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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