No. 22-

IN THE

Supreme Court of the United States

HAISAM ELSHARKAWI,

Petitioner,

v.

ALEJANDRO MAYORKAS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; TROY A. MILLER, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF CUSTOMS AND BORDER PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiffs across the United States turn to the courts to challenge treatment they endure while traveling and the lack of due process available for them to do so otherwise. The harms they suffer include hours-long detentions, consistent "random" selection for invasive searches and, as here, searches of electronics and public removal from gate areas in handcuffs, followed by detention in airport cells. These individuals often receive no explanation for this treatment. They come to courts nationwide seeking relief from the same fear: that it will happen to them again. Yet the Circuits disagree on the test for standing in this context.

Question No. 1 presented:

Do plaintiffs properly establish standing to bring claims for prospective relief when they plead past harm, a history of prior travel patterns, and an articulated desire to travel again based on continuing connections and needs, including religious pilgrimages, or must their showing of "concrete plans" identify specific dates of "when the … travel will be" before they gain access inside the courthouse doors?

Question No. 2 presented:

Does the analysis above differ when for any length of time plaintiffs, through no fault of their own, cannot make specific travel arrangements in the future, as occurred during the pandemic when the U.S. and other governments heavily restricted flying, or do those uncontrollable circumstances preclude standing even if plaintiffs could otherwise meet their burdens?

PARTIES TO THE PROCEEDING

Petitioner Haisam Elsharkawi ("Petitioner" or "Mr. Elsharkawi") was the Plaintiff in the district court and the Appellant before the Ninth Circuit Court of Appeals.

Respondents Alejandro Mayorkas and Troy Miller were the Defendants in the district court and the Appellees before the Ninth Circuit Court of Appeals.

RELATED CASES

Elsharkawi v. United States, et al., No. 21-56206, United States Court of Appeals for the Ninth Circuit. Judgment entered November 7, 2022.

Elsharkawi v. United States, et al., No. 8:18–cv–01971–JLS–DFM, United States District Court for the Central District of California, Southern Division. Judgment entered September 13, 2021.

Elsharkawi v. United States, et al., No. 19-56448, United States Court of Appeals for the Ninth Circuit. Judgment entered October 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Haisam Elsharkawi respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit Court of Appeals in this matter.

OPINIONS BELOW

The Ninth Circuit's decision is available at *Elsharkawi v. United States,* No. 21-56206, 2022 U.S. App. LEXIS 30795 (9th Cir. 2022). Pet. App. 1a-5a. The District Court's decision is available at *Elsharkawi v. United States*, No. 8:18-CV-01971, 2021 U.S. Dist. LEXIS 214037 (C.D. Cal. Sept. 1, 2021). Pet. App. 6a-12a.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on November 7, 2022. Petitioner filed an Application for Extension of Time to File a Petition for Writ of Certiorari on January 31, 2023. Justice Kagan granted that application on February 2, 2023. Petitioner timely filed this Petition on February 20, 2023. The jurisdiction of the Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or

the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. I.

Fourth Amendment:

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

U.S. CONST. AMEND. IV.

STATEMENT OF THE CASE

I. Introduction

Dressed in religious attire, U.S. citizen Haisam Elsharkawi prepared to take an international flight in February 2017. International travel was not new to him. He had visited family in Egypt many times, approximately every two to three years. This trip was different: he went to Los Angeles International Airport ("LAX") to start his trip to Saudi Arabia for a religious pilgrimage. Pet. App. 21a. He had saved for this trip, and he was ready and eager to go. He never made that trip.

Instead, he was questioned by multiple agents at the airport, who went through his bags again at the gate and insisted he must be hiding something. Pet. App. 21a. When he asked for a lawyer, the agents took him by force in handcuffs to a basement cell in the airport. Pet. App. 22a.

He remained there, handcuffed to a bench, for four hours. He carried no contraband. He committed no crime. Yet his flight left without him. Pet. App. 23a. Agents only let him leave after he felt worn down enough to provide the code to his cell phone. As agents searched his phone, they asked him about individual Amazon and eBay purchases, what mosque he attended and how often he prayed, and looked through pictures of his wife without her hijab.[1] Pet. App. 23a. No one charged him with any crime.

He still wants to make that pilgrimage. Pet. App. 24a. But after what he endured he was afraid to try again, afraid that next time it might be more than four hours, or that agents might take him somewhere other than a cell in an airport basement that he had never known existed. So he filed administrative charges, but got no response. Pet. App. 24a. Then he hired a lawyer. And they filed a lawsuit. Pet. App. 24a. Then Covid-19 began. And the U.S. Department of State advised citizens not to go to Saudi Arabia or Egypt. Pet. App. 3a-4a. So he didn't. But he continued with his lawsuit, filing an Amended Complaint by the deadline of February 2021, truthfully stating he would travel in the future as soon as he could, but due to the pandemic he didn't know and couldn't say for sure when that would be. Pet App. 7a. The district court dismissed his lawsuit. Pet. App. 6a-12a. The Ninth Circuit affirmed. Pet. App. 1a-5a. The courts told him he couldn't bring these claims because he hadn't shown enough of a risk of future harm—because he didn't allege specific days he planned to travel internationally, when no one could.

1. Mr. Elsharkawi had already explained his religious-based reservations about others seeing these pictures, and his concerns about any male agents seeing them. Pet. App. 23a.

Across the country in Texas, Abdulaziz Ghedi got a different answer. The Fifth Circuit recognized he met the imminence requirement to ask for prospective relief because he pointed to both his business need and family desire to travel internationally again. *Ghedi v. Mayorkas*, 16 F.4th 456, 465 (5th Cir. 2021). The Fifth Circuit recognized that for Mr. Ghedi, the harm came via the *act* of flying, not just the destination. *Id.* And out of Washington, D.C., the seven Jibril family members also heard something different. The D.C. Circuit disagreed with the district court's dismissal of their claims and described the Jibrils' "extensive travel history" as "easily distinguishable" from *Lujan*. *Jibril v. Mayorkas*, 20 F.4th 804, 815 (D.C. Cir. 2021) (distinguishing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)). The Jibrils weren't "test" plaintiffs who claimed a hypothetical desire to "someday" travel to a place they'd never been and to which they had no connection; they are a family, looking to visit other family members, like they did every two years. And they had a religious reason for their travel too: their "sincerely held religious beliefs require[d] them to travel … to fulfill religious obligations." *Jibril,* 20 F.4th at 817 ("The [plaintiffs] are Muslims with sincerely held religious beliefs that require traveling to Saudi Arabia to complete Hajj and pilgrimage obligations."). And the D.C. Circuit saw no charm in the government's "heartless" argument that this family of seven needed to try to fly again and risk suffering the same harm just to show it was likely to happen in the future. Instead, the D.C. Circuit recognized their family connections, previous travel history, and religious need to travel as sufficient to establish standing, and sent them back to the district court.

Despite these victories for others in different parts of the country, the Ninth Circuit held Mr. Elsharkawi to a higher standard. The Ninth Circuit disregarded his past travel

patterns and travel-related requirements of his sincerely held religious beliefs, instead insisting that "concrete" plans must equate to specific dates and times tantamount to requiring that he produce a full itinerary with his first pleading. Pet. App. 4a. These contrasting standards create confusion, inconsistent law and unequal outcomes, and necessitate this Court's intervention to resolve.

II. Relevant Factual Background

Mr. Elsharkawi is a U.S. citizen of Egyptian national origin. In February 2017, he began travel out of LAX intended for Saudi Arabia on a religious pilgrimage. Pet. App. 21a. Agents from Customs and Border Protection ("CBP") came to Mr. Elsharkawi's gate, detained him, researched his carry-on luggage, and asked him to unlock his cell phone. When he refused, agents handcuffed Mr. Elsharkawi and took him to a holding cell in the basement of LAX, where he remained handcuffed to a bench for several hours. Pet. App. 22a. Ultimately, he felt he had no alternative other than to unlock his cell phone for the agents' search. Pet. App. 23a. He missed his flight. He did not get reimbursed.

Mr. Elsharkawi has a history of repeated international travel to Egypt to visit family, and did so in 2009, 2013, and 2016 leading up to the 2017 travel date at issue here. Pet. App. 21a. His intended trip to Saudi Arabia derives from his sincerely held religious belief that he must perform a pilgrimage to Saudi Arabia. Pilgrims must obtain visas from the Saudi government and book their travel and accommodations through government-approved travel agents in order to complete their pilgrimage.[2]

2. Bureau of Consular Affairs, *Pilgrimage Travelers (Hajj and Umrah)* U.S. Dep't of State (July 6, 2022), https://travel.

On February 26, 2020, Saudi Arabia suspended all international travel to the country over concerns about the rapid spread of Covid-19. It did not issue visas to non-nationals in 2020 or 2021. The Ninth Circuit first heard, then remanded, this case in October 2020. Pet. App. 13a-18a. Mr. Elsharkawi then needed to file his Amended Complaint with the district court in February 2021. But not until 2022 did Saudi Arabia once again issue visas to non-nationals, and even then extremely limited in number and with strict controls.[3] At the time he needed to file his Amended Complaint, Mr. Elsharkawi could not plead a specific date that he knew he could travel to Saudi Arabia. He still could not obtain a visa to complete a pilgrimage, and had no way of knowing when that would change.

Similarly, Mr. Elsharkawi could not plead a date certain that he could travel to Egypt to visit his family again due to the health risks caused by Covid-19. The State Department's travel advisory for Egypt designated traveling to Egypt as highly unsafe. Pet. App. 3a. Before the outbreak of Covid-19 worldwide, Mr. Elsharkawi traveled to visit his family in Egypt on average every three years, and pled that he would have continued this pattern had it been safe to do so. Pet. App. 4a. Unfortunately, the Centers for Disease Control and Prevention ("CDC") listed Egypt as a country with a "Level 4: Very High" risk of contracting Covid-19 through the date of Mr.

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state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/hajj-umrah.html.

3. Al Jazeera News, *Saudi Arabia receives 1st foreign Hajj pilgrims since COVID began*, Al Jazeera (June 4, 2022), https://www.aljazeera.com/news/2022/6/4/saudi-receives-first-foreign-hajj-pilgrims-since-before-pandemic.

Elsharkawi's Amended Complaint. Egypt remained classified as a "Level 3: High" risk country through late 2022.[4]

III. Lower Court Proceedings

Mr. Elsharkawi filed suit on October 31, 2018, alleging violations of the First and Fourth Amendments to the U.S. Constitution based on the harassing and invasive actions of the Department of Homeland Security ("DHS") and CBP. Pet. App. 24a. He also sought relief under 42 U.S.C. § 1981 ("Section 1981").

The district court first dismissed Mr. Elsharkawi's claims under the First and Fourth Amendments as well as his claims under Section 1981 on August 8, 2019. Pet. App. 19a. His tort claims survived, with the district court later entering judgment for Mr. Elsharkawi pursuant to an Offer of Judgment by the United States. Pet. App. 8a, n.2. Mr. Elsharkawi appealed to the Ninth Circuit, which affirmed in part and reversed in part and remanded the case on October 9, 2020. Pet. App. 13a-18a.

After Mr. Elsharkawi filed his Amended Complaint in February 2021, the district court granted dismissal under Fed. R. Civ. P. 12(b)(1) without ruling on the government's motion under Fed. R. Civ. P. 12(b)(6). Pet. App. 6a-12a. In doing so, the district court ruled that Mr. Elsharkawi failed to plead more specific future travel plans in his Amended

4. Centers for Disease Control and Prevention, *Travelers' Health: COVID-19 in Egypt,* WAYBACK MACHINE (Jan. 3, 2022), https://web.archive.org/web/20220103011046/https://wwwnc.cdc.gov/travel/notices/covid-3/coronavirus-egypt.

Complaint. Pet. App. 8a. Despite recognizing the practical impossibility imposed by Covid-19 and the resulting restrictions worldwide, the district court nonetheless ruled that specifically identified dates of future travel were necessary for him to sufficiently establish standing. Mr. Elsharkawi timely appealed on November 1, 2021. The Ninth Circuit affirmed the district court's determination on November 7, 2022. Pet. App. 1a-5a. That panel held that Mr. Elsharkawi still needed to plead specific future travel plans and dates in order to show standing. It did not consider his pattern of travel or explanation that he would travel again in the future as soon as he safely could to be sufficient support for actual imminent future injury. The Ninth Circuit further determined that any leave to amend would be futile, given that Mr. Elsharkawi already amended once and, in its view, could still not show what it deemed to be a sufficient basis for standing. Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

I. This Case Raises Exceptionally Important Questions of Law

This case raises both exceptionally important and timely questions of law. Answering Petitioner's questions presented will not require this Court to overturn any existing precedent; instead, doing so will allow this Court to clarify the proper interpretation and application of its existing holdings. *Stare decisis* does not counsel against review in this matter.

A. Article III Standing Exists Here, Consistent with *TransUnion LLC v. Ramirez* and Petitioner's Constitutional Claims

"No concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). This Court made that clear just over a year ago, permitting some class members who were directly harmed to move forward with their claims against a credit agency while upholding dismissal of claims by those who did not suffer direct, or concrete, harm in any way. *Id.* The concept of standing serves as a gatekeeper to prevent courts from becoming merely sources of advisory opinions for all statutory violations. *See id.* And plaintiffs do not become automatically imbued with standing simply because Congress passes a statute that "purports to authorize that person to sue to vindicate that right." *Id.* at 2204, *quoting Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

But that does not preclude the presence of standing for injuries such as reputational harm. *Id.* This Court found that concrete harm existed for the 1,853 class members about whom TransUnion published an alert labeling them as "potential terrorists, drug traffickers or serious criminals." *Id.* at 2209. And, this Court recognized the potential that risk of future harm could establish standing as well, even though standing did not exist for the *TransUnion* class members whose reports were not published to third parties. *Id.*

B. Petitioner's Injuries Arise from Personal Constitutional Harms

Petitioner here is not "an uninjured plaintiff" who "merely seek[s] to ensure a defendant's compliance with

regulatory law (and, of course, to obtain some money via the statutory damages)." *Id.*, *quoting Spokeo*, 578 U.S. at 345 (Thomas, J., concurring). Mr. Elsharkawi is comparable to neither the hypothetical Hawaii resident contemplated by this Court in *TransUnion* who suffered no injury from pollution in Maine, nor the plaintiffs in *Lujan* who had no ongoing connection to the nature sites they pled a sudden interest in visiting. *TransUnion*, 141 S. Ct. at 2211; *Lujan*, 504 U.S. at 562-63.

Instead, he suffered harm individually. He demonstrated a past history of international travel, visiting family in Egypt every two to three years before initiating this lawsuit. Pet. App. 21a. He was literally dressed and ready to go on religious pilgrimage to Saudi Arabia on the day of the events that led to this lawsuit, and he pled his intent to still make that religious pilgrimage in accordance with his sincerely held religious beliefs. Pet App. 24a. Respondents dispute none of this. Even without considering the intervening realities of Covid-19 limitations during the pandemic, Petitioner sufficiently establishes a likelihood of future harm that satisfies the standards set forth by this Court. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *Clapper v. Amnesty Int'l USA*, 569 U.S. 398, 409, 414 (2013); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993). The Ninth Circuit erred in holding he needed to do more.

II. The Circuits Disagree on What Plaintiffs Must Establish to Bring Claims for Prospective Relief

The Ninth Circuit's stringent requirements of Petitioner contradict both this Court's precedent and the standards applied by multiple other Circuits. *See also*

Deanda v. Becerra, No. 2:20-CV-092-Z, 2022 U.S. Dist LEXIS 222087, at *6 (N.D. Tex. Dec. 8, 2022) (citing *Village of Elk Grove Village v. Evans* 997 F.2d 328, 329 (7th Cir. 1993) (holding that "even a small probability of injury is sufficient"). This split in the Circuits renders this case in need of a resolution only this Court can provide.

A. The Fifth Circuit Described Applying *Lujan* To Plaintiffs With Demonstrated Past Travel Patterns as an Apples-to-Oranges Comparison

Before the Ninth Circuit imposed heightened requirements on Petitioner, the Fifth Circuit considered the standing issue in a very similar context. *Ghedi*, 16 F.4th at 465 (holding that a pattern and practice of regular travel reasonably demonstrates the likelihood of future travel). Abdulaziz Ghedi, "an international businessman who regularly jets across the globe" due to "extensive professional and personal connections with Somalia," sought prospective injunctive relief. The Fifth Circuit rejected the government's attempted parallels to *Lujan,* holding that "[c]omparing *Lujan* to this case, though, is an apples-to-oranges comparison." *Id.* at 465. The plaintiffs in *Lujan* traveled merely for pleasure and had only been to the relevant sites a limited number of times before, if any, with no real intent or plans to do so again. *Id., citing Lujan*, 504 U.S. at 563. Mr. Ghedi, by contrast, "alleges both a professional need for habitual travel and that his injuries are tied to the *act of flying*, not his destination." *Id.* (emphasis in original).

The Fifth Circuit did not require set dates of travel from Mr. Ghedi. It did not require an exact itinerary, or even a specific event or conference to which he intended

to travel. Instead, the Fifth Circuit credited Mr. Ghedi's "professional need for habitual travel" and harm tied to the "act of flying." In doing so, the Fifth Circuit held his allegations of injury and likelihood of their continuing into the future to be "both real and immediate." *Id*. at 456.

Mr. Elsharkawi pled travel at regular intervals of two to three years to visit family in Egypt. Pet. App. 21a. He further identified his religious need for travel, evident in his attire and reason for travel on the day of the events giving rise to this lawsuit. Pet App. 21a. As did Mr. Ghedi, Mr. Elsharkawi established harm sufficient for Article III standing and a showing of likely future harm. The Ninth Circuit was wrong to impose an even higher burden on him.

B. The D.C. Circuit Recognized the Relevance of Religious Need for Travel

The Jibril family approached the courts in Washington, D.C., seeking similar prospective relief. The D.C. Circuit, overruling the district court's contrary finding, agreed with the Fifth Circuit's analysis and added another element relevant here: the religious need for travel based on sincerely held religious beliefs. *Jibril*, 20 F.4th at 814 (holding that a "history of traveling to Jordan every two years to visit family, combined with [] professed desire to continue that pattern, strongly suggests that they will travel internationally within the next year or two" and suffices to establish imminence); *id*. ("The [plaintiffs] are Muslims with sincerely held religious beliefs that require traveling to Saudi Arabia to complete Hajj and pilgrimage obligations.").

Like Petitioner, the seven Jibril family members endured prolonged detention (though without handcuffs or a holding cell), invasive searches and even separation of the parents from their tender age children. *Id.* at 809-810. Like Petitioner, they established a history of international travel every few years to visit family members. *Id.* And like Petitioner, they articulated a religious need for future travel based on their sincerely held religious beliefs. *Id.*

Unlike Petitioner, the Jibrils found recognition by the appellate court that they sufficiently demonstrated past travel, personal injury, and the likelihood of harm recurring in the future. *Id.* at 817. The D.C. Circuit described the government's argument that the family should try to fly again and risk the same harm just to confer standing as "heartless" and making "no sense." *Id.* Pointing out that this Court "made it clear that 'a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial[,]'" the D.C. Circuit found that "the Jibrils' complaint plausibly alleges a risk of harm that is sufficiently imminent and substantial. Therefore, they have standing to pursue a number of their claims for prospective relief." *Id.*, *quoting TransUnion*, 141 S. Ct. at 2210.

These contradictory outcomes in different Circuits on the same issue encourage forum shopping and do not promote justice. This Court can clarify the application of its holding in *TransUnion* to the instant circumstances, and only this Court can do so in a way that will result in consistency of the law across the country. Petitioner respectfully requests this Court grant his Petition and take up these issues.

C. Additional Case Holdings Show the Inconsistency Resulting from these Divergent Rulings

Subsequent cases in each relevant Circuit follow the divergent holdings of the *Ghedi*, *Jibril*, and *Elsharkawi* Circuit Court holdings, further deepening the divide that exists. *See, e.g., Valentine v. Wash. Nat'ls Baseball Club, LLC*, No. 22-1299, 2023 U.S. Dist. LEXIS 9728 (D.D.C. Jan. 20, 2023) (citing *Jibril*) (dismissing the plaintiff's claims under the ADA because he could not show imminence by merely stating that the baseball team could reinstate a mask mandate); *Mich. Welfare Rts. Org. v. Trump*, No. 20-3388, 2022 U.S. Dist. LEXIS 215474 (D.D.C. Nov. 28, 2022) (citing *Jibril*) (agreeing with plaintiffs that defendants' past conduct helps support the allegations sufficient to withstand a motion to dismiss); *Hailu v. Morris-Hughes,* No. 22-cv-00020, 2022 U.S. Dist LEXIS 68770 (D.D.C. Apr. 14, 2022) (rejecting plaintiff's reliance on *Jibril* and holding that while an alleged harm need not be immediate to be imminent, a plaintiff must show that the harm will happen within some timeframe); *Cherokee Nation v. United States Dep't of the Interior*, No. 20-2167, 2022 U.S. Dist. LEXIS 212044 (D.D.C. Nov. 23, 2022) (citing *Jibril*) (deciding that at the motion to dismiss stage, allegations need only be plausible to support standing); *E.T. v. Paxton*, 41 F.4th 709 (5th Cir. 2022) (citing *Ghedi*) (explaining that the Fifth Circuit does not recognize standing for an increased risk of harm to an individual if that risk equally affects the general public); *United Fed'n of Churches, LLC v. Johnson*, 598 F. Supp. 3d 1084 (W.D. Wash. 2022) (pointing to *Elsharkawi* for the proposition that plaintiffs must plausibly allege an imminent future injury to have standing for prospective relief).

The longer courts within each Circuit look to the governing precedents established by these cases, the further away the courts will be from providing consistent and predictable rulings on the law. "Resolv[ing] conflicts among the Circuit Courts of Appeals" serves a "principal purpose" of this Court's certiorari jurisdiction. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Petitioner asks this Court to exercise that jurisdiction in this matter before the conflicts and inconsistencies in application of the law in this area grow further.[5]

III. The Temporary Impossibility Resulting from Covid-19 Travel Restrictions Does Not Deprive Petitioner of Standing

Courts evaluate standing as of the commencement of a suit. *Lujan*, 504 U.S. at 570 n.5. Here, Petitioner adequately pled standing both in his Original Complaint and his Amended Complaint. The impossibility of travel during the Covid-19 pandemic did not negate his right to bring suit.

A. Petitioner Sufficiently Pled as Much Specificity As Global Health Conditions Permitted

Nothing about the imminence of Petitioner's injury dissipates simply because he could not book an actual flight or in good faith provide specific dates for future travel

5. *See also Deanda*, 2022 U.S. Dist. LEXIS 222087, at *9-10 n.2 (citing *TransUnion*, *Spokeo* and *Summum* as support that "intangible injuries can nevertheless be concrete" and that harms specified by the Constitution suffice for standing) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 465 (2009)).

at the time he filed his Amended Complaint. Although the temporary situation of the global pandemic impaired Petitioner's ability to plead specific dates or times of travel, he pled as much specificity as he had: "Mr. Elsharkawi has, in the past, regularly traveled to Egypt to visit family, including in 2009, 2013, and 2016[;]" "Mr. Elsharkawi's current and future travel plans have been placed on temporary hold due to the global COVID-19 pandemic; however, he intends to once again visit Egypt regularly when it is safe to do so, consistent with his prior travel patterns[;]" and "[i]n addition to his articulated intent to travel to visit family, Mr. Elsharkawi hopes to complete the pilgrimage CBP interfered with previously. At the very least, Mr. Elsharkawi will travel to Saudi Arabia to complete the Hajj in accordance with his sincerely held religious belief that such pilgrimage is religiously obligatory upon him at least once in his lifetime." Pet. App. 3a.

Petitioner next identified the future harm he will suffer without court intervention: "Mr. Elsharkawi will be irreparably harmed absent injunctive relief from this Court, as he will be unable to travel to Egypt to visit family or Saudi Arabia for religious pilgrimage," and that the absence of the right to seek redress through the courts means he would "have to give up his sincerely held religious beliefs" or "forgo international travel to visit his family," both of which are options that cause him harm. *See* Pet. App. 11a. Despite the inability to safely obtain a specific flight on a specific date at the time of his February 2021 Amended Complaint, the reason for which he identified, Petitioner articulated a sufficient basis for standing based on a "risk of future harm [that] is sufficiently imminent and substantial." *TransUnion*, 141 S. Ct. at 2210.

B. Petitioner Satisfies His Burden of Proof at This Stage Without the Need to Plead Specific Travel Dates

Independent of whether he could plead specific dates of future travel at the time of his Amended Complaint, Mr. Elsharkawi still sufficiently establishes standing. As shown above, he need not reach the heightened burden imposed by the Ninth Circuit of identifying specific dates, and this Court does not place a burden that heavily on plaintiffs at the motion to dismiss stage. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (citing *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669 (1973)); *see also Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'"). The burdens cited by the district court and the Ninth Circuit under the *Lujan* cases address the standards under Fed. R. Civ. P. 56 for motions for summary judgment, not motions to dismiss under Fed. R. Civ. P. 12. *Cf. id*. with Pet. App. 8a-9a and Pet. App. 2a.

This Court required no such specificity of exact travel dates in *Lujan*, nor did it require anything comparable in *TransUnion*. This Court rejected the claims of the *Lujan* plaintiffs because they traveled once to the places at issue and retained no connections to those locations. *Lujan*, 504 U.S. at 563. And this Court refused to recognize a risk of future harm for some of the *TransUnion* plaintiffs based solely on an unrealized potential publication that those plaintiffs never experienced. *TransUnion*, 141 S.

Ct. at 2209. Neither situation equates to Mr. Elsharkawi's situation. Instead, like Mr. Ghedi and the Jibril family, he pleads regular travel to visit family plus a religious need to travel based on sincerely held religious beliefs. Those sufficed to establish imminence in the Fifth Circuit and D.C. Circuit, and the result should be no different for Mr. Elsharkawi.

IV. This Case Presents a Controversy Ripe For This Court's Review

This matter presents a controversy between the parties that is ripe for review by this Court. Petitioner articulates his "personal stake" in the matter involved in this case, which is sufficient to establish standing. *TransUnion*, 141 S. Ct at 2203. Petitioner Elsharkawi experienced harm when federal agents handcuffed him and detained him in the basement of LAX. Pet. App. 22a. He experienced harm when the Respondents' actions prevented him from taking his intended religious pilgrimage. And he continues to have the same imminent need to travel for two reasons: (1) to visit his family in Egypt in the future just as he has in the past; and (2) to travel to Saudi Arabia for pilgrimage due to his sincerely held religious beliefs. Pet. App. 21a. Therefore, his case remains "a real controversy with real impact on real persons." *TransUnion*, 141 S. Ct. at 2203.

V. This Case Presents an Appropriate Vehicle to Resolve the Pending Issues

Petitioner's case presents an ideal vehicle for review of the question presented. The Ninth Circuit's holding perpetuates an improperly heightened burden on plaintiffs

beyond what this Court's precedent requires. Only this Court may revisit and clarify the appropriate scope of its prior cases, and curtail further imposition of additional burdens this Court never intended. This Court may fully resolve the issues presented through an order on the proper legal standard. The parties agree on the material facts of this case, so any order of this Court will have full force and effect, free from any game-changing lingering factual disputes. Further, the lower courts' opinions in this matter are wholly consistent with each other, giving this Court a clear blueprint for review.

Both lower courts concluded that Petitioner needed to plead precise dates and locations for future travel in order to show the likelihood of future harm. Pet. App. 5a, 11a. Both decisions go too far and contradict the holdings of this Court. Although Respondents may argue that Petitioner's claims fail on the merits, therefore creating a vehicle problem for consideration of this matter, that position lacks merit. This Court routinely reviews cases where a respondent asserts that a second issue not addressed by the lower court would bar a petitioner's requested relief. In those circumstances, this Court grants certiorari on the question presented and then remands for the lower courts to consider the previously unaddressed issue fully. *See*, *e.g.*, *Stinson v. United States,* 508 U.S. 36, 37 (1993). Applying that process here allows this Court to remand the case with instructions to proceed under an appropriately tailored analysis, rather than allow an increased burden to remain in place without precedent.

CONCLUSION

Prospective relief from future harms allows the courts to protect citizens from repeated injuries. The divergent standards resulting from conflicting Circuit holdings and the heightened burden imposed on Petitioner by the Ninth Circuit merit consideration by this Court. Petitioner Haisam Elsharkawi therefore respectfully requests this Court grant his Petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-56206

D.C. No. 8:18-cv-01971-JLS-DFM

HAISAM ELSHARKAWI,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

September 20, 2022, Argued and Submitted,
Pasadena, California; November 7, 2022, Filed

MEMORANDUM[*]

Before: BOGGS,[***] WARDLAW, and IKUTA, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Appendix A

Haisam Elsharkawi ("Elsharkawi") appeals the dismissal of his claims for prospective relief arising out of a warrantless border search of his cell phones as he attempted to fly out of Los Angeles International Airport in 2017. In a prior appeal of this action, we held that Elsharkawi's complaint failed to establish Article III standing to pursue a prospective injunction against future border searches of his cell phones at the airport, and remanded to the district court to allow Elsharkawi leave to amend his complaint. *See Elsharkawi v. United States*, 830 Fed. App'x 509, 512 (9th Cir. 2020). On remand, the district court found that Elsharkawi failed to allege sufficient new facts in the amended complaint to demonstrate the "imminent future injury" necessary to pursue prospective injunctive relief, and dismissed the case without leave to amend. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court correctly dismissed Elsharkawi's amended complaint for lack of Article III standing. To establish standing, plaintiffs must allege an "injury in fact," which is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations omitted). While "imminence is concededly a somewhat elastic concept," *id.* at 564 n.2, "some day intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the actual or imminent injury," *id.* at 564 (internal quotation marks omitted).

Elsharkawi argues that the allegations of a "pattern of travel coupled with averments to upcoming travel"

sufficiently establish an imminent risk of future injury. However, as the district court found, Elsharkawi's first complaint alleged that same pattern of travel: namely, that Elsharkawi "regularly traveled to Egypt to visit his family in 2009, 2013, and 2016" and that he hoped to travel to Egypt again that summer or to Saudi Arabia to complete a religious pilgrimage. While an extensive travel history can be sufficient to demonstrate an imminent risk of future history, *see Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012), Elsharkawi does not allege a sufficient record of international travel or pattern of having his cell phones searched during that travel. Nor do we find *Jibril v. Mayorkas*, 20 F.4th 804, 455 U.S. App. D.C. 127 (D.C. Cir. 2021), cited by Elsharkawi, persuasive authority. To be sure, like Elsharkawi, the Jibrils alleged that their sincerely held religious beliefs required international travel to complete pilgrimage obligations. *Id.* at 810. However, the Jibrils traveled abroad far more extensively than Elsharkawi—roughly once every two years—and alleged that they had been searched repeatedly because they were on a government watchlist. *Id.* at 810-11. By contrast, Elsharkawi did not allege he was on a government watchlist, had only traveled or attempted to travel internationally on four occasions, and had been searched but one time.

In his amended complaint, Elsharkawi did not plead any additional facts that would support a finding of "concrete" or imminent travel plans. Instead, the facts he added made his future travel plans *less* concrete, as his complaint now alleges that travel advisories for Egypt and Saudi Arabia, as well as the COVID-19 pandemic itself,

had placed his travel plans on hold. The amended complaint also included the assertion that his "future travel abroad to visit his family is not a matter of speculation, it is a certainty for him." But such "mere conclusory statements . . . . are not entitled to the assumption of truth" at the pleadings stage and do not survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

These "new facts" in the amended complaint fail to describe "concrete plans" or a "specification of *when* the some day [travel] will be." *Lujan*, 504 U.S. at 564 (emphasis in original). Elsharkawi's "new facts"—an understandable delay in travel due to the COVID-19 pandemic and country conditions—instead stretch the timeframe of his future travel indefinitely. And while Elsharkawi argues that we should apply legal concepts like force majeure and equitable tolling to relax the standing analysis, those common law and statutory doctrines do not bear on issues of standing, which is an Article III jurisdictional requirement. Jurisdictional requirements are not subject to statutory equitable tolling, *see United States v. Wong*, 575 U.S. 402, 408-09, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015), and force majeure primarily describes a contractual provision that details events that excuse a party from performance, *see, e.g., InterPetrol Bermuda Ltd. v. Kaiser Aluminum Intern. Corp.*, 719 F.2d 992, 997 (9th Cir. 1983).

2. The district court did not err in dismissing this case without leave to amend. The "district court's discretion to deny leave to amend is particularly broad where the

court has already given the plaintiff an opportunity to amend his complaint." *Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986). Here, Elsharkawi was granted an opportunity to amend his complaint to establish standing, but failed to allege any new facts about any imminent plans to travel in his amended complaint. In his complaint, and on appeal, Elsharkawi did not argue that he could plead any additional facts that would demonstrate standing, but simply speculated that COVID-19 pandemic restrictions on travel would eventually abate. Therefore, the district court correctly determined that any further amendment would be futile, and properly dismissed the amended complaint without leave to amend.

3. Because we hold that Elsharkawi failed to demonstrate Article III standing in his amended complaint, we decline to reach the merits of his Fourth and First Amendment claims.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED SEPTEMBER 1, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

8:18-cv-01971-JLS-DFM

HAISAM ELSHARKAWI,

v.

UNITED STATES OF AMERICA *et al.*

September 1, 2021, Decided
September 1, 2021, Filed

HONORABLE JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

CIVIL MINUTES — GENERAL

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Doc. 76)

Before the Court is a Motion to Dismiss filed by Defendants.[1] (Mot., Doc. 76.) Plaintiff opposed and

1. The remaining Defendants in this action are Alejandro N. Mayorkas, in his official capacity as Secretary of the U.S. Department of Homeland Security, and Troy A. Miller, Senior Official performing the duties of Commissioner of U.S. Customs and Border Protection.

Defendants replied. (Opp., Doc. 78; Reply, Doc. 82.) The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing set for **September 3, 2021 at 10:30 a.m.** is VACATED. Having considered the pleadings, the parties' briefs, and for the reasons stated below, the Court GRANTS the Motion.

The background facts of this case have been set forth in a previous order and need not be repeated in detail here. (*See* Motion to Dismiss Order ("MTD Order"), Doc. 57.) In brief, Plaintiff Haisam Elsharkawi ("Elsharkawi") filed this suit in October 2018, asserting various claims arising out of a search of his cellphone by United States Customs and Border Patrol ("CBP") agents as he went through the security at LAX International Airport to board a flight to Saudi Arabia. (*See* Compl., Doc. 1.) Defendants moved to dismiss the original complaint. This Court held, in relevant part, that Elsharkawi had standing to seek prospective injunctive relief pursuant to his First Amendment and Fourth Amendment claims but dismissed those claims on the merits. (MTD Order at 8-13.) Elsharkawi appealed the Court's decision, and the Ninth Circuit reversed in part and affirmed in part in a memorandum decision. (Notice of Appeal, Doc. 64; Ninth Circuit Decision, Doc. 67.) The panel did not reach the merits of Elsharkawi's First Amendment or Fourth Amendment claim. (Ninth Circuit Decision at 5.) Rather, the Ninth Circuit held that Elsharkawi had failed to establish standing to pursue prospective injunctive relief and granted Elsharkawi leave to amend to attempt to allege an imminent future injury. (*Id.*) On remand, Elsharkawi filed a First Amended Complaint ("FAC"), which is the target of Defendants'

present motion to dismiss. (*See* FAC, Doc. 73; *see* Mot.) Defendants argue that Elsharkawi still fails to establish he has standing to seek prospective injunctive relief and that, in any event, Elsharkawi has not stated a claim under the First Amendment or Fourth Amendment. (*See generally* Mot.)[2] Because the Court agrees that Elsharkawi has failed to establish he has standing, it does not reach the latter argument.

Article III standing is a jurisdictional requirement, and therefore an appropriate subject of a Rule 12(b)(1) motion. *See Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir.2000) (standing is a jurisdictional issue deriving from the "case or controversy" requirement of Article III of the United States Constitution). To have Article III standing, a plaintiff must "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed.

2. After this Court issued the first motion to dismiss order, Elsharkawi accepted an offer of judgment from the United States on the tort claims he had asserted under the Federal Tort Claims Act ("FTCA"). (*See* Doc. 63.) Then, after the case was remanded, Defendants filed ten supplemental declarations confirming they had not retained any data from Elsharkawi's cell phones and had not conducted any forensic search of his electronic devices. (Doc. 74.) Elsharkawi therefore voluntarily dismissed his claims for retrospective injunctive relief, which requested the destruction of any digital information in Defendants' possession. (Doc. 75.) Thus, only Elsharkawi's claims under the First Amendment and Fourth Amendment, which request prospective injunctive relief, remain at issue.

2d 635 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); then citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). To establish an injury in fact, a plaintiff must show that she suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560).

Here, Elsharkawi has not alleged any new facts to show "the imminent future injury" the Ninth Circuit found lacking in his original complaint. Originally, Elsharkawi had alleged that he would be irreparably harmed absent injunctive relief because "he [would] be unable to travel to Egypt to visit family or Saudi Arabia for religious pilgrimage, without fear that his electronic devices [would] be searched again, that his data [would] be seized, and that he [would] be arrested, all in violation of the Constitution." (Compl. ¶ 71.) The complaint pleaded that Elsharkawi "[had] regularly traveled to Egypt to visit his family in 2009, 2013, and 2016," and that "[a]t all times, he traveled with his electronic devices." (Compl. ¶ 29 n. 18.) Moreover, the complaint pleaded that "[Elsharkawi] hope[d] to visit family abroad again *[that] summer* along with completing the pilgrimage CBP interfered with previously," and that "[a]t the very least, Mr. Elsharkawi [would] travel to Saudi Arabia to complete the Hajj in accordance with his sincerely held religious belief that such pilgrimage is religiously obligatory upon him at least once in his lifetime." (*Id.*) (emphasis added).

Appendix B

This Court noted, in its standing discussion, that "[m]ere profession of an intent to travel 'some day' in one's lifetime—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of actual or imminent injury." (First MTD Order at 8 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)) (internal quotation marks omitted).) However, the Court found that Elsharkawi had pleaded "more than mere aspirations to leave the United States." (*Id.*) The Court relied on the complaint's allegations, summarized above, in concluding that Elsharkawi had "allege[d] an established pattern of international travel" that he claimed "would continue [that] year but for [the CBP agents'] conduct." (*Id.*) Moreover, the Court reasoned that "[Elsharkawi's] regular visits to his family abroad sufficiently concretize[d] his alleged future travel intentions for standing purposes even if he ha[d] not literally purchased tickets yet." (*Id.* at 8-9.) Accordingly, the Court held that Elsharkawi had standing to pursue prospective injunctive relief. (*Id.* at 9.)

On appeal, the Ninth Circuit reversed, holding that "the complaint fail[ed] to allege an imminent future injury and therefore fail[ed] to establish that Elsharkawi ha[d] Article III standing to pursue a prospective injunction against future border searches of his cell phones." (Ninth Circuit Decision at 5 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).) The court remanded to allow Elsharkawi to amend his pleadings "to attempt to allege the imminent future injury necessary to pursue a prospective injunction against future border searches of his cell phones." (*Id.*)

This Court's task is therefore clear: it must determine whether Elsharkawi has alleged enough additional facts to establish an "imminent future injury." The Court concludes that he has not. The FAC contains no new facts about Elsharkawi's imminent plans to travel abroad. Instead, the FAC realleges, almost verbatim, the past and future travel-related facts set forth in the original complaint and adds that Elsharkawi's travel plans are currently on hold due to the COVID-19 pandemic. (FAC ¶ 74.) Specifically, the FAC avers that, because of the pandemic, Elsharkawi "has not purchased any airline tickets at this time" but that "[Elsharkawi] intends to once again visit Egypt regularly when it is safe to do so, consistent with his prior travel patterns." (FAC ¶¶ 74-75.) But the original complaint already pleaded Elsharkawi's prior travel patterns and stated that Elsharkawi hoped to visit family in Egypt *that summer*. (*See* Compl. ¶ 29 n. 18.) The Ninth Circuit held, on those facts, that Elsharkawi had not established an "imminent future injury." (Ninth Circuit Decision at 5.) Now, the FAC contains *no* concrete future travel plans. The pandemic-related pause in Elsharkawi's travel plans—while understandable and stemming from circumstances outside of his control—nonetheless makes it *less*, not *more*, likely that Elsharkawi will be imminently harmed by another border search of his cell phone. Finally, the FAC adds that "[Elsharkawi's] future travel abroad to visit his family is not a matter of speculation, it is a certainty for him." (*Id.* ¶ 75.) This allegation, however, is merely a conclusory assertion; not a fact tending to show that "imminent future injury" is likely.

In sum, the Court concludes that Elsharkawi has failed to establish standing to pursue prospective injunctive relief, which is the only remedy requested for the Fourth Amendment claim (claim 1) and the First Amendment claim (claim 3). Accordingly, Defendants' Motion is GRANTED. Moreover, because Elsharkawi has already had an opportunity to amend his complaint to establish standing, and because he does not assert he *could* plead any additional facts in support of standing, the Court concludes that any further amendment would be futile and this dismissal is therefore WITHOUT LEAVE TO AMEND. Defendants are ORDERED to submit to the Court, **no later than five (5) days from the date of this Order**, a proposed judgment pursuant to the Court's Procedures.

APPENDIX C — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 9, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-56448

HAISAM ELSHARKAWI,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; JOHN P. SANDERS, CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; LAZARO RIVAS, OFFICER FNU, IN HIS INDIVIDUAL CAPACITY; EDUARDO RODRIGUEZ, OFFICER FNU, IN HIS INDIVIDUAL CAPACITY; JOHN STEVENSON, OFFICER FNU, IN HIS INDIVIDUAL CAPACITY; JENNIFER DOYLE, OFFICER LNU, IN HER INDIVIDUAL CAPACITY,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California.
D.C. No. 8:18-cv-01971-JLS-DFM.
Josephine L. Staton, District Judge, Presiding.

Appendix C

October 5, 2020, Argued and Submitted,
Pasadena, California
October 9, 2020, Filed

MEMORANDUM[*]

Before: M. SMITH and OWENS, Circuit Judges, and CARDONE,[**] District Judge.

Haisam Elsharkawi (Elsharkawi) appeals the dismissal of his claims arising out of a border search of his cell phones that caused him to miss a flight he attempted to board at Los Angeles International Airport (LAX). Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling. We have jurisdiction under 28 U.S.C. § 1291. We AFFIRM in part, and REVERSE and REMAND in part.

Elsharkawi seeks retrospective injunctive relief under the Fourth Amendment and First Amendment of the United States Constitution to order the Department of Homeland Security (DHS) to destroy any data collected during the alleged border searches of his cell phones. Elsharkawi also seeks prospective injunctive relief against future border searches of his cell phones, and money damages from the United States under the Federal Tort Claims Act (FTCA) and certain DHS Officers in their

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

individual capacities under 42 U.S.C. § 1981. Elsharkawi accepted an Offer of Judgment under Federal Rule of Civil Procedure 68 on his FTCA claims for $20,001. The district court then entered judgment for Elsharkawi on the FTCA claims in accordance with the accepted Offer of Judgment.

Under FTCA's judgment bar, "once a plaintiff receives a judgment (favorable or not) in an FTCA suit, he generally cannot proceed with a suit against an individual employee based on the same underlying facts." *Simmons v. Himmelreich*, ___ U.S. ___, 136 S. Ct. 1843, 1847, 195 L. Ed. 2d 106 (2016). The FTCA's judgment bar forecloses a claim against a federal employee when: (1) there is a "judgment"; (2) that judgment came in "an action under section 1346(b)"; and (3) that action was based on "the same subject matter" as the claims against the federal employee. *See* 28 U.S.C. § 2676. All three elements are satisfied here.

The first two elements are met because the district court entered a judgment on Elsharkawi's FTCA claims, which were brought under § 1346(b). The third element is satisfied because Elsharkawi's FTCA claims and individual capacity claims are based on the same alleged conduct by the DHS Officers questioning him and searching his cell phones at LAX. We therefore AFFIRM dismissal of Elsharkawi's § 1981 claims against CBP Officer Lazaro Rivas, CBP Officer Eduardo Rodriguez, CBP Officer John Stevenson, and Homeland Security Investigations (HSI) Special Agent Jennifer Doyle in their individual capacities.

The district court dismissed as moot Elsharkawi's claims for retrospective injunctive relief under the First

Amendment and Fourth Amendment. It relied on a declaration from the DHS Officer who allegedly searched Elsharkawi's cell phones, Officer Doyle, who stated that to her knowledge DHS does not have any data from the alleged searches of Elsharkawi's cell phones. However, because disputed issues of fact must be resolved in Elsharkawi's favor when evaluating a motion to dismiss, we REVERSE dismissal of Elsharkawi's claims for retrospective injunctive relief and REMAND those claims to the district court to direct DHS to submit supplemental declarations explaining more definitively whether DHS has any data from the alleged searches of Elsharkawi's cell phones and whether DHS conducted any forensic searches of his cell phones. *See Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). The district court should then determine whether those supplemental declarations render Elsharkawi's claims for retrospective injunctive relief moot. Because the jurisdictional inquiry—whether the government currently has Elsharkawi's data—is not substantially intertwined with the merits of the case that focus on the constitutionality of the underlying searches, the district court can consider such declarations for jurisdictional purposes. *See Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979)). To the extent necessary, Elsharkawi should also be granted leave to amend to allege specific facts supporting the allegation that DHS conducted a forensic search of his cell phones. We offer no assessment as to the merits of Elsharkawi's claims.

With respect to Elsharkawi's claims for prospective injunctive relief, the district court held that Elsharkawi had Article III standing to pursue a prospective injunction

against future border searches of his cell phones, but dismissed those claims under the Fourth Amendment and First Amendment on the merits and denied him leave to amend. We REVERSE and hold that the complaint fails to allege an imminent future injury and therefore fails to establish that Elsharkawi has Article III standing to pursue a prospective injunction against future border searches of his cell phones. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Therefore, we AFFIRM dismissal of Elsharkawi's claims for prospective injunctive relief, but REVERSE the district court and grant him leave to amend to attempt to allege the imminent future injury necessary to pursue a prospective injunction against future border searches of his cell phones. *See id.* at 564 n.2; *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951, 204 L. Ed. 2d 305 (2019) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013)). Again, we offer no assessment as to the merits of Elsharkawi's claims.

Accordingly, we **AFFIRM** dismissal of Elsharkawi's § 1981 claims against CBP Officer Lazaro Rivas, CBP Officer Eduardo Rodriguez, CBP Officer John Stevenson, and HSI Special Agent Jennifer Doyle in their individual capacities. Because disputed issues of fact must be resolved in Elsharkawi's favor, we **REVERSE** dismissal of Elsharkawi's claims for retrospective injunctive relief and **REMAND** those claims to the district court to direct DHS to submit supplemental declarations explaining more definitively whether DHS has any data from the alleged searches of Elsharkawi's cell phones and whether DHS conducted any forensic searches of his cell phones. To the extent necessary, Elsharkawi should also be granted leave to amend to allege specific facts supporting the

allegation that DHS conducted a forensic search of his cell phones. Finally, because the complaint fails to allege an imminent future injury to establish that Elsharkawi has Article III standing to pursue a prospective injunction, we **AFFIRM** dismissal of Elsharkawi's claims for prospective injunctive relief, but **REVERSE** the district court and grant Elsharkawi leave to amend to attempt to allege the imminent future injury necessary to pursue an injunction against future border searches of his cell phones. Each party shall bear its own costs on appeal.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 8, 2019

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 8:18-cv-01971-JLS-DFM

HAISAM ELSHARKAWI,

v.

UNITED STATES OF AMERICA *et al.*

August 8, 2019, Decided
August 8, 2019, Filed

HONORABLE JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

CIVIL MINUTES — GENERAL

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING OFFICIAL-CAPACITY DEFENDANTS' MOTION TO DISMISS (Doc. 39); (2) GRANTING INDIVIDUAL-CAPACITY DEFENDANTS' MOTION TO DISMISS (Doc. 40); AND GRANTING IN PART AND DENYING IN PART DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS (Doc. 41)

Appendix D

Before the Court are three Motions to Dismiss: one filed by Defendants Acting Secretary of Homeland Security Kevin McAleenan and Acting Commissioner of U.S. Customs and Border Protection Mark Morgan, sued in their official capacities (collectively, "Official-Capacity Defendants") (Off.-Cap. Dfdts' Mot., Doc. 39);[1] one filed by Defendants Rivas, Rodriguez, Stevenson, and Doyle, federal law-enforcement officers sued in their individual capacities (collectively, "Individual-Capacity Defendants") (Ind.-Cap. Dfdts' Mot., Doc. 40.); and one filed by Defendant United States of America (USA's Mot., Doc. 41). Plaintiff opposed each Motion. (Opp. to Off.-Cap. Dfdts' Mot., Doc. 49; Opp. to Ind.-Cap. Dfdts' Mot., Doc. 47; Opp. to USA's Mot., Doc. 48.) Defendants replied in support of their respective Motions. (Off.-Cap. Dfdts' Reply, Doc. 50; Ind.-Cap. Dfdts' Reply, Doc. 51; USA's Reply, Doc. 52.) For the reasons below, the Court GRANTS Official-Capacity Defendants' Motion, GRANTS Individual-Capacity Defendants' Motion, and GRANTS IN PART and DENIES IN PART Defendant United States of America's Motion.[2]

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1. Plaintiff originally sued then-Secretary of Homeland Security Kirstjen Nielsen and then-Acting Commissioner of U.S. Customs and Border Protection McAleenan in their official capacities. (*See* Compl., Doc. 1 ¶¶ 9-10.) McAleenan became Acting Secretary of Homeland Security on April 7, 2019, and Morgan became Acting Commissioner of U.S. Customs and Border Protection on July 7, 2019; they are therefore automatically substituted as parties under Federal Rule of Civil Procedure 25(d).

2. The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Accordingly, the hearing set for August 9, 2019, at 10:30 a.m., is VACATED.

Appendix D

I. Background

Plaintiff alleges the following facts in his Complaint:

Plaintiff is a United States citizen of Egyptian descent and a practicing Muslim. (Compl. ¶ 7.) He has regularly traveled to Egypt to visit family, including in 2009, 2013, and 2016. (*Id.* ¶ 29 n.18.) On February 9, 2017, Plaintiff attempted to board a flight at Los Angeles International Airport. The Turkish Airlines-operated flight was bound for Saudi Arabia, where Plaintiff intended to partake in a religious pilgrimage. (*Id.* ¶ 29.) Plaintiff passed through airport security screening without incident. (*Id.* ¶ 32.)

While in the process of boarding his flight, Plaintiff was removed from the boarding line by Officer Rivas. (*Id.* ¶ 34.) Officer Rivas asked Plaintiff where he was traveling to, how long he planned to stay, if he was meeting anyone during his stay, and how much currency he was carrying. (*Id.* ¶ 35.) Plaintiff answered these questions, including declaring the approximately $2,500 he was carrying. (*Id.* ¶ 36-37.) Officer Rivas then repeated the same questions while searching Plaintiff's carry-on bag. (*Id.* ¶ 37.) Officer Rivas also asked Plaintiff about Plaintiff's past travels to Egypt, what family Plaintiff has in Egypt and Saudi Arabia, when Plaintiff first arrived in the United States, and when Plaintiff became a United States citizen. (*Id.* ¶ 38.)

Plaintiff then asked if there was a problem and whether he needed an attorney. (*Id.* ¶ 39.) Officer Rivas then accused Plaintiff of hiding something and five other officers then approached, including Officer Rodriguez.

(*Id.* ¶¶ 39-40.) Officer Rodriguez warned Plaintiff that he would miss his flight if he did not cooperate with the officers. (*Id.* ¶ 41.) Officer Rodriguez then searched Plaintiff's person. (*Id.*) The search produced Plaintiff's phone, which Officer Rodriguez asked Plaintiff to unlock. (*Id.*) Plaintiff declined to do so and advised the officers that he would not answer further questions without an attorney. (*Id.*) Officer Rodriguez then told Plaintiff that the officers would seize his phone if Plaintiff did not unlock it. (*Id.* ¶ 43.) Plaintiff still refused to unlock it. (*Id.*)

Plaintiff again requested an attorney and was told that he did not have a right to an attorney because he was not under arrest. (*Id.* ¶ 44.) Plaintiff then asked for his phone back. (*Id.* ¶ 46.) Officer Rodriguez then handcuffed Plaintiff. (*Id.*) Officer Rodriguez and two other officers pulled Plaintiff into an elevator. (*Id.* ¶ 47.) While being pulled into the elevator, and again while in the elevator, Plaintiff yelled out for help. (*Id.* ¶¶ 48-49.) Officer Rodriguez then pushed Plaintiff›s arms up toward his head, to the point Plaintiff worried he would be severely injured. (*Id.* ¶ 50.) Plaintiff was taken to a holding cell and handcuffed to a bench. (*Id.* ¶ 53.) After some time passed, Officer Stevenson entered and told Plaintiff that we would be free to leave if he unlocked his phone. (*Id.* ¶ 54.) Plaintiff again declined to unlock his phone. (*Id.*)

Plaintiff was later taken to a separate room, where Officer Rivas searched Plaintiff's bags while Officer Stevenson questioned Plaintiff about his work, family, and citizenship history. (*Id.* ¶¶ 57, 59.) Officer Stevenson also again asked Plaintiff to unlock his phone, and Plaintiff

again refused. (*Id.* ¶ 59.) Officer Stevenson then informed Plaintiff that his phone was being seized. (*Id.*) Plaintiff believes that the data from his phone was forensically examined, copied, and extracted while the phone was out of his possession. (*Id.* ¶ 76.)

Later, Officer Doyle entered and again requested that Plaintiff unlock his phone. (*Id.* ¶ 60.) Plaintiff again declined. (*Id.*) Officer Doyle told Plaintiff that his phone would then be seized and returned to him in thirty days. (*Id.*) Plaintiff stated that he had pictures of his wife without her headscarf on his phone, and this was one reason why he did not want his phone searched. (*Id.* ¶ 62.) Officer Doyle offered to search the phone herself. (*Id.* ¶ 63.) Plaintiff then unlocked his phone. (*Id.* ¶ 64.) After manually searching that phone and questioning Plaintiff about its apparent contents, Officer Doyle asked Plaintiff to unlock another phone that had been retrieved from Plaintiff's luggage. (*Id.* ¶¶ 65-66.) Plaintiff advised that the second phone was not locked. (*Id.*) Officer Doyle searched that phone and subsequently advised Plaintiff that he was free to leave. (*Id.* ¶¶ 66-67.)

Plaintiff missed his flight and was unable to get a refund from Turkish Airlines. (*Id.* ¶ 68.) He alleges that neither the initial searches of his person and luggage nor the ultimate search of his phone were conducted pursuant to any suspicion of wrongdoing, much less pursuant to a warrant supported by probable cause. (*Id.* ¶¶ 2, 73, 76.) He further alleges that the suspicionless search of his phone was done pursuant to a then-policy (the "2009 Policy") enforced by Official-Capacity Defendants, and

that the 2009 Policy has since been superseded by a new official policy (the "2018 Policy") that similarly authorizes suspicionless searches of persons departing the United States and their electronic devices. (*Id.* ¶¶ 9-19.)

Plaintiff intends to travel abroad this year to Egypt to visit his family there and to Saudi Arabia for religious pilgrimage. (*Id.* ¶¶ 29 n.18, 71.) He intends to travel with his electronic devices to facilitate personal and business communications while abroad. (*Id.* ¶ 29 n.18.)

Plaintiff has filed multiple administrative complaints and otherwise sought redress from the government, but he has not received any response. (*Id.* ¶¶ 69-70.)

On October 31, 2018, Plaintiff filed the instant action. (*See* Compl.) The Complaint brings nine causes of action: (1) unreasonable search and (2) unreasonable seizure of Plaintiff's phone data in violation of the Fourth Amendment, against Official-Capacity Defendants; (3) unreasonable search of Plaintiff's phone data in violation of the First Amendment, against Official-Capacity Defendants; (4) interference with contract in violation of 42 U.S.C. § 1981, against Individual-Capacity Defendants; (5) false arrest and imprisonment, (6) battery, (7) negligence, (8) intentional infliction of emotional distress, and (9) intrusion into private affairs in violation of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, against Defendant United States of America. (*Id.* ¶¶ 72-99.)

All Defendants now move to dismiss pursuant to Rule 12(b)(6). Official-Capacity Defendants also move to dismiss pursuant to Rule 12(b)(1).

II. Legal Standard

A. Rule 12(b)(1)

"When a motion is made pursuant to Rule 12(b)(1), the plaintiff has the burden of proving that the court has subject matter jurisdiction." *Marino v. Countrywide Fin. Corp.*, 26 F. Supp. 3d 955, 959 (C.D. Cal. 2014) (citing *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001)). "For the court to exercise subject matter jurisdiction, a plaintiff must show that he or she has standing under Article III." *Id.* (citing *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004)). "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). When considering a Rule 12(b)(1) motion, the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Rule 12(b)(6)

In deciding a motion to dismiss under Rule 12(b) (6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A court must draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Assoc.*, 629 F.3d 992, 998 (9th Cir. 2010). Yet, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A plaintiff must not merely allege conduct that is conceivable; "[w]hen a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

III. Discussion

A. Claims Against Official-Capacity Defendants

1. Standing

Plaintiff seeks only declaratory and injunctive relief, not money damages, from Official-Capacity Defendants. (Opp. to Off.-Cap. Dfdts' Mot. at 14; *see also* Compl. at 26-27.) Plaintiff seeks prospective relief preventing Official-Capacity Defendants from authorizing suspicionless searches of Plaintiff's electronic devices when he attempts to travel abroad and retrospective relief requiring Official-Capacity Defendants to delete any data copied from Plaintiff's phone during his detention. (*See* Compl. at 26-27.) As an initial matter, Official-Capacity Defendants challenge Plaintiff's standing to seek such relief. (Off.-Cap. Dfdts' Mot. at 6-11.) The Court cannot address the merits of Plaintiff's claims without first establishing jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

i. Retrospective Relief

Official-Capacity Defendants argue that Plaintiff's claim for retrospective relief is moot because they do not still have any of Plaintiff's data. (Off.-Cap. Dfdts' Mot. at 8-9.) To support this argument, Official-Capacity Defendants submit a Declaration from Officer Doyle, in which she attests:

> I did not record the password to [Plaintiff's] phone or any of his electronic devices. I did not connect [Plaintiff's] phone or any of his electronic devices to external equipment to copy or analyze their contents. I did not make any copies of the contents of his phone or any of his electronic devices. I did not transmit any copies of the contents of his phone or any of his electronic devices to any other agencies. To my knowledge, neither [Homeland Security] nor [Customs and Border Protection] has any copies of the contents of [Plaintiff's] phone or any of his electronic devices.

(Doyle Decl., Attachment to Off.-Cap. Dfdts' Mot. ¶ 5.) Plaintiff argues that the Court should not consider Doyle's declaration—even for jurisdictional purposes—because it goes to the merits of Plaintiff's claims. (Opp. to Off.-Cap. Dfdts' Mot. at 13-14.)

"[A] district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary . . . However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publishing Co. v. General Telephone Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979)). Here, there is no factual

dispute that Officer Doyle searched and temporarily seized Plaintiff's phone and its contents; instead, the merits inquiry focuses on the legal question of whether the search and seizure were constitutionally permissible. Alternatively, the jurisdictional inquiry focuses on the factual question of whether the government *still retains* Plaintiff's data. These inquiries are not substantially intertwined. Therefore, the Court may properly consider Officer Doyle's declaration for jurisdictional purposes.

Doyle's uncontroverted testimony that she did not store data from Plaintiff's phone moots Plaintiff's claim for retrospective relief. Plaintiff seeks further assurances that *no one* copied and stored data from his phone while it was out of his sight, and he volunteers to drop his claim for retrospective relief if Official-Capacity Defendants will stipulate as much. (Opp. to Off.-Cap. Dfdts' Mot. at 14.) In their Reply, Official-Capacity Defendants effectively accept Plaintiff's offer to stipulate that they are not in possession of his data, stating: "[the] proposed stipulation is what is stated in the declaration of [Officer] Doyle . . . There thus appears to be no live request for an injunction requiring Official-Capacity Defendants to destroy all copies of the contents of Plaintiff's phones." (Off.-Cap. Dfdts' Reply at 7.) Moreover, the allegations in the Complaint do not reasonably describe where, when, or how anyone but Officer Doyle would have been able to access and copy the data on Plaintiff's locked phone.[3] Rather, Plaintiff's phone apparently remained locked

3. Plaintiff does not allege that his second, unlocked phone was accessed outside his presence.

throughout the ordeal but for the time he unlocked it for inspection by Officer Doyle, and she attests that she did not copy or store any data. Hence, Plaintiff does not plead facts—much less provide evidence—that Official-Capacity Defendants are engaged in an ongoing seizure of Plaintiff's data that could be redressed by an injunction from this Court.

Accordingly, Plaintiff's claim for retrospective relief against Official-Capacity Defendants is dismissed as moot.

ii. Prospective Relief

Official-Capacity Defendants argue that Plaintiff lacks standing to seek prospective relief because he does not adequately plead an imminent injury: particularly, that he neither has concrete plans to travel abroad nor sufficiently alleges that his phone would be unlawfully searched or seized at the border if he did so travel. (Off.-Cap. Dfdts' Mot. at 7-8.)

"An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, n.5, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)). Mere profession of an intent to travel "some day" in one's lifetime"—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of [] actual or imminent injury." *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 564, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks omitted).

Here, however, Plaintiff pleads more than mere aspirations to leave the United States. First, he alleges an established pattern of international travel that he alleges would continue *this year* but for Official-Capacity Defendants' conduct. (*Id.* ¶ 29 n.18.) Second, Plaintiff's regular visits to his family abroad sufficiently concretize his alleged future travel intentions for standing purposes even if he has not literally purchased tickets yet. *See Ibrahim v. Dep't of Homeland Security*, 669 F.3d 983, 993-94 (9th Cir. 2012) (distinguishing *Lujan* and holding that allegations of substantial professional and social networks in a destination evince an "obvious" and non-hypothetical intent to travel there).

Accordingly, Plaintiff has standing to seek prospective relief against Official-Capacity Defendants.

2. Merits

Having established subject matter jurisdiction, the Court addresses the merits of Plaintiff's constitutional challenges to the 2018 Policy and Official-Capacity Defendants' enforcement thereof.

i. Fourth Amendment

Plaintiff first argues that the 2018 Policy's authorization of suspicionless manual searches of electronic devices carried by travelers exiting the United States violates

the Fourth Amendment's prohibition on unreasonable searches. (Opp. to Off.-Cap. Dfdts' Mot. at 16-22.)

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "Reasonableness" is a matter of balancing sovereign interests against individual privacy rights and "depends on the totality of the circumstances, including the scope and duration of the deprivation." *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013). However, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior" and is "struck much more favorably to the [g]overnment at the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 540, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985). Thus, "[b]ecause searches at the international border of both inbound and outbound persons or property are conducted 'pursuant to the long-standing right of the sovereign to protect itself,' they generally require neither a warrant nor individualized suspicion." *United States v. Seljan*, 547 F.3d 993, 999 (9th Cir. 2008) (quoting *United States v. Ramsey*, 431 U.S. 606, 616, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977)). "Searches of international passengers at American airports are considered border searches because they occur at the 'functional equivalent of a border.'" *United States v. Arnold*, 533 F.3d 1003, 1006 (9th Cir. 2008) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 273, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973)).

Appendix D

In *Arnold*, and again in *Cotterman*, the Ninth Circuit unequivocally held that the Fourth Amendment permits cursory, manual inspections of personal electronic devices at the border without any suspicion of wrongdoing.[4] *Arnold*, 533 F.3d at 1008-09; *accord Cotterman*, 709 F.3d at 960. Plaintiff argues, however, that this holding should be limited to persons seeking to *enter* the United States and does not rightfully extend to persons seeking to *leave*. (Opp. to Off.-Cap. Dfdts' Mot. at 18.) Specifically, Plaintiff argues that the Supreme Court's recognition of a heightened privacy interest against searches of personal electronic devices in *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)—decided after *Arnold* and *Cotterman*—suggests that the government's previously-recognized interests justifying border searches—including prevention of unlawful entry, smuggling of contraband, combating security threats, and interdiction of child pornography—are now insufficient with respect to searches of devices carried by persons leaving the country. (*Id.* at 16-22.)

In *Riley*, the Supreme Court held that police interests in officer safety and preventing the destruction of evidence do not overcome arrestees' privacy interests in personal data stored on electronic devices, and therefore warrantless searches of cell phones incident to arrest are unreasonable under the Fourth Amendment. 573 U.S. at 387-91, 401. In doing so, the Court emphasized that "modern cell phones, as a category, implicate privacy concerns far beyond those

4. By contrast, comprehensive, intrusive forensic searches of electronic devices at the border require justification by reasonable suspicion. *Cotterman*, 709 F.3d at 967-68.

implicated by the search of [physical containers]" and "any extension of th[e] reasoning" justifying searches of physical spaces "to digital data has to rest on its own bottom." *Id.* at 393. The Court further found that personal electronic devices "differ in both a quantitative and a qualitative sense" from physical containers because the former can hold "millions of pages of text, thousands of pictures, or hundreds of videos," and are routinely used by adults to keep "a digital record of nearly every aspect of their lives—from the mundane to the intimate," from which "[t]he sum of an individual's private life can be reconstructed." *Id.* at 393-95.

As an initial matter, Plaintiff does not identify how *Riley* provides a "principled basis to conclude that the [] border search doctrine does not apply with equal force to exit searches as it does to entry searches," *United States v. Cardona*, 769 F.2d 625, 629 (9th Cir. 1985), or otherwise disturbs the line of Ninth Circuit cases holding that the border search doctrine applies to equally "both inbound *and outbound* persons or property." *Seljan*, 547 F.3d at 999 (emphasis added); *see also United States v. Duncan*, 693 F.2d 971, 977-78 (9th Cir. 1982). Rather, Plaintiff merely highlights the obvious reality that the government's interests in searching inbound persons are not *identical* to the interests in searching outbound travelers. But such inverse interests are two sides of the same coin. Combatting trafficking requires preventing contraband from entering the country and currency from leaving it. Thwarting espionage requires preventing foreign agents from entering the country and sensitive information from leaving it. Stemming the spread of child

pornography requires intercepting illicit materials going both ways across the border. The list goes on. This reality is already accounted for in current border search doctrine and is not logically implicated by *Riley*.

Therefore, because Plaintiff does not adequately explain why the heightened privacy interest identified in *Riley* weighs heavier in the outbound context than in the inbound one, Plaintiff's claim can succeed only if *Riley* counsels prohibition of *all* suspicionless searches of electronic devices at the border. Such a holding would do far more than carve-out an exception to *Cotterman* and *Arnold*; it would explicitly subvert them. And *Riley* provides no basis for the Court to overcome those binding precedents. The heightened privacy interests in personal data stored on electronic devices was discussed at length by the Ninth Circuit in *Cotterman* in an analysis remarkably similar to that in *Riley*; indeed, such recognition of the heightened privacy interest in digital data is the very reason the Ninth Circuit adopted a reasonable suspicion requirement for intrusive, forensic border searches of personal electronic devices:

> The amount of private information carried by international travelers was traditionally circumscribed by the size of the traveler's luggage or automobile. That is no longer the case. Electronic devices are capable of storing warehouses full of information . . . The nature of the contents of electronic devices differs from that of luggage as well. Laptop computers, iPads and the like are simultaneously offices

> and personal diaries. They contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails . . . *We [therefore] rest our analysis on the reasonableness of this search, paying particular heed to the nature of the electronic devices and the attendant expectation of privacy* . . . A person's digital life ought not be hijacked simply by crossing a border . . . [T]he exposure of confidential and personal information has permanence. It cannot be undone. Accordingly, *the uniquely sensitive nature of data on electronic devices carries with it a significant expectation of privacy and thus renders an exhaustive exploratory search more intrusive than with other forms of property.*

Cotterman, 709 F.3d at 964-66 (emphasis added). Yet, the Ninth Circuit nevertheless confirmed *Arnold*'s holding that such heightened privacy interest does not outweigh the government's interests in the context of the limited manual searches at issue here. *See id.* at 967.

Therefore, the Court declines Plaintiff's invitation to reassess the constitutionality of suspicionless manual searches of personal electronic devices at the border. That *Riley* subsequently held the same heightened privacy interests discussed in *Cotterman* can overcome a different governmental interest in a different context does not induce the Court to ignore otherwise binding precedent.

Accordingly, Plaintiff's Fourth Amendment claims against Official-Capacity Defendants are dismissed.

ii. First Amendment

Plaintiff next argues that suspicionless border searches of personal electronic devices violate the First Amendment insofar as they facilitate the government's acquisition of information regarding an individual's personal associations and beliefs without being narrowly tailored to achieve a compelling governmental interest. (Opp. to Off.-Cap. Dfdts' Mot. at 23-25.) This argument, however, is foreclosed by *Arnold*, in which the Ninth Circuit held that the First Amendment does not provide any greater protections in the border search context than does the Fourth Amendment. 533 F.3d at 1010. Therefore, Plaintiff's First Amendment claim fails for the same reasons discussed in the preceding section.

Accordingly, Plaintiff's First Amendment claims against Official-Capacity Defendants are dismissed.

B. Claims Against Individual-Capacity Defendants

Plaintiff alleges that Individual-Capacity Defendants intentionally interfered with his contract with Turkish Airlines and caused him to miss his flight because of Plaintiff's race and ethnicity. (Compl. ¶¶ 81-84.) Section 1981 prohibits impairment of any person's right to make and enforce contracts "by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. §

1981(c). Individual-Capacity Defendants respond that they cannot be liable under § 1981 because—being *federal* agents acting under color of *federal* authority—they were neither nongovernmental actors nor actors under color of *state* law. (Ind.-Cap. Dfdts' Mot. at 5-7.)

The Court agrees that Individual-Capacity Defendants' federal status bars these claims. Despite Plaintiff's unsupported insistence that Individual-Capacity Defendants are "nongovernmental" actors under § 1981 simply because they are sued in their personal capacities for conduct allegedly beyond the lawful authority of their official positions (Opp. to Ind.-Cap. Dfdts' Mot. at 7-8), such a conclusion contradicts the obvious nature of this suit: that Individual-Capacity Defendants allegedly improperly *asserted the power of their federal positions* to Plaintiff's detriment. Indeed, numerous courts have held that § 1981 does not provide a cause of action against persons acting with the imprimatur of federal authority—even if nominally sued as individuals. *See, e.g.*, *Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Gottschalk v. City & Cnty. of San Francisco*, 964 F. Supp. 2d 1147, 1162-63 (N.D. Cal. 2013); *see also Davis-Warren Auctioneers, J.V. v. F.D.I.C.*, 215 F.3d 1159, 1161 (10th Cir. 2000).

Accordingly, Plaintiff's § 1981 claims against Individual-Capacity Defendants are dismissed.

Appendix D

C. Claims Against Defendant United States of America

The federal government is liable under the FTCA "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Hence, Plaintiff adequately states an FTCA claim insofar as he sufficiently alleges a corresponding tort under California law.

1. Intrusion into Private Affairs

The parties agree that California law requires a plaintiff to show that he had a "reasonable expectation of privacy" to succeed on a claim for intrusion into private affairs. *See Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286-87, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (2009). In arguing whether Plaintiff is entitled to such expectation, the parties largely rehash their arguments regarding the Fourth Amendment "reasonableness" of suspicionless border searches of electronic devices. (USA's Mot. at 4-5; Opp. to USA's Mot. at 10-13.) The Court agrees that the two analyses are coextensive in this context. *But see Hernandez*, 47 Cal. 4th at 292 n. 9. Hence, Plaintiff's intrusion into private affairs claim fails for the same reasons discussed above; Plaintiff did not have a reasonable expectation of privacy where Ninth Circuit

precedent permitted the suspicionless manual inspection of his electronic devices at the border and concordant official policy clearly stated that such searches may occur. *See Duncan*, 693 F.2d at 978 ("[A] person exiting the United States has constructive notice that he or she is subject to search."); *United States v. Stanley*, 545 F.2d 661, 667 (9th Cir. 1976).

Accordingly, Plaintiff's FTCA claim for intrusion into private affairs is dismissed.

2. Other FTCA Claims

With respect to Plaintiff's remaining FTCA claims, the government contends that the Complaint does not provide fair notice of which acts are supposedly tortious. (USA's Mot. at 5.)

Under Rule 8, a complaint must contain a "short and plain statement of the claim showing the pleader is entitled to relief," and "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d)(1). "[T]he 'short and plain statement' must provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005).

Here, the Complaint provides a detailed account of the underlying factual events and alleged conduct by the government's employees. (Compl. ¶¶ 29-68.) It also provides clear statements of the legal theories under which Plaintiff asserts the government might be liable for such conduct. (*Id.* ¶¶ 85-97.) This is textbook pleading under

Rule 8 and the Court does not grasp the government's apparent confusion. The government implies that each and every factual allegation must be tagged or otherwise cross-referenced to the cause(s) of action it supports (*see* USA's Reply at 5), but Rule 8 is not so demanding.

Accordingly, the Motion is denied as to Plaintiff's FTCA claims for false arrest and imprisonment, battery, negligence, and intentional infliction of emotional distress.

D. Leave to Amend

Because the legal theories underlying Plaintiff's dismissed claims are either squarely foreclosed by Ninth Circuit precedent or otherwise not viable as a matter of law, no amount of further factual development could save those claims, and amendment would therefore be futile. *See Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Plaintiff's Fourth Amendment, First Amendment, § 1981, and intrusion into private affairs claims are therefore dismissed with prejudice.

IV. Conclusion

For the foregoing reasons, Official-Capacity Defendants' Motion is GRANTED, Individual-Capacity Defendants' Motion is GRANTED, and Defendant United States of America's Motion is GRANTED IN PART and DENIED IN PART; Plaintiff's Fourth Amendment, First Amendment, § 1981, and intrusion into private affairs claims are DISMISSED WITH PREJUDICE.