No. __________

IN THE

Supreme Court of the United States

JONATHAN CORBETT,

Petitioner

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the Eleventh Circuit's "substantial likelihood" test for Article III standing relating to future injuries comport with this Court's "certainly impending" test that takes aim at whether a future injury is "too speculative" to adjudicate?

2) When the government indicates it will search a small number of members of a large group at random, do all members of that group have a "real and immediate" injury sufficient to challenge the constitutionality of the search practice?

PARTIES TO THE PROCEEDING

Petitioner is Jonathan Corbett, a California attorney appearing before this Court *pro se*.

Respondent is the U.S. Transportation Security Administration, a sub-agency of the U.S. Department of Homeland Security.

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This case began as a petition to the Court of Appeals for review of an order of the Transportation Security Administration, pursuant to 49 U.S.C. § 46110(a). There were therefore no District Court proceedings, and Petitioner was neither entitled to nor received any proceedings in front of the agency.

The opinion of the Eleventh Circuit dismissing Petitioner's original petition is attached as Appendix A. The case number below was 15-15717.

JURISDICTION

The Court of Appeals entered its judgment on July 19th, 2019. Jurisdiction was proper in the Court of Appeals pursuant to 49 U.S.C. § 46110(a).

This Court has jurisdiction under 28 U.S.C. § 1254(1), and this petition is timely pursuant to 28 U.S.C..§ 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., Art. III, § 2, Cl. 1 is reproduced in Appendix B. All statutes and regulations found in the Table of Authorities are reproduced in Appendix C.

STATEMENT OF THE CASE

A. Factual Background

Respondent TSA has been given authority by Congress to conduct warrantless administrative searches at airport checkpoints nationwide for the purpose of preventing air terrorism. Starting in 2010, TSA implemented body scanners, which it refers to as "Advanced Imaging Technology," as the primary screening method.

These body scanners were controversial, generating more than a dozen lawsuits across the country, because they created images of passengers' bodies underneath their clothing, effectively allowing for a virtual strip search. Some passengers also questioned the health risks presented by the radiation emitted by the devices, and still others questioned their efficacy. Notwithstanding, no challenge to their constitutionality has been successful.

Part of the reason TSA has been successful in defending its use of these devices is because it has maintained that passenger participation in the body scanner program was *optional*. *Elec. Priv. Info Cntr. v. Dept. of Homeland Sec.*, 653 F.3d 1, 10 (DC Cir 2011). Any passenger was allowed to "opt-out" of screening via body scanner and be screened via manual "pat-down" instead. *Id.*

This all changed in 2015, when TSA announced that for "some" passengers, the pat-down option would

no longer be permitted. Appendix A, Eleventh Circuit Opinion, p. 25. TSA refused to elaborate on who those "some" passengers would be until the filing of the petition in the instant case, challenging the decision to remove the opt-out option on Administrative Procedures Act and Fourth Amendment grounds.

B. Proceedings in the Court of Appeals

Petitioner filed his original proceeding in U.S. Court of Appeals for the Eleventh Circuit, the circuit in which he resided, on December 28th, 2015. The case was filed directly in the Court of Appeals because the policy involves a change to TSA's "Screening Checkpoint Standard Operating Procedures," a document TSA considers an "order" under 49 U.S.C. § 46110(a), a statute which channels review directly to that court.

Respondent's brief was filed on October 20th, 2016, which revealed that "some" passengers means the following:

1) Passengers on a "selectee list," a government watch list similar to the no-fly list but with the lesser consequence of receiving additional screening rather than refused boarding, and
2) Passengers selected at random.

Petitioner is not on the selectee list and therefore challenges the order only as it pertains to passengers

selected at random. Petitioner is a very frequent flyer, at time of filing, at all times since, and for the foreseeable future, Appendix A, Eleventh Circuit Opinion, p. 43, and thus regularly runs the risk of being randomly selected.

TSA indicated in its brief that the exact percentage of passengers chosen at random to be refused an opt-out option (and, essentially, to be treated as if they were on the selectee list) is Sensitive Security Information, 49 C.F.R. § 1520.5, and (over Petitioner's objection) filed the percentage only in an *ex parte* and under seal version of their brief. *Id.*, p. 46. As of the date of filing, Petitioner and the public are still in the dark as to this number.

The case was fully briefed on May 1st, 2017, and decided, without oral arguments, by a panel on July 19th, 2019. The Eleventh Circuit, giving no indication as to the reason behind the extreme delay in issuing a ruling, dismissed the petition in its entirety.

The basis for the dismissal was lack of standing. The panel stated that it relied on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which required a "real and immediate" threat of harm, and that "after considering the actual percentage of passengers that TSA expects to randomly select for mandatory AIT screening, we have no doubt that Corbett does not risk a *substantial likelihood* of future injury." Appendix A, Eleventh Circuit Opinion, p. 46 *(emphasis added)*.

REASONS FOR GRANTING THE PETITION

I. The Correct Test is "Certainly Impending," Which Contemplates Looking at Attenuated Chains of Events to Determine Whether a Future Injury is "Too Speculative"

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy." *Lyons* at 101. When a plaintiff has not yet been injured, but seeks to prevent a future injury, the courts must first consider whether an actual, live case or controversy has been brought. The test for whether there is Article III standing for a future injury is frequently examined by courts in the context of injunctive relief, whether on a motion for a preliminary injunction or a demand for a permanent injunction. The Court has spoken to this issue many times, most recently settling on the "certainly impending" test. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

The word "certainly" has confused some courts, perhaps because the Court did not mean that it "require[s] plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Clapper* at 414, fn. 5; *see also* *Clapper* at 432-433 (Breyer, J., explaining in dissent that the Court intends "literally" to "emphasize[] … the immediately following term "impending").

Clapper clarifies for us that at base, the "certainly impending" test is simply intended to exclude injuries that are "too speculative." *Id.* at 401. In order to consider whether a claim is sufficiently speculative to preclude standing, the Court has endorsed considering whether "a highly attenuated chain of possibilities" is required to occur before the injury can occur. *Id.* at 410. For example in *Clapper*:

> "[R]espondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its statutory authority under §1811a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the FISC will conclude that the Government's proposed surveillance procedures satisfy §1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts."
>
> *Id.*

The Court has also declared at least a couple of specific circumstances where a claim will be too speculative. First, courts should assume plaintiffs will follow the law, and that if the plaintiff would be required to break the law in order to risk future injury, the claim is necessarily too speculative.

O'Shea v. Littleton, 414 U.S. 488, 497 (1974) ("We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct…"); *Lyons* at 106 (plaintiff would have to resist arrest or officer would have to break the law). Second, "'some day' intentions" will not be sufficient. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). If plaintiff is required to do something before they are at risk of the challenged harm, they must have "concrete plans" to do that prerequisite action. *Id.*

The Eleventh Circuit not only invented its own test, as discussed *infra*, but in this case specifically eschewed the "attenuated chain of possibilities" analysis that this Court set forth. Appendix A, Eleventh Circuit Opinion, p. 52, fn. 3 ("Corbett also claims that many of the injury in fact cases we rely on, like Lyons, are distinguishable, because no chain of attenuated events must occur before Corbett will be randomly subjected [to the challenged harm]. But that is a distinction without a difference."). Having dismissed this Court's mandate in a footnote, the court below went on to discuss probabilities, despite this Court never having endorsed creating bright-line tests using statistics and percentages. *Id.*

The Court should grant *certiorari* to correct the Eleventh Circuit: an individualized analysis of whether a harm is speculative is the requirement, not engaging in probabilities.

II. The Eleventh Circuit Confused "Likelihood of Substantial Injury" with "Substantial Likelihood of Injury"

The Eleventh Circuit's improper focus on the probability that a harm will occur, rather than the proper focus on the speculative nature of the challenged harm, comes, perhaps, from a line of cases where that court transposes the word "substantial" from modifying the word "injury" to modifying the word "likelihood," or from borrowing the word from discussions of whether the relief requested would be "substantially likely" to redress the injury.

In *O'Shea*, the Court required "a likelihood of substantial and immediate irreparable injury." *Id.* at 502; see also *Lyons* at 111 (citing *O'Shea* with approval). It requires no special canon of construction to understand that it is the *injury* that must be substantial, not the *likelihood*. And, substantial, in this context, appears to mean "of substance," not "of considerable amount" or similar.

The Court has also used the word "substantial" in the context of standing when discussing whether a court can grant adequate relief. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 521 (2007) (requiring "substantial likelihood" that the relief requested would redress the injury); *Lujan* at 595 (same, quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-76 (1978)).

But the only place in this Court's standing jurisprudence one can find "substantial" being applied to the "likelihood of injury" is *in the dissent* of *Lyons*, which worried that the majority's opinion may reach further than intended. *Lyons* at 137 (framing the majority as having required a "substantial certainty" of injury). The Court has since allayed *Lyons* dissent's framing. *Clapper* at 414, fn. 5 (the word "certainly" not intended to be taken literally).

Notwithstanding, the Eleventh Circuit has essentially adopted the minority's position (or more accurately, the minority's *fear*, given that the minority was *complaining* that *Lyons* went too far) in *Lyons* to make its demands more exacting than they are. As early as at least 1991, the Eleventh Circuit has included a "likelihood" of injury test. *Cone Corp v. Fla. Dept. of Transp.*, 921 F.2d 1190, 1203-4 (11th Cir. 1991) ("he must demonstrate that he is likely to suffer future injury"). By 1999, the Eleventh Circuit, reading *Cone Corp* and *Lyons*, inserted the word "substantial" into their test for no readily apparent reason. *Malowny v. Federal Collection Deposit Group*, 193 F.3d. 1342, 1346 (11th Cir. 1999) ("In order to demonstrate that a case or controversy exists … a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future."). In doing so, the Eleventh Circuit blatantly misquoted *Lyons* and even misquoted itself.

Since *Malowny*, the Eleventh Circuit has continued with a "substantial likelihood of injury"

test. In the instant case, the court below cited not only its own misguided precedent, and not only its own misinterpretation of Lyons, but also bastardized *Lujan:*

> "We recognize there's a chance that [Petitioner might be injured in the future] but that is not enough under our case law to show a substantial likelihood of future injury that is "real and immediate," "actual and imminent," and not "conjectural" or "hypothetical." Lujan, 504 U.S. at 560 (quotations omitted); Lyons, 461 U.S. at 102 (quotations omitted)."
>
> *(Emphasis in original.)*
>
> Of course, *Lujan* also stands for no such thing (nor does *Lyons*), and again uses the word "substantial" only to discuss the potential for the requested relief to be effective. *Lujan* at 595 ("plaintiff must show 'substantial likelihood' that relief requested will redress the injury"') (*summarizing and quoting Duke Power Co*).

The Court should take this case to correct the Eleventh Circuit: this Court has never imposed a "substantial" requirement on "likelihood of injury."

III. All Other Circuits Disagree With the Eleventh Circuit on the "Likelihood" Standard

Of the remaining numbered circuits and D.C. Circuit:

- Six of them appear to consider whether the harm is speculative by considering whether an attenuated chain of events is required
- Two use a "plausibility" standard
- Two use a "likely to suffer future injury" standard
- One uses a "contingent upon speculation or conjecture" standard.

The six circuits that appear to use the correct standard are the 1st, 2nd, 6th, 7th, 8th, and D.C. circuits. See *In re New Motor Vehicles Can*, 522 F.3d 6, 14 (1st Cir. 2008) (discussing that prior injuries were result of "perfect storm" for which the repetition was speculative); *Caruso v. Zugibe*, Case No. 15-2219 (2nd Cir. 2016) (addresses whether a "string of possibilities" is "too speculative"); *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, No. 18-1896 *11 (6th Cir., Jun. 10, 2019) (denying standing because assumptions were made about how the government would act); *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 396 (7th Cir. 2019) (attenuated chain-type approach); *Brazil v. Ark. Dep't of Human Servs.*, 892 F.3d 957, 960 (8th Cir., Jun. 12, 2018) *(citation omitted)* (despite referring to "evidence [of] a likelihood," the court too took an attenuated chain-type approach: "Only a far-fetched sequence of events…"); *Chaplaincy of Full Gospel Churches v. U.S. Navy (In re Navy Chaplaincy)*, 697 F.3d 1171 (D.C. Cir. 2012) (focus on unlikely series of events).

The Fourth and Ninth circuits appear to take the most relaxed view on standing, allowing future injuries when they are "plausible." *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 455 (4th Cir. 2017) ("plan to return… was plausible," "his plausible intentions," *etc.,* not mentioning *Clapper*'s standard); *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1115 (9th Cir. 2017) (a "consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product," was held to be sufficient to demonstrate standing to enjoin a future injury relating to false advertising, despite citing *Clapper*'s "certainly impending" language).

The Third and Fifth circuits do not appear to have deeply dived into the contours of standing relating to future injuries, but in cases that were not a "close call," used a "likely to suffer future injury" test. *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 292 (3rd Cir. 2018). *M.D. v. Leblanc*, 627 F.3d 115, 123 (5th Cir. 2010).

The Tenth Circuit uses a "contingent upon speculation or conjecture" test. *Redmond v. Crowther*, 882 F.3d 927, 942 (10th Cir. 2018). However, like the Third and the Fifth circuits, it does not appear the Tenth Circuit has decided a "close call" and thus has not substantially elaborated on how their test works in practice.

The Court should hear this matter because the circuits are split among several different tests – and *no* circuit agrees with the Eleventh Circuit's "substantial likelihood" test.

IV. No "Chain of Attenuation" or "Unlawful Conduct" Is Required Here Before Petitioner is At Risk of Injury

As the Court typically grants certiorari to mend circuit splits or specify new rules of law, and may very well correct the court below on the proper test while leaving that court to actually apply the test and decide the outcome on remand, Petitioner will only briefly discuss why the proper test would have changed the result in this case.

Petitioner's challenge is distinguishable from all other cases where courts have grappled with whether a claim is too speculative because there is no "chain of events," attenuated or not, required for the injury to occur. The government has conceded that every time Petitioner does what he lawfully does on a regular basis, it "spins the wheel" and decides whether his fate will be that of an ordinary passenger or that of a "selectee" subject to the challenged search procedure. No discretion is given to any government official as to whether or not Petitioner is affected by this random challenge: the "wheel spinner" is a computer that either prints a code on his boarding pass or does not based on random luck.

The court below focused on how often the wheel turns up "selectee." While the exact frequency was not disclosed publicly or to Petitioner, the panel convinced itself that the frequency was low enough that Petitioner had no case.

Both the analysis and result mandated by this Court's approach are in direct contrast with the Eleventh Circuit's approach. Under this Court's approach, given that Petitioner faces a very real, non-speculative risk – no matter how small – each time he travels, standing is permitted. Under the Eleventh Circuit rule, the government is free to undertake[1] any unconstitutional action so long as it does it to only 1 in 100 persons, or 1 in 1,000 persons, or whatever the secret bright-line is that the Eleventh Circuit endorses[2], and so long as it is willing to pay damages to those it injures.

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[1] Obviously, the Eleventh Circuit's rule does not prevent a party who has been subjected to the search *in the past* from recovering money damages. But it does allow the government to "continue the policy indefinitely as long as it is willing to pay damages." *Lyons* at 113 (Marshall, J., *dissenting*). In *Lyons*, the majority based their holding on there being no policy of the government allowing chokeholds without threat of violence, *see Lyons* at 107 fn. 7, 110 (but the minority disputed this point, *see Lyons* at 136). The Eleventh Circuit apparently would have allowed the L.A.P.D. to continue even if they had a written policy of indiscriminately choking out drivers in traffic stops.

[2] In at least one case cited in the court below's opinion, they denied standing to plaintiffs when a "vast majority" of defendant's conduct did not result in liability. Appendix A, Eleventh Circuit Opinion, p. 33, *citing Bowen v. First Family Financial Svcs.*, 233 F.3d 1331 (11th Cir. 2000). The threshold for "vast majority" is not identified, but would it not mean that if

Finally, the court below compounded the handicap it placed on Petitioner's case by giving improper consideration of the merits of the case itself. Appendix A, Eleventh Circuit Opinion, p. 48 (taking "a 'peek' at the merits"). This comes from another failed attempt to articulate *Lyons*. In *Lyons*, the Court considered that not every time a chokehold was used by a police officer would there be a constitutional injury (*e.g.*, there would be no constitutional injury if the chokehold were used in response to a threat of serious bodily injury or death). *Lyons* at 108 ("conjecture to suggest" every such interaction would be unlawful). In the instant case, it is clear that if Petitioner were successful on the merits, TSA would be violating the rights of travelers *every time* it forced the screening procedure on a random traveler. In other words, the Eleventh Circuit took *Lyons* as authorization to consider a litigant's chances of success on the merits when Lyons was merely discussing risk of constitutional injury.

TSA selected as many as 1 out of 10 for random screening, that the "vast majority" (90%) would not be selected and thus no standing? Clearly such odds should open the courthouse door, which underscores why the Eleventh Circuit's creation of a test based on probabilities is inferior to this Court's approach of individually examining the speculative nature of a claim.

CONCLUSION

In the cases between and including *O'Shea*, *Lyons*, *Lujan*, and *Clapper*, this Court has already placed substantial burdens on plaintiffs seeking to enjoin future injuries. The Court should not allow the circuit courts to impose upon plaintiffs any more difficulty than this Court has already demanded.

For the reasons above, this petition for *certiorari* should be granted.

Respectfully,

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APPENDIX A – Eleventh Circuit Opinion

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15717

Non-Argument Calendar

Agency No. 49 U.S.C. section 46110

JONATHAN CORBETT,

Petitioner,

versus

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent.

Petition for Review of a Decision of the

Transportation Security Administration

(July 19, 2019)

Before TJOFLAT, MARCUS and ROSENBAUM, Circuit Judges

MARCUS, Circuit Judge:

This is Jonathan Corbett's third pro se challenge to some aspect of the Transportation Security Administration's ("TSA") airport scanner equipment using advanced imaging technology ("AIT"). On each occasion, he has claimed that TSA's airport screening procedures violated his right to be free from unreasonable searches and seizures, citing to the Fourth Amendment of the United States Constitution. In an earlier lawsuit that wound up before this Court, Corbett sought to reverse a decision of TSA, challenging the Administration's previous policy that gave passengers at airport security checkpoints the option of obtaining security clearances through either advanced imaging technology (AIT) body screeners or alternative screening procedures, like a physical pat down. A panel of this Court dismissed Corbett's petition as being untimely, and, alternatively, held that TSA's use of body scanners and pat-down procedures did not violate the Fourth Amendment. Corbett v. TSA, 767 F.3d 1171, 1182 (11th Cir. 2014) ("Corbett I"). We had little trouble concluding that the substantial danger to life and property that could result from airplane terrorism outweighed the possible intrusion of TSA's AIT and pat-down screening procedures on airline passengers. Id.

This time Corbett challenges TSA's latest policies and orders that require certain airline passengers to pass through AIT screeners, eliminating for them the option of being screened by a physical pat-down. After careful review, however, we conclude that this Court is without jurisdiction to entertain Corbett's claims. As pled, Corbett lacks the necessary standing to bring this petition, and, accordingly, we are required to dismiss it.

In the absence of standing, the federal courts do not have the power to opine in an advisory capacity about the merits of these claims. We have repeatedly held that "[s]tanding is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974 (11th Cir. 2005) (quotations omitted; citing, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)). The essential problem here is that Corbett has failed to establish that he suffered an injury in fact, that is, the invasion of a judicially cognizable interest that is concrete and particularized and actual and imminent.

I.

A.

We review de novo questions concerning subject-matter jurisdiction, including standing. Elend v. Basham, 471 F.3d 1199, 1204 (11th Cir. 2006). When ruling on standing at the pleading stage, we "must accept as true all material allegations of the

[pleading], and must construe [it] in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975). Moreover, if we have been presented with "facts beyond the four corners" of the pleading that are relevant to the question of standing, we may consider them. Cone Corp. v. Fla. Dep't of Transp., 921 F.2d 1190, 1206 n.50 (11th Cir. 1991). The party invoking federal jurisdiction bears the burden of establishing standing. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

B.

We begin with the relevant background and procedural history surrounding Corbett's petition. Congress vests responsibility for civil aviation security in the TSA Administrator. 49 U.S.C. § 114(d). The Administrator is required to "assess current and potential threats to the domestic air transportation system," take all necessary steps to protect the Nation from those threats, and improve transportation security in general. Id. §§ 44903(b), 44904(a), (e). Among other things, the Administrator must ensure that "all passengers and property" are screened before boarding, to prevent passengers from "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." Id. §§ 44901(a), 44902(a).

Nonmetallic explosives and other nonmetallic threats pose a significant danger to aviation security. See Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11,364, 11,365 (Mar. 3, 2016)

(final rule); see also 49 U.S.C. § 44925(a) (directing TSA to "give a high priority" to the development of new technologies to detect such threats). The danger caught this nation's attention when, on Christmas Day, 2009, a terrorist affiliated with Al Qaeda in the Arabian Peninsula attempted to destroy a plane using a nonmetallic explosive device hidden in his underwear. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,299 (Mar. 26, 2013) (notice of proposed rulemaking); see also id. (describing similar attempts). The screening procedures then in effect, which included the use of metal detectors and pat-downs, could not detect the Christmas Day bomber's device. Id.

In October 2010, TSA began using AIT scanners as a primary screening method at airport security checkpoints. Corbett I, 767 F.3d at 1174-75. Unlike conventional metal detectors, AIT scanners can detect both metallic and nonmetallic objects concealed on a passenger's body or in a passenger's clothing. Id.; see 78 Fed. Reg. at 18,297 (listing examples of potentially dangerous items, including nonmetallic threat items, that TSA has discovered using advanced imaging technology). Indeed, TSA has determined that AIT scanners are the "most effective technology currently available" to repair this "critical weakness" in the Nation's security infrastructure. 81 Fed. Reg. at 11,365.

When AIT scanners were first used, they displayed the actual contours of the scanned passengers' bodies.

They no longer do so -- each scanner instead now notifies TSA agents about potential concealed threats by highlighting those areas on a generic outline of a person, and that generic or stylized image is temporarily shown on a monitor. See Corbett I, 767 F.3d at 1175. The image of a screened individual is the same as the images provided for all other screened individuals. 49 U.S.C. § 44901(l) . Moreover, the AIT scanners in use at American airports do not collect any personally identifiable information, they do not display an individualized image every time a passenger passes through them, and they are not configured to store or to transmit any passenger-specific images. See 81 Fed. Reg. 11,373-82; Privacy Impact Assessment Update for TSA Advanced Imaging Technology, DHS/TSA/PIA-032(d), at 4 (Dec. 18, 2015).

Since TSA began using AIT technology, Corbett has brought at least five suits challenging the Administration's screening policies; two of them did not involve the AIT body scanners. In 2010, Corbett sued TSA in federal district court in Miami challenging the use of AIT scanners as a primary screening method at airport security checkpoints, and moved for a nationwide injunction barring TSA from implementing that or any AIT screening. See Order Granting Mot. to Dismiss, Corbett v. United States, No. 10-cv-24106, 2011 WL 2003529 (S.D. Fla. Apr. 29, 2011). The district court denied the motion and dismissed the action for want of jurisdiction because

the procedures he sought to challenge constituted a TSA "order" pursuant to 49 U.S.C. § 46110. Petitioner appealed and moved for interim injunctive relief. A panel of this Court denied that motion, see Order, Corbett v. United States, No. 11-12426 (11th Cir. July 27, 2011), and affirmed the district court's judgment, see Corbett v. United States, 458 F. App'x 866, 871 (11th Cir. 2012), cert. denied, 133 S. Ct. 161 (2012).

Corbett later petitioned this Court to review TSA's use of AIT scanners as a primary screening method at airport security checkpoints, and again sought injunctive relief. A panel of this Court denied the application because it "fail[ed] to meet the applicable standard for granting injunctive relief." Order, Corbett v. TSA, No. 12-15893 (11th Cir. Apr. 4, 2013). Thereafter, we dismissed the petition as untimely, and, in the alternative, denied the petition because the challenged screening methodology did not violate the Fourth Amendment. Corbett I, 767 F.3d at 1184. Petitioner unsuccessfully sought certiorari review. Corbett v. TSA, 135 S. Ct. 2867 (2015).

Meanwhile, in March 2012, Corbett filed another complaint in the United States District Court for the Southern District of Florida, this time arising out of a TSA screening experience he had at the Fort-Lauderdale-Hollywood International Airport, when he consented to a pat-down after refusing to go through a full-body scanner. Corbett v. TSA, 568 F. App'x 690, 692 (11th Cir. 2014), cert. denied, 135 S. Ct. 1559 (2015). He lodged twenty-one claims against

TSA, a TSA official, Broward County and the Broward County Sheriff's Office, including Fourth Amendment claims against the TSA official at the airport, Federal Tort Claims Act ("FTCA") claims against the United States, Privacy Act claims against TSA, and a claim against TSA for unredacted records under the Freedom of Information Act ("FOIA"). Id. at 695. After the district court dismissed the majority of Corbett's claims for failure to state a claim and granted summary judgment on the remaining FOIA claims, a panel of this Court affirmed. Id. at 692. We held that the district court had not erred because, among other things, the search of Corbett's bags by the TSA official and TSA's detention of Corbett were reasonable under the Fourth Amendment, the FTCA claims were barred by sovereign immunity, Corbett had failed to allege that he suffered any damages as required for his Privacy Act claims, and FOIA allowed for the redactions that had been made to documents TSA had provided to Corbett. Id. at 696-705.

Again, in 2015, Corbett filed another petition for review in this Court, this time challenging a TSA program that requires airline employees to ask certain passengers some questions before allowing them to board international flights bound for the United States. Order, Corbett v. TSA, No. 15-10757 (11th Cir. July 21, 2016). There, a panel of this Court concluded that the claim was not justiciable, reasoning that even if Corbett bought a ticket for an international flight, there was no assurance that he

would actually be questioned. Id. at 4. The long and short of it was that his claim was speculative and speculative claims could not support constitutional standing. Id.

C.

Coming then to Corbett's instant petition, TSA issued a notice of proposed rulemaking on March 26, 2013. See 78 Fed. Reg. 18,287. The proposal was designed to "codif[y] the use of AIT to screen individuals at aviation security screening checkpoints." Id. at 18,289. The final rule regarding AIT screening was promulgated in March 2016. See 81 Fed. Reg. 11,364. The final rule provides that airport security checkpoints "may include the use of [AIT]." Id. at 11,405. The preamble to the final rule for the first time codified that AIT screening will be mandatory for some passengers as warranted by security considerations. This rule reflected "current DHS policy." Id. at 11,366. TSA declined to include a passenger's right to opt-out of AIT screening, writing that the agency "may require AIT use, without the opt-out alternative, as warranted by security considerations in order to safeguard transportation security." Id. at 11,388-89. TSA explained publicly in a Private Impact Assessment Update that TSA had changed its "operating protocol regarding the ability of individuals to . . . opt-out of AIT screening in favor of physical screening." Privacy Impact Assessment Update for TSA Advanced Imaging Technology, DHS/TSA/PIA-032(d), at 1 (Dec. 18, 2015). "While

passengers may generally decline AIT screening in favor of physical screening, TSA may direct mandatory AIT screening for some passengers as warranted by security considerations in order to safeguard transportation security." Id. at 3.

TSA has explained that the "enhanced screening" procedures -- which require the use of AIT machinery without an opt-out alternative -- apply to individuals designated as "selectees." Supp. App'x 90; see also TSA, Frequently Asked Questions, https://www.tsa.gov/travel/frequently-asked-questions (search "decline AIT screening") (last visited June 27, 2019) (explaining that "some passengers will be required to undergo AIT screening if their boarding pass indicates that they have been selected for enhanced screening"). There are several "[s]electee categories, which differ based on the individual's [] known [] derogatory and risk information." Supp. App'x 90[1]. One of these categories covers "[k]nown or

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[1] Congress has directed TSA to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if [TSA] decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(r)(1)(C). In response to that directive, TSA has defined a body of information as Sensitive Security Information ("SSI") that may not be disclosed except in certain limited circumstances. 49 C.F.R. § 1520.5 (describing information that constitutes SSI); id. § 1520.9(a)(2) explaining that SSI may generally be disclosed only to "covered persons who have a need to know"); id. § 1520.7 (defining "[c]overed persons"); id. § 1520.11 (defining "need to know"). In this case, TSA has filed a Supplemental Appendix containing SSI materials, and has filed a redacted version available for Corbett to review…

suspected [t]errorists," and includes individuals listed in a "Terrorist Screening Database." Id. The other categories have been redacted from the public version of this document. Id. In addition to the categories of selectees created based on risk information, TSA has created an additional category of selectees, as of July 2016, which is comprised of airline passengers randomly chosen as selectees for a particular trip. Id. at 105-06. TSA explained that this policy was designed to inform the general public that "enhanced screening is conducted on a random basis," thereby deterring "[u]nknown terrorists" without significantly impeding checkpoint operations. Id. at 105. When passengers are designated as selectees subject to enhanced screening -- whether they were selected randomly or for risk-based reasons -- their boarding passes always display an "SSSS" notation. See id. at 90. TSA has explained, however, that mandatory AIT screening will be required "in a very limited number of circumstances," so it will not affect the "vast majority of passengers." See TSA, Frequently Asked Questions, https://www.tsa.gov/travel/frequently-

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Since the filing of Corbett's petition, TSA moved this Court to supplement the record with additional SSI materials, also reproduced in TSA's Supplemental Appendix. Because the materials contained therein are relevant to the questions before us and will allow us to make a more informed decision as to standing, we GRANT TSA's motion to supplement. See Schwarz v. Millon Air, Inc., 341 F.3d 1220, 1225 n.4 (11th Cir. 2003); see also Corbett I, 767 F.3d at 1183 (granting TSA's motion to seal SSI materials information because "Corbett has no statutory or regulatory right to access it").

asked-questions (search "decline AIT screening") (last visited June 14, 2019).

This policy -- which denies certain passengers the right to opt-out -- is at the heart of Corbett's challenge. He claims that a screening policy banning any opportunity to opt-out of AIT screening violates the Fourth Amendment and the Administrative Procedure Act. Corbett says that the newly minted mandatory policy violates the Fourth Amendment because a physical pat-down would be equally effective. TSA, in turn, argues that mandatory AIT screening procedures for certain passengers is in fact far more effective at detecting threats than the opt-out policy that it replaced. Finally, and, for our purposes, most importantly, TSA urges that Corbett lacks standing to challenge the mandatory screening procedures and, therefore, that this Court is without power to entertain Corbett's claims.

II.

"It by now axiomatic that the inferior federal courts are courts of limited jurisdiction. They are empowered to hear only those cases falling within the judicial power of the United States as defined by Article III of the Constitution." Univ. of S. Alabama v. Am. Tobacco Co., 168 F.3d 405, 409 (11th Cir. 1999). Article III, then, limits our power only to "cases or controversies." Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1339 (11th Cir. 2000). One essential component of the "case or controversy" requirement is

that the plaintiff must have standing to pursue his claim in a federal court. Id. Indeed, standing is a threshold question that must be explored at the outset of any case. Bochese, 405 F.3d at 974. In its absence, "a court is not free to opine in an advisory capacity about the merits of a plaintiff's claim." Id. In fact, standing is "perhaps the most important jurisdictional" requirement, and without it, we have no power to judge the merits. Id. (quotations omitted)[2].

The three prerequisites for standing are that: (1) the plaintiff has suffered an "injury in fact" -- an invasion of a judicially cognizable interest, which is (a)

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[2] It may be that there are also problems of ripeness and finality lurking in Corbett's petition for review. The ripeness doctrine examines "whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision-making by the court." Elend v. Basham, 471 F.3d 1999, 1210-11 (11th Cir. 2006). Whether an agency action is "final" depends on if the agency's action has been "consummated," as opposed to being "tentative and interlocutory," and if the action is one by which "rights and obligations have been determined" or from which "legal consequences will flow." Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1236 (11th Cir. 2003) (quotations omitted). But because the standing issue before us is straightforward, because standing is paramount among our jurisdictional inquiries, and because the parties have not argued ripeness or finality, we dismiss Corbett's petition on standing grounds alone. As the Supreme Court has explained, "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (citations and quotations omitted). Indeed, "[t]here is no mandatory sequencing of jurisdictional issues." Id. (citation and quotations omitted).

concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there be a causal connection between that injury and the conduct complained of -- the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it be likely, not merely speculative, that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61; see also 31 Foster Children v. Bush, 329 F.3d 1255, 1263 (11th Cir. 2003). "By insisting that a plaintiff show a substantial likelihood of future injury, in the absence of declaratory or injunctive relief, courts further one of the purposes of the constitutional standing requirement -- reserving limited judicial resources for individuals who face immediate, tangible harm absent the grant of declaratory or injunctive relief." Bowen, 233 F.3d at 1340 (citing 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 3532.1, at 114 (2d ed. 1984)).

In order to satisfy the injury-in-fact requirement of standing, a plaintiff may show that he "has sustained or is immediately in danger of sustaining some direct injury." Lynch v. Baxley, 744 F.2d 1452, 1456 (11th Cir. 1984) (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)). "Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of

constitutional questions." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (quotations omitted). "Abstract injury is not enough." Id. A plaintiff need not wait for an injury to occur, so long as he "is immediately in danger of sustaining some direct injury" as a result of the challenged official conduct and the injury or threat of injury is both "real and immediate," not "conjectural" or "hypothetical." Id. at 101-02 (quotations omitted); see also Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) ("A threatened injury must be certainly impending to constitute injury in fact.") (quotations omitted); 31 Foster Children, 329 F.3d at 1266-67 (noting that standing for declaratory or injunctive relief requires that future injury "proceed with a high degree of immediacy"). Immediacy requires that the anticipated injury occur within some fixed period of time in the future. Fla. State Conference of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1161 (11th Cir. 2008). "When a plaintiff cannot show that an injury is likely to occur immediately, the plaintiff does not have standing to seek prospective relief even if he has suffered a past injury." 31 Foster Children, 329 F.3d at 1265. And even if the plaintiff shows immediacy, the injury must still be substantially likely to actually occur, meaning that the threatened future injury must pose a realistic danger and cannot be merely hypothetical or conjectural. Fla. State Conference of N.A.A.C.P., 522 F.3d at 1161; see also Bowen, 233 F.3d at 1340 (observing that a "perhaps or maybe chance" of an injury occurring is not enough for standing).

The Supreme Court extensively explored the idea of future injury in City of Los Angeles v. Lyons. There, the plaintiff, Adolph Lyons, sought to enjoin Los Angeles police officers from using a certain chokehold technique in order to render arrestees unconscious. 461 U.S. at 97-98. Lyons claimed that he had been personally subjected to the challenged technique in the past, and that Los Angeles police officers "routinely appl[ied] chokeholds in situations where they are not threatened by the use of deadly force." Id. at 105. In holding that Lyons lacked standing to sue, the Supreme Court explained that while Lyons "may have been illegally choked by the police" in the past, this "does nothing to establish a real and immediate threat that he would again be . . . illegally choke[d]" in the future. Id. The Supreme Court recognized that, "among the countless encounters between the police and the citizens of . . . Los Angeles, there will be certain instances in which strangleholds will be illegally applied." Id. at 108. Nevertheless, "it is . . . no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of [the] chokehold" technique that Lyons challenged. Id. In other words, "even assuming that Lyons would again be stopped for a traffic or other violation in the reasonably near future, it is untenable to assert, and the complaint made no such allegation, that strangleholds are applied by the Los Angeles police to every citizen who

is stopped or arrested regardless of the conduct of the person stopped." Id.

Applying Lyons, we've held many times that a plaintiff failed to establish an injury in fact when the likelihood of future constitutional injury was too speculative. Thus, for example, in J W ex rel. Williams v. Birmingham Bd. of Educ., 904 F.3d 1248 (11th Cir. 2018), some Birmingham high school students sued the Birmingham school board and the City's police department, alleging that the defendants used excessive force in violation of the Fourth Amendment by spraying Freeze +P -- an incapacitating chemical spray -- on students and by failing to adequately decontaminate them. A panel of this Court held that the student class representative lacked standing to seek declaratory and injunctive relief barring the use-of-spray claims because there was no "real and immediate threat that she would be subjected to excessive force" by the use-of-spray policy. Id. at 1265. Again, the "likelihood of future constitutional injury [was] too speculative" because the intentional "use of chemical spray in Birmingham high schools had been infrequent," with an estimated 0.4% chance per student, and "[a]llegations of intentional chemical spraying that also constitutes excessive force were even more rare," with an estimated 0.003% chance per student. Id. at 1268 (emphases added). We did not suggest that Freeze +P would never be used against a student in an unconstitutional way by a police officer, but we concluded nevertheless that "the probability of

future instances of unconstitutional spraying is [in]sufficient to provide standing to obtain declaratory and injunctive relief." Id. For the same reasons, we extended the holding to bar the decontamination claims, where there was only an estimated 1.77% chance of a student being intentionally or unintentionally sprayed and improperly decontaminated. Id. at 1273.

We faced the same problem in Bowen v. First Family Financial Services, where the plaintiffs challenged a lender's practice of requiring customers to sign arbitration agreements. 233 F.3d at 1333. We did not address the merits of the plaintiffs' claims that the practice violated the Truth in Lending Act ("TILA") because we concluded that the plaintiffs lacked standing to pursue their TILA claims. Id. at 1341. The plaintiffs had not shown a "substantial likelihood that [the defendant] will take some action that at least arguably violates the TILA or some related law." Id. at 1340. We went on to say that if the defendant were to violate TILA, "we would also have to find there was a substantial likelihood that the plaintiffs and [the defendant] would be unable to resolve any resulting dispute without litigation," and "[t]he undeniable fact is that the vast majority of credit transactions such as the ones in this case do not result in litigation." Id. (emphasis added). Without more, "enforcement of the arbitration agreement against these plaintiffs" was not "certainly impending," for purposes of the standing inquiry. Id.

Still again, a panel of this Court addressed the requirements of standing in Elend v. Basham, 471 F.3d 1199 (11th Cir. 2006). There, the plaintiffs had been protesting outside of the Sun Dome in Tampa, Florida during a political rally attended by President George W. Bush in 2002. Id. at 1202-03. The Secret Service ordered them to move to an authorized "protest zone," which was further away. Id. The plaintiffs sought to enjoin the Secret Service from taking similar action in the future that they said would violate their First Amendment rights, and they claimed to have standing because they "fully intend[ed] to peacefully express their viewpoints in the future in a manner similar to their activities on November 2, 2002 in concert with presidential appearances at the . . . Sun Dome and at other locations around the country." Id. at 1204. We affirmed the district court's dismissal of the claims because the plaintiffs' intention to protest in a similar manner in the future was too speculative. "Other than the one instance in November 2002, we [we]re not even given a description of Plaintiffs' past conduct from which to infer that they might act in a similar manner in the future," and thus it was "entirely conjectural that President Bush would return to speak at a political rally at the Sun Dome." Id. at 1209.

On the record presented to this Court, Corbett's theory of standing is just as conjectural and speculative as the claims made by the plaintiffs in Lyons, in J W, in Bowen, and in Elend, if not more so.

For starters, Corbett has not claimed that he has ever been subjected to mandatory AIT screening under the current TSA policy that he is challenging, nor that he represents a heightened security risk that would trigger mandatory screening under the policy. Nor, finally, has he claimed that his boarding pass has ever had an "SSSS" notation on it. We recognize that the mandatory AIT screening policy on review was not fully in place until July 2016, after Corbett filed his petition with us in December of 2015, which means that Corbett may not have yet had a chance to make these claims in his petition. Significantly, however, since he filed his petition, Corbett has never said that he has been selected for mandatory screening or that he represents a heightened security risk.

While we typically confine our standing analysis to the four corners of the complaint, we may look beyond it when we have before us facts in the record. Cone Corp., 921 F.2d at 1206 n.50; see also Elend, 471 F.3d at 1208 ("[I]n the context of a Rule 12(b)(1) challenge to standing, we are obliged to consider not only the pleadings, but to examine the record as a whole to determine whether we are empowered to adjudicate the matter at hand." (quotations omitted)). So, in Elend, we found the plaintiffs' future intentions insufficiently clear to establish standing where the original allegedly unconstitutional incident had occurred many years before our decision without any suggestion that it had occurred again. 471 F.3d at 1209. We observed that "the injury alleged . . . remains

wholly inchoate" where "[p]laintiffs' intention . . . to protest 'in concert with presidential appearances at the USF Sun Dome and at other locations around the country' fail[ed] to provide any limitation on the universe of possibilities of when or where or how such a protest might occur." Id. It was "entirely conjectural that President Bush would return to speak at a political rally at the Sun Dome," and there was "no indication that he ha[d] done so again since November 2002 despite numerous presidential visits to Florida." Id.

Here, both parties have submitted extensive materials since the filing of Corbett's petition, including the Petitioner's declarations about his travel experiences and plans and materials submitted by TSA. In light of these subsequent filings, it's telling that Corbett has never said, in his declarations or otherwise, that he has been subjected to the policy. Indeed, Corbett has told us that he flew no less than 150,000 miles on over 100 domestic flights from 2013 to 2015, and that because he "fl[ies] at least 50 times a year for both business and personal reasons, [he] will have at least 50 more opportunities to be randomly selected in 2016." See Decl. of Jonathan Corbett at 1 (Dec. 24, 2015); Decl. of Jonathan Corbett at 3 (Sep. 19, 2016). But despite his declaration that he has flown and will continue to take, as best we can tell, over 50 flights a year, he's taken approximately 150 flights to date since 2016, without incident. Even in Lyons, J W and Elend, the plaintiffs claimed to have

suffered some sort of injury as a result of the challenged policy in the past. See J W, 904 F.3d at 1253, 1264 (recognizing that "[p]ast wrongs serve as evidence of whether there is a real and immediate threat of future injury" and that "[a] number of Birmingham high school students . . . were sprayed with or exposed to Freeze +P in 2009, 2010, and 2011"); see also Lyons, 461 U.S. at 108 ("We note that five months elapsed between October 6, 1976, and the filing of the complaint, yet there was no allegation of further unfortunate encounters between Lyons and the police."); Elend, 471 F.3d at 1209 (describing the plaintiffs' "one instance in November 2002"). Corbett, however, has never said that he was subjected to the mandatory TSA policy, before his petition or since then, even though he has made numerous filings since he lodged his petition for review containing substantial information about his travel patterns and his interactions with TSA.

Thus, Corbett is left to argue only that he might be designated as a selectee under TSA's random selection process. He first says it's likely he will be randomly selected in the future because he "regularly gets the 'full treatment'" from TSA, and under its past procedure, TSA randomly subjected him to "selectee" screening on "at least 3 occasions" and to an unspecified form of "elevated screening" on "several more occasions." Pet. Br. at 2. Importantly, however, Corbett recognizes that TSA's policy has changed, Pet. Br. at 5, which makes his prior screening history

irrelevant. Cf. Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen, 586 F.3d 908, 917 (11th Cir. 2009) ("In cases where government policies have been challenged, the Supreme Court has held almost uniformly that voluntary cessation of the challenged behavior moots the claim.").

In the alternative, Corbett hypothesizes that, as a frequent flyer who intends to continue flying frequently, it is likely that he will be randomly chosen to be a selectee passenger in the future. See Pet. Opp. To MTD at 6; see also Decl. of Jonathan Corbett at 3 (Sep. 19, 2016). We recognize there's a chance that he might be selected in the future, based on the random selection process, but that is not enough under our case law to show a substantial likelihood of future injury that is "real and immediate," "actual and imminent," and not "conjectural" or "hypothetical." Lujan, 504 U.S. at 560 (quotations omitted); Lyons, 461 U.S. at 102 (quotations omitted). Notably, as TSA has explained, its AIT screening policy does not affect the "vast majority" of airline passengers. TSA, Frequently Asked Questions, http://www.tsa.gov/travel/frequently-asked-questions (last visited June 27, 2019). We used this exact phrase in Bowen, where we held that the plaintiffs lacked standing to make a TILA claim since the "vast majority of credit transactions" would not involve at least some arguable violation of TILA or a related law. Bowen, 233 F.3d at 1340 (emphasis added). The odds of something not happening the "vast majority" of

times can be compared with the plaintiffs' claims in Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1288 (11th Cir. 2010) (holding that a plaintiff's First Amendment rights were "at imminent risk of invasion" because an agreement his employer entered into with a labor union "substantially increase[d] the likelihood" that he would be unionized against his will); Browning, 522 F.3d at 1163-64 (holding in an associational standing case that the 20,000-member organization had standing where it was "highly unlikely" that not a single member of the organization would be injured since "someone is certain to get injured in the end"); and GTE Directories Pub. Corp. v. Trimen Am., Inc., 67 F.3d 1563, 1569 (11th Cir. 1995) (concluding that the "practical likelihood" the contingencies would occur was "very high" and "almost inevitable").

It's also worth noting that we've reviewed the unredacted sensitive security materials provided to the Court by TSA, and, after considering the actual percentage of passengers that TSA expects to randomly select for mandatory AIT screening, we have no doubt that Corbett does not risk a substantial likelihood of future injury. See Supp. App'x 105-06 (explaining that, under the selectee-designation regime currently in effect, no more than [REDACTED MATERIAL] airline passengers are randomly designated as selectees to whom the challenged policy would apply); see also Order, Corbett v. TSA, No. 15-15717 (11th Cir. June 6, 2016) (granting TSA's

request to file portions of the administrative record ex parte and under seal); Order, Corbett v. TSA, No. 15-15717 (11th Cir. Nov. 30, 2016) (granting TSA's request to file a supplemental appendix ex parte and under seal); Order, Corbett v. TSA, No. 15-15717 (11th Cir. May 1, 2017) (denying Corbett's request for reconsideration); see generally Corbett I, 767 F.3d at 1183 (granting TSA's motion to seal SSI materials).

We do not deny that the "countless encounters between" TSA agents and airline passengers may well give rise to "certain instances in which" the mandatory-AIT-screening policy will be applied to someone. Lyons, 461 U.S. at 108. But, as the Supreme Court said in Lyons, that fact does not make Corbett's claim any less conjectural. See id. (finding no injury-in-fact despite recognizing "certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim"). Indeed, even if Corbett sought to represent a class of people, at least one of whom would likely be affected -- and he has not sought class relief in this case -- that would not be enough to make his claim sufficiently likely. See J W, 904 F.3d at 1268, 1272 (finding no injury-in-fact for the class representative despite recognizing that the spray may be used against a student in an unconstitutional way "in the future" because "named plaintiffs who represent a class must allege and show that they personally have been injured") (quotations omitted).

Corbett's claim of future injury is weakened still further because, even accepting the small chance that Corbett may be randomly subjected to the new policy at some indeterminate time in the future, there's an even smaller chance that his random selection for participation in the mandatory screening program will result in a constitutional injury. As we've said, sometimes our standing analysis requires us to take a "peek" at the merits of the underlying constitutional claim. Club Madonna, Inc. v. City of Miami Beach, 924 F.3d 1370, 1382 (11th Cir. May 24, 2019)). We explained in Club Madonna that while "standing in no way depends on the merits" of a plaintiff's claim, "it often turns on the nature and source of the claim asserted," and in some circumstances "weakness on the merits" informs the question of Article III standing. Id. (quotations omitted); id. at 1383 (holding that the Club lacked standing where, among other things, it could not "clear the low bar of demonstrating that the challenged provisions are at least arguably [unconstitutionally] vague as applied to it"). And in Lyons, the Supreme Court relied in part on the recognition that not every "traffic stop, arrest, or other encounter between the police and a citizen" will result in "the police [acting] unconstitutionally and inflict[ing] injury without provocation or legal excuse." 461 U.S. at 108. Similarly, in J W, we relied in part on the realization that the "chance of being unconstitutionally sprayed" was "miniscule." 904 F.3d at 1268 (emphasis added); see also Kerr v. City of West Palm Beach, 875 F.2d 1546, 1554 (11th Cir.

1989) (concluding that plaintiffs who had been seriously injured when bitten by police dogs in the course of their arrests by West Palm Beach police officers lacked standing where the police policy might "permit unconstitutional seizures in some circumstances," but did "not require its officers to act unconstitutionally").

Here, Corbett has alleged that the TSA policy -- which randomly selects certain passengers to undergo mandatory AIT screening -- violates the Fourth Amendment. Notably, however, a panel of this Court has already held, when Corbett challenged the previous TSA screening regime on Fourth Amendment grounds, that the use of AIT scanners is constitutional. See Corbett I, 767 F.3d at 1174. We explained that "[t]he scanners at airport checkpoints are a reasonable administrative search [under the Fourth Amendment] because the governmental interest in preventing terrorism outweighs the degree of intrusion on Corbett's privacy and the scanners advance that public interest." Id. at 1180; see also id. at 1182 ("The jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane outweighs the slight intrusion of a generic body scan or, as a secondary measure, a pat-down.") (quotations omitted). As we detailed, the AIT scanners, equipped with automated target recognition software "effectively reduce the risk of air terrorism" while "pos[ing] only a slight intrusion on an individual's

privacy." Id. at 1181. There, as here, the AIT scanners do not collect any personally identifiable information, nor do they display an individualized image every time a passenger passes through them; rather, the software temporarily overlays the location of potential threats onto a generic and stylized figure. See id. at 1175; see also 81 Fed. Reg. 11,373-82; Privacy Impact Assessment Update for TSA Advanced Imaging Technology, DHS/TSA/PIA-032(d), at 4 (Dec. 18, 2015).

While Corbett I involved TSA's prior system -- which allowed passengers to opt-out of AIT screening and choose a pat-down instead -- the opinion did not turn on the opt-out option. To the contrary, Corbett took issue with alternative pat-down procedures as well. Corbett I, 767 F.3d at 1182. And in any event, we explained that "the United States enjoys flexibility in selecting from among reasonable alternatives for an administrative search." Id. at 1181. "The Fourth Amendment does not compel the Administration to employ the least invasive procedure or one fancied by Corbett." Id. at 1182.

Nor does the strength of his APA claims bolster his standing arguments. Again, without drawing any conclusions, despite Petitioner's suggestion that TSA failed to use the notice-and-comment rulemaking process to implement the challenged screening policy, the policy was promulgated after a notice-and-comment rulemaking process that expressly invited comment on "the ability of passengers to opt-out of

AIT screening." 78 Fed. Reg. at 18,294. And as for Corbett's argument that the challenged policy is so devoid of justification that it must be reversed as arbitrary and capricious, we've already held in one of Corbett's earlier cases that TSA's AIT body scanners are a reasonable administrative search, and that "the United States enjoys flexibility in selecting from among reasonable alternatives for an administrative search." Corbett I, 767 F.3d at 1180-81.

All of this is to say that Corbett has not shown a substantial likelihood of a future injury that is "real and immediate," "actual and imminent," and not "conjectural" or "hypothetical." Lujan, 504 U.S. at 560 (quotations omitted); Lyons, 461 U.S. at 102 (quotations omitted). Just as in Lyons, where the Supreme Court determined that the likelihood of unconstitutional chokeholds was too remote, or as in J W, where this Court found that the likelihood of being unconstitutionally sprayed was too removed, we cannot say that the likelihood of Corbett being unconstitutionally scanned at the airport is substantial enough. To be clear, we cannot and do not hold that the mandatory AIT scanning now used by TSA is constitutional; we can't reach that question without the power to do so. See Bochese, 405 F.3d at 974. Nevertheless, we are able to say that based on our holding in Corbett I that TSA's AIT scanning regime as a general matter was not unconstitutional, and more importantly, based on our reading of this record, it's entirely too speculative to assume that

Corbett would be subjected to TSA's new policy in an unconstitutional manner[3].

As for Corbett's alternative argument that he has standing based on the "chilling effect" that the policy has on his travel because he faces an administrative fine of up to $11,000 and the loss of his airfare if he refuses to complete screening at a TSA checkpoint, we remain unpersuaded. The Supreme Court has explained that parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not

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[3] Corbett also claims that many of the injury-in-fact cases we rely on, like Lyons, are distinguishable, because no chain of attenuated events must occur before Corbett will be randomly subjected to mandatory AIT screening. But that is a distinction without a difference. In either instance, be it through TSA's random selection process or the steps involved in a police interaction that may result in a chokehold, the resulting probability of a future unconstitutional injury is too small to constitute an injury in fact. Moreover, to the extent the courts are more likely to confer standing where the plaintiffs' alleged constitutional injuries are the result of involuntary conduct, see J W, 904 F.3d at 1269 (noting that plaintiffs with standing in other cases "could not avoid exposure to the conduct they challenged because their own behavior or situation, which drove the challenged conduct, was involuntary"), Corbett cannot claim that his conduct is involuntary. As we said in one of Corbett's earlier challenges to TSA's screening process, being an airline traveler is a voluntary pursuit, since "passengers elect to travel by air knowing that they must undergo a search." Corbett I, 767 F.3d at 1182; see also J W, 904 F.3d at 1269 (rejecting the standing argument that students were sprayed simply because of their status as students since "[s]tudents may misbehave or act defiantly from time to time, but they can control their own behavior"). So while we accept that cases like Lyons, J W, Elend and Bowen do not map directly onto this case, they are nevertheless instructive.

certainly impending." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013). Corbett cannot demonstrate that the possible harm of maybe having to undergo mandatory AIT screening at some indeterminate time is impending, and his subjective fear of this harm is not sufficient to create standing. And, in any event, we cannot ignore Corbett's statement in several filings that he "has not and has no intention of changing his travel patterns." Reply Br. at 2; Pet. Opp. To MTD at 6; Decl. of Jonathan Corbett at 1 (Dec. 24, 2015). This admission severely undermines the claim that TSA's policy has had a chilling effect on his travel plans.

His remaining arguments fare no better. He suggests that because he has also brought claims under the Administrative Procedure Act, we should exercise jurisdiction because he has the "substantial interest" required by 49 U.S.C. § 46110(a) -- the statute that provides for judicial review of TSA orders. But even if Corbett satisfies the statutory requirement that he have a "substantial interest" in the challenged screening policy, he must first establish the type of injury in fact that is a prerequisite to maintaining suit under Article III of the Constitution. See Illinois Dep't of Transp. v. Hinson, 122 F.3d 370, 371 (7th Cir. 1997) (explaining that 49 U.S.C. § 46110(a)'s requirement that a person have a "substantial interest" means "[a]t a minimum, . . . someone who has the kind of interest that Article III of the Constitution has been interpreted to make prerequisite to maintaining a suit in any Article III

court"); see also Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1279 (11th Cir. 2015) (recognizing that a plaintiff seeking to bring suit under a federal statute must show both that he has Article III standing and also that his injury in fact "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."). And to the extent Corbett points to this Court's exercise of jurisdiction in Corbett I, it's also irrelevant because there, he was challenging a different policy that applied to all passengers, see Corbett I, 767 F.3d at 1174 (describing the challenged policy as "standard operating procedures for security screening nationwide"), whereas the policy Corbett now challenges does not affect the "vast majority" of passengers.

Finally, it may be possible for Corbett to bring a Fourth Amendment challenge to TSA's policy in the future -- if, among other things, he is able to establish, based on a new set of facts, that he has a substantial likelihood of injury that is "real and immediate," "actual and imminent," and not "conjectural" or "hypothetical." Lujan, 504 U.S. at 560 (quotations omitted); Lyons, 461 U.S. at 102 (quotations omitted). All we hold today -- indeed all we could hold today -- is that on this record, Corbett has not claimed a sufficient injury in fact. He's not said that he's ever been subjected to the TSA policy, let alone that he suffers a greater likelihood of injury in the future than

the likelihood urged by the unsuccessful plaintiffs in Lyons, or in J W, or in Elend -- for purposes of our standing inquiry. We are, therefore, required to dismiss his petition.

PETITION DISMISSED.

APPENDIX B – U.S. CONST., Art. III, § 2, Cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX C – Statutes & Regulations

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

49 U.S.C. § 46110(a)

Filing and Venue.—

Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the

Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part, part B, or subsection (l) or (s) [1] of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

49 CFR § 1520.5

In general. In accordance with 49 U.S.C. 114(s), SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would -

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

AFFIDAVIT OF SERVICE & RULE 33(H) COMPLIANCE

I, Jonathan Corbett, *pro se* petitioner, hereby certify that I have served this petition upon:

Solicitor General of the United States
United States Dept. of Justice, Room 5616
950 Pennsylvania Ave. N.W.
Washington, DC 20530-0001

U.S. Transportation Security Administration
601 S. 12th St.
Arlington, VA 22202

…by inserting a copy of this petition in a postage-paid USPS Priority Mail envelope and depositing that envelope into a USPS mailbox on October ___th, 2019.

I also certify that this document meets the requirements of Rule 33.1's word count limit because it contains approximately 3,950 words exclusive of appendices.

____
Jonathan Corbett

Sworn to before me this

___th day of October, 2019

____
Notary Public