bd. v. Bannercroft Clothing Co.*, 415 U.S. 1
4 (1974), *see* Pls. Opp. at 5-10, which is inapposite. In *Bannercroft* (which was not a “pattern or
5 practice” case), respondents challenged the Renegotiation Board’s (the “Agency”) findings that
6 they had realized excessive profits on government contracts, and then submitted FOIA requests for
7 documents underlying the Agency’s findings. *Id.* at 5-6. Respondents filed lawsuits, seeking to
8 enjoin the Board “from withholding the documents requested and from conducting any further
9 renegotiation proceedings with Bannercroft . . . until the documents were produced.” *Id.* at 6
10 (emphasis added). Thus, unlike here, the only equitable relief even considered in *Bannercroft* was
11 an injunction ancillary to a FOIA cause of action for document withholding. The Court held that,
12 regardless of whether the district court had discretion to issue an injunction under those
13 circumstances, it was not appropriate for the court to enjoin the agency proceedings at issue. *Id.* at
14 20. Specifically, the Court explained that judicial interference, under the guise of the Court’s
15 “broad equitable powers,” would impermissibly interfere with agency proceedings and disrupt the
16 Agency’s comprehensive statutory scheme for resolving its contract disputes. *See id.* at 20-26.
17 Indeed, the only parallel between *Bannercroft* and this case is that the equitable relief that the
18 *Bannercroft* Court denied – just like the relief Plaintiffs seek here – would have undermined the
19 Agency’s comprehensive (and statutorily-prescribed) dispute-resolution procedures. *See Kissinger*,
20 445 U.S. at 154 (citing *Bannercroft*’s “reluctance to construe the FOIA as silently departing from
21 [an agency’s] prior longstanding practice.”). This Court should follow *Bannercroft*, and dismiss
22 Plaintiffs’ claims for equitable relief for the same reasons.
23
24
25

26 Other cases Plaintiffs cite for the Court’s “broad, equitable powers to review pattern and
27 practice claims,” Pls.’ Opp at 5, also are distinguishable because they involved document
28

1 withholdings and/or egregious intent by an agency to circumvent FOIA – in other words,
2 actionable FOIA violations that justified equitable relief. For example, in *Payne*, the Air Force
3 conceded it had an “impermissible practice” of unlawfully withholding documents, and its
4 Secretary was unable “to deal with [his agency’s] noncompliance.” 837 F.2d at 494. Likewise, in
5 *Long v. IRS*, the IRS “us[ed] the FOIA offensively to hinder the release of nonexempt documents”
6 by, among other things, deliberately and systematically refusing to produce nonexempt documents
7 until after lawsuits were filed. 639 F.2d 907, 910 (9th Cir. 1982). By contrast, CBP has not denied
8 Plaintiffs’ requests in this case, much less held back nonexempt documents or stalled deliberately.
9

10 Finally, Plaintiffs argue that they should receive “systemic equitable relief” for their
11 “pattern and practice” claims because it would be “manageable and comports with the purpose and
12 intent of FOIA.” Pls.’ Opp. at 9-10. The “systemic relief” they seek is “a nationwide injunction”
13 that would: (1) give CBP 60 days to respond to nearly 35,000 backlogged FOIA requests; and (2)
14 require CBP to respond to all current and future FOIA requests within 20 days of receipt. Compl.
15 at 22-23. Plaintiffs’ argument is belied both by common sense, and by the FOIA’s express
16 recognition that all responses to document requests need not be answered within a fixed time
17 period. *See supra* Part I. And Plaintiffs’ demand for “systemic relief” directly contradicts the clear
18 intent of the FOIA’s three-tier scheme for resolution information requests. As recognized by the
19 D.C. Circuit in *CREW*, the FOIA’s unusual and exceptional circumstances provisions reflect that
20 “it would be a ‘practical impossibility’ for agencies to process all FOIA requests within 20 days,”
21 and any reading of the FOIA must “recognize[] and accommodate[] that reality.” 711 F.3d at 189.
22 The FOIA’s three-tiered “scheme provides an incentive for agencies to move quickly [so as to
23 avoid court supervision] but recognizes that agencies may not always be able to adhere to the
24 timelines that trigger the exhaustion requirement.” *Id.* (emphasis added).
25
26
27
28

1 Indeed, Congress recently considered this very issue, and confirmed that it would be
2 impractical to require CBP to process all of its backlogged FOIA requests within 60 days. In May
3 2015, a House Subcommittee approved and introduced a bill entitled the “DHS FOIA Efficiency
4 Act of 2015” (the “Bill”), which outlines potential steps to improve FOIA efficiency and decrease
5 backlogs at DHS. *See* H.R. 1615 (May 25, 2015).⁶ The Bill includes “the goal of reducing
6 [agency backlogs] by 50 percent between fiscal year 2015 and fiscal year 2018.” *Id.* at 4. Thus,
7 the Subcommittee recognized that, at best, Congress may set a goal to address half of CBP’s
8 backlog over the course of three years. Even then, the Subcommittee has proposed an amendment
9 that would recognize the Bill’s timeline as aspirational, and that DHS may not have resources to
10 cut its backlog in half over the course of three years. *See id.* at Subcomm. Markup, Am. 1, en bloc
11 2 (agreed to by voice vote) (providing for ongoing “assessment of whether [DHS] has adequate
12 staffing and other resources to address the [Bill’s] backlog goals.”).⁷ This proposed Bill sharply
13 contrasts Plaintiffs’ insistence that it would be “manageable” and “quite simpl[e]” for CBP to
14 address its entire backlog in 60 days. Pls.’ Opp. at 9. The Court should defer to Congress’s
15 expertise on this issue, not Plaintiffs’ unsupported theory.⁸
16
17
18
19
20

21 ⁶ *available at* <http://homeland.house.gov/bill/hr-1615-dhs-foia-efficiency-act>

22 ⁷ *available at* [http://docs.house.gov/meetings/HM/HM09/20150513/103440/BILLS-114-](http://docs.house.gov/meetings/HM/HM09/20150513/103440/BILLS-114-HR1615-W000822-Amdt-1-Enbloc-2.pdf)
23 [HR1615-W000822-Amdt-1-Enbloc-2.pdf](http://docs.house.gov/meetings/HM/HM09/20150513/103440/BILLS-114-HR1615-W000822-Amdt-1-Enbloc-2.pdf). This amendment also was included in the Full
24 Committee markup of the Bill. *See id.* at Full Comm. Markup, Am 1 at 5 (agreed to by voice
25 vote), *available at* [http://docs.house.gov/meetings/HM/HM00/20150520/103514/BILLS-114-](http://docs.house.gov/meetings/HM/HM00/20150520/103514/BILLS-114-HR1615-C001103-Amdt-1.pdf)
26 [HR1615-C001103-Amdt-1.pdf](http://docs.house.gov/meetings/HM/HM00/20150520/103514/BILLS-114-HR1615-C001103-Amdt-1.pdf).

27 ⁸ Plaintiffs continue to press the absurd argument that because CBP has more overall
28 funding than other DHS agencies, it “cannot seriously claim ‘limited resources’ or that an order
from this court would cause CBP to ‘second-guess’ its management of ‘competing priorities.’” Pls.’
Opp. at 9-10. CBP is the largest law enforcement agency in the United States, and its budget is
disbursed amongst its many significant duties. Accordingly, that budget is not relevant to this case.

1 **III. Plaintiffs Do Not Have Standing to Bring a Pattern and Practice Claim**

2 Plaintiffs also fail to recognize the limited scope of “pattern and practice” standing.
3 “Pattern and practice” claims are a narrow exception to the rule that FOIA relief is reserved for
4 existing document withholdings. *See supra* Part I. Since ongoing FOIA claims usually can
5 become moot at any time during the pendency of a case (as soon as the documents at issue are
6 released), “pattern and practice” claims provide a limited exception for a party who demonstrates a
7 likelihood that he will file similar FOIA requests in the future. By definition, this applies only
8 where the same requestor will suffer the same injury in the future, since the purpose is to allow a
9 requestor to resolve his entire individual dispute all at once. *See Payne*, 837 F.2d at 491. It
10 follows that a party only has “pattern and practice” standing when: (1) he is subject to a document
11 withholding in the first place; and (2) he “is likely to suffer similar document withholding “in the
12 future.” *Id.* (emphasis added); *see also Long*, 693 F.2d at 907 (“[W]here the district court finds a
13 probability that alleged illegal conduct will recur in the future, an injunction may be framed to bar
14 future violations that are likely to occur.”) (emphasis added). Plaintiffs fail on both fronts.
15

16
17 First, failure to comport with the FOIA timelines is not a withholding under the statute, and
18 Plaintiffs do not allege any other injury. *See supra* Part I. Second, Plaintiffs concede that they do
19 not stand to suffer any future injury from CBP’s purported “pattern and practice” of FOIA delays.
20 Pls.’ Opp. at 12-13. Nonetheless, Plaintiffs try to claim “pattern and practice” standing based on
21 the fact that they had pending FOIA requests at the time this case was filed. *See id.* at 10-14.
22 Plaintiffs misapprehend the purpose and context of FOIA “pattern and practice” claims. Such
23 claims are inherently prospective, and require a likelihood of future injury that is not alleged here.
24

25 **IV. Plaintiffs’ Claim Fails because they do not Challenge a Discrete Policy or Practice**

26 Plaintiffs also fail to identify any discrete policy or practice of CBP at issue in this case.
27 For that additional reason, this Court does not have jurisdiction over their “pattern and practice”
28

1 claim. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (“The limitation to
 2 discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan v.*
 3 *Nat’l Wildlife Fed.*, 497 U.S. 871 (1990).”).⁹ Plaintiffs incorrectly contend that the FOIA’s 20-day
 4 timeline is a “mandate” and “a very discrete action that is specified under the statute.” Pls.’ Opp.
 5 at 14. But, the “20-working-day timeline is not absolute.” *CREW*, 711 F.3d at 184. Rather, the
 6 FOIA timeline places considerable discretion with the agency to determine when it needs more
 7 time to respond to requests. *See supra* Part I. Indeed, the FOIA contemplates that any agency may
 8 take longer to respond to FOIA requests for a host of reasons, including lack of resources and a
 9 substantial increase in the number of FOIA requests received. *See id.*

10
 11 Plaintiffs want the Court to order an impractical result (*i.e.*, that CBP must respond to about
 12 35,000 FOIA requests in 60 days), without pointing to any discrete policy or practice that could, or
 13 should, change in order to make that happen. The Supreme Court has foreclosed such generalized
 14 attacks on agency programs, and Plaintiffs’ claim is not properly before this Court.¹⁰

15 CONCLUSION

16
 17 Accordingly, the Court should grant Defendants’ Motion to Dismiss Plaintiffs’ First
 18 Amended Complaint.

19
 20
 21 ⁹ Plaintiffs’ attempt to distinguish *Norton* and *Lujan* on the basis that they arose from the
 22 ADA is a red herring. *See* Pls.’ Opp. at 14. *Norton* and *Lujan* recognized that there are limits on
 23 judicial power to review an agency’s “failure to act.” Plaintiffs’ “pattern and practice” claim
 24 alleges that Defendants “failed to act” on FOIA requests within the FOIA timeline. Where, as
 here, Plaintiffs’ claims are based on “delay of an action over which the agency had discretion,” not
 “invocation of inapplicable statutory exemptions,” it is clear that *Norton* and *Lujan* apply. *See Del*
Monte Fresh Produce N.A., Inc. v. United States, 706 F. Supp. 2d 116, 120 (D.D.C. 2010).

25
 26 ¹⁰ In fact, the issue of DHS backlogs already is under consideration by Congress, *see supra*
 Part II, which is the appropriate forum. *See Lujan*, 497 U.S. at 891 (“[W]holesale improvement of
 [an agency] program [cannot be sought] by court decree, rather than in the office of the Department
 27 or the halls of Congress, where programmatic improvements are normally made.”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: June 8, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Emily B. Nestler
EMILY B. NESTLER D.C. Bar #973886
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-8489
Facsimile: (202) 616-8470
emily.b.nestler@usdoj.gov

*Counsel for Defendants United States Customs and
Border Protection and Department of Homeland
Security*

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2015, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

Executed on June 8, 2015, in Washington, D.C.

/s/ Emily B. Nestler
Emily B. Nestler

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28