No. 24-

IN THE

Supreme Court of the United States

MOHAMMED JIBRIL, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN Y.J. AND O.J., *et al.*,

Petitioners,

v.

ALEJANDRO MAYORKAS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The lower courts endorsed the agency defendants' assertion that all seven Jibril family members lacked standing to sue for injunctive relief challenging the due process in the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP") as applied to them. The Jibrils still do not know the factual basis for that asserted lack of standing.

Question No. 1 presented:

Do plaintiffs show a risk of future harm sufficient to establish standing to challenge the DHS TRIP redress process, based on the likelihood of repetition of past harm, in light of the ability of the government to place plaintiffs on or return plaintiffs to the Terrorist Screening Dataset at any time and for any reason, without notice?

Question No. 2 presented:

Do plaintiffs sufficiently show imminent future harm by establishing the need for future religious travel, even without specific dates and times, such as the intent to complete religiously mandated pilgrimages?

Question No. 3 presented:

Must plaintiffs and courts defer to factual bases behind an agency's conclusory assertion that plaintiffs lack standing, or are those matters more appropriately addressed after factual discovery?

a. If so, do courts exercise appropriate independent judgment when they defer to factual assertions that agencies allege show plaintiffs' lack of standing, even where agencies never reveal the facts to plaintiffs before or during litigation?

PARTIES TO THE PROCEEDINGS

Petitioner Mohammed Jibril, individually and on behalf of his minor children, Y.J. and O.J., was a Plaintiff in the district court and an Appellant before the D.C. Circuit Court of Appeals.

Petitioner Aida Shahin, individually and on behalf of her minor children, Y.J. and O.J., was a Plaintiff in the district court and an Appellant before the D.C. Circuit Court of Appeals.

Petitioner Ala'a Jibril was a Plaintiff in the district court and an Appellant before the D.C. Circuit Court of Appeals.

Petitioner Khalid Jibril was a Plaintiff in the district court and an Appellant before the D.C. Circuit Court of Appeals.

Petitioner Hamza Jibril was a minor Plaintiff in the district court and an Appellant before the D.C. Circuit Court of Appeals.

Respondent Alejandro Mayorkas, in his official capacity as Secretary of the Department of Homeland Security, was the Defendant before the district court and Appellee before the D.C. Circuit Court of Appeals. His predecessor, Chad Wolf, in his official capacity as Secretary of the Department of Homeland Security, was the Defendant before the district court in 2020.

Respondent David Pekoske, in his official capacity as Administrator of the Transportation Security

Administration, was the Defendant before the district court and the Appellee before the D.C. Circuit Court of Appeals.

Respondent Troy A. Miller, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection, was the Appellee before the D.C. Circuit Court of Appeals. Mark Morgan, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection, was the Defendant before the district court.

Respondent Merrick Garland, in his official capacity as Attorney General of the United States, was the Appellee before the D.C. Circuit Court of Appeals. His predecessor, William Barr, in his official capacity as Attorney General of the United States, was the Defendant before the district court in 2020.

Respondent Christopher Wray, in his official capacity of Director of the Federal Bureau of Investigation, was the Defendant before the district court and the Appellee before the D.C. Circuit Court of Appeals.

Respondent Michael Glasheen, in his official capacity as Director of the Terrorist Screening Center, now substitutes in as the representative for the Terrorist Screening Center. His predecessor, Charles Kable, in his official capacity as Director of the Terrorist Screening Center, was the Defendant before the district court and the Appellee before the D.C. Circuit Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

Jibril v. Mayorkas, No. 23-5074, United States Court of Appeals for the D.C. Circuit. Judgment entered May 14, 2024.

Jibril v. Mayorkas, No. 1:19-cv-2457, United States District Court for the District of Columbia. Judgment entered February 27, 2023.

Jibril v. Mayorkas, No. 20-5202, United States Court of Appeals for the D.C. Circuit. Judgment entered December 21, 2021.

Jibril v. Wolf, No. 1:19-cv-02457, United States District Court for the District of Columbia. Judgment entered May 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mohammed Jibril (individually and on behalf of his minor children, Y.J. and O.J.), Aida Shahin (individually and on behalf of her minor children, Y.J. and O.J.), Ala'a Jibril, Khalid Jibril, and Hamza Jibril respectfully petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the D.C. Circuit in this matter.

OPINIONS BELOW

The most recent D.C. Circuit decision is available at *Jibril v. Mayorkas*, 101 F.4th 857 (D.C. Cir. 2024). Pet. App. 1a–27a. The most recent District Court for the District of Columbia's decision is available at *Jibril v. Mayorkas*, No. 1:19-cv-2457-RCL, 2023 U.S. Dist. LEXIS 32199 (D.D.C. Feb. 27, 2023). Pet. App. 28a–49a. The first D.C. Circuit decision is available at *Jibril v. Mayorkas*, No. 20-5202, 20 F.4th 804 (D.C. Cir. 2021). Pet. App. 50a-74a. The first District Court for the District of Columbia's decision is available at *Jibril v. Wolf*, No. 1:19-cv-2457, 2020 U.S. Dist. LEXIS 81926 (D.D.C. May 9, 2020). Pet. App. 75a-88a.

STATEMENT OF JURISDICTION

The D.C. Circuit entered judgment on May 14, 2024. On August 7, 2024, this Court granted Petitioner an extension to September 11, 2024. Petitioner now timely files this Petition. The jurisdiction of the Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Paragraph 1

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III § 2.

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.

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

28 U.S.C. § 1331—District Court Jurisdiction, Federal Question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331.

28 U.S.C. § 2201—Declaratory Judgments, Creation of Remedy

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section

> 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

5 U.S.C. § 706—The Administrative Procedure Act ("APA")

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

***

5 U.S.C. § 706(1), (2)(A)-(B).

STATEMENT OF THE CASE

I. Introduction

The D.C. Circuit's ruling in this case establishes precedent that requires this Court's immediate intervention. The current ruling obscures government transparency, precludes independent judicial judgment, and contravenes recent precedent of this Court. The impact on plaintiffs like these Petitioners leaves them to only guess blindly whether they have standing, both at the time of filing a lawsuit and throughout litigation. That cannot be the intent of this Court's rulings, nor even a tenable position for individual Americans to navigate when seeking access to the courts to prevent future harm.

The Jibril family of two parents and five children, ranging in age from young adults to a toddler, suffered extreme delays in their travel and utilized the only avenue of redress available to them—the DHS TRIP redress process. Yet the government responded that it could "neither confirm nor deny" any family member's presence on a watchlist, let alone provide any reasons.

The family initiated this litigation in 2019. Only after reversal and remand by the D.C. Circuit Court of Appeals of the first motion to dismiss, and after nearly four years of litigation, did the government—for the first time—provide information attached to an *in camera* declaration that had been available to it all along. The District Court "reluctantly" granted the motion to dismiss based on a purported lack of standing that allegedly existed when the Jibrils first initiated litigation, but which the government withheld from courts and the Jibrils during the entirety of litigation prior to that point. The Jibril family still does not know the factual basis of the dismissal, despite the presence of a hypothetical situation articulated in the district court's opinion which the D.C. Circuit later termed "thoughtful." Pet. App. 19a. The family's attorneys do not know the factual basis either. Yet two courts now overlooked that obvious barrier, and ultimately blessed the government's withholding of the very information it now claims deprives the Petitioners of jurisdiction. Resolution of these legal issues necessitates this Court's intervention to resolve.

II. Relevant Factual Background

Petitioners Mohammed Jibril, Aida Shahin, Ala'a Jibril, Khalid Jibril, Hamza Jibril, and minor children Y.J. and O.J. (together, "the Jibril family") are all U.S. citizens with family in Jordan. Doc. 1 ¶¶ 1–7, 92. In the spring and summer of 2018, the Jibril family traveled to the Middle East to visit family members in Jordan. *Id.* ¶ 94. On their travel date, the Jibril family arrived at the ticketing counter in Los Angeles to obtain their boarding passes. *Id.* ¶ 96. After waiting about one hour, they received their boarding passes, all of which had

"SSSS" printed on them. *Id.* The Jibril family was then searched for about two hours, during which all members were pat down, including the minor children.[1] *Id.* ¶ 97. Department of Homeland Security ("DHS") agents took the Jibril family from their gate to a private area where they searched the family's luggage. *Id.* ¶ 100. The Jibril family almost missed their flight to Abu Dhabi. *Id.* ¶ 101. Once the Jibril family arrived in Jordan, they were interrogated for about two hours before being allowed to enter the country. *Id.* ¶ 102.

Their travel troubles had just begun. In August 2018, the Jibril family headed home to Los Angeles, California. At the Jordanian airport, officials told Mohammed Jibril that American officials have an issue with him, and that the family's names—all of them—needed to be cleared prior to the family's boarding time. *Id.* ¶ 104. All family members again received boarding passes with "SSSS" printed on them. *Id.* ¶ 105. The Jibril family next endured interrogation by U.S. officials in Abu Dhabi. *Id.* ¶ 106. CBP agents at the Preclearance location in Abu Dhabi detained the family, separated them, and interrogated them for hours. *Id.* ¶ 107. Agents separated both Mohammed Jibril and Aida Shahin from their minor children. *Id.* ¶¶ 108–09.

The Jibril family missed their scheduled flight home because of the extensive screening. *Id.* ¶ 118. When they returned to the airport the next morning to try again, agents searched them thoroughly again despite all the security screenings the day before. *Id.* ¶¶ 120–21. The extensive security screening the Jibril family endured is

1. At the time of travel and filing this complaint, Petitioner Hamza Jibril was also a minor child. Doc. 1 ¶ 5.

consistent with the treatment of Selectee list persons, or persons on the Terrorist Watch List. *Id.* ¶ 123.

In March 2019, the family initiated redress inquiries through the DHS Traveler Redress Inquiry Program ("DHS TRIP") to learn why they received such enhanced screening, and for a way to appeal this treatment. *Id.* ¶ 126. On June 13, 2019, DHS TRIP sent its standard response letter for persons who are not on the No Fly list, but who could be on the Selectee list, in response to Ala'a Jibril's DHS TRIP inquiry. *Id.* ¶ 135. The letter relays, in part, that "DHS has researched and completed our review of your case. DHS TRIP can neither confirm nor deny any information about you which may be within federal watchlists or reveal any law enforcement sensitive information. However, we have made any corrections to our records that our inquiries determined were necessary, including, as appropriate, notations that may assist in avoiding incidents of misidentification." *Id.* On July 2, 2019, DHS sent the same vague response letters to Mohammed Jibril and Aida Shahin. *Id.* ¶ 136. On July 13, 2019, DHS sent similar responses to Khalid Jibril, minor Y.J., and minor O.J., refusing to confirm whether they were on the Selectee List. *Id.* ¶ 137. O.J.'s response differed and included the language "[y]our experience was most likely caused by a misidentification against a government record or by random selection." *Id.* ¶ 137, n.13. Two members of the Jibril family never received responses. The DHS TRIP process provides the Jibril family's only avenue to challenge their apparent Watch List placement and the resulting infringements on their rights and liberties. *Id.* ¶ 142.

The Jibril family has an established history and pattern of traveling to Jordan to visit family every two to three years. *Id.* ¶¶ 139–41. The Jibril family, all Muslim, require travel to Saudi Arabia to complete *Hajj* and pilgrimage obligations consistent with their sincerely held religious beliefs. *Id.* ¶ 122. As a result of the egregious treatment the Jibril family experienced, the Jibril family suffered emotional distress due to the burdens government agencies placed on their religious exercise. *Id.* ¶¶ 124–25.

III. Lower Court Proceedings

On August 13, 2019, the Jibril family sued Respondents in the District Court for the District of Columbia, alleging violations of their Fourth Amendment rights to be free from unreasonable and warrantless searches, violations of their Fifth Amendment procedural right to due process via the required DHS TRIP process, and violations of the Administrative Procedure Act. *Id.* ¶¶ 146–203. The District Court dismissed the complaint for lack of standing. *Jibril v. Wolf*, No. 1:19-cv-02457, 2020 U.S. Dist. LEXIS 81926, at *2–3 (D.D.C. May 9, 2020), Pet. App. 75a-88a. The D.C. Circuit reversed in part and remanded, holding that the Jibril family plausibly alleged that they were on a terrorist watchlist and faced imminent risk of harm from government actions sufficient to support most of their claims for prospective relief. *Jibril v. Mayorkas*, 20 F.4th 804, 812–13 (D.C. Cir. 2021), Pet. App. 50a-74a. The D.C. Circuit noted the need for religious travel and the established history of international travel to visit family as evidence of the likely repetition of harm to the Jibrils in the future. Pet. App. 67a-68a. The D.C. Circuit specifically lambasted the government's "heartless argument" that if the Jibrils wanted to know if they were on a watchlist,

they could risk enduring a repeat of the same horrific experience by traveling again to see what happens. Pet. App. 72a.

On remand, Respondents filed a renewed motion to dismiss and submitted an *ex parte* declaration to the District Court for *in camera* review. *See* Doc. 20-3 (Redacted Robinson Decl.). Although the government continued its refusal to confirm or deny the Jibril family's placement on a terrorist watchlist to the Jibrils or their attorneys, the district court again granted the government's motion to dismiss for lack of standing based solely on its *in camera* review of the unredacted *ex parte* declaration. *Jibril v. Mayorkas*, No. 1:19-cv-02457, 2023 U.S. Dist. LEXIS 32199, at *5 (D.D.C. Feb. 27, 2023), Pet. App. 39a-47a. Without confirming or denying the contents of the redacted portions of the declaration, the District Court reasoned that "[i]f the government provided evidence that satisfied this Court that no member of the family is now on the Selectee List, nor is there any reason they should be added to that list absent some future development," then "the Jibrils could not adequately allege an imminent threat of future injury for those claims challenging the Government's policies and the alleged lack of adequate redress process." *Id.* at 47a. Yet the District Court made clear that it did so "reluctantly" and berated the "sick sense of delight" the government seemed to take in having waited literal years before revealing its information even *in camera*. Pet. App. 40a-41a.

On Petitioners' second appeal, the D.C. Circuit held that the District Court's reliance on the *ex parte* submission to dismiss the case for lack of standing was appropriate. The panel agreed with the District Court

that the Jibril family could not establish standing at the time of filing the lawsuit to support either their as-applied claims or a facial challenge to DHS TRIP under the Due Process Clause and APA. *Jibril v. Mayorkas*, 101 F.4th 857 (D.C. Cir. 2024), Pet. App. 19a-25a. The D.C. Circuit did not address its previous holding that the Jibrils' religious reasons for future travel nor their established history of international travel to see family supported their likelihood of future harm.

REASONS FOR GRANTING THE PETITION

I. The Circuit Court ruling disregards the independent judgment mandated of the judiciary and leaves plaintiffs to blindly guess whether they have standing before filing

The current ruling of this case violates multiple fundamental legal principles, and contradicts this Court's recent rulings on both standing and the independent judgment of the courts.

A. This Court's Recent Holdings Require Independent Judgment by the Courts

Subsequent to the relevant lower court rulings in this matter, this Court issued multiple high-impact rulings that contradict the outcome in this case. *See FBI v. Fikre*, 601 U.S. 234 (2024) (holding in the No Fly context that subsequent removal from the No Fly list did not deprive plaintiffs of the right to pursue claims because, in part, the government retained the right to return them to the list at any time for reasons not made clear to the individuals); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024)

(ending *Chevron* deference to agency interpretation and rule-making authority, and requiring that courts exercise the "independent judgment" of the judiciary); *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024) (requiring court consideration of administrative legal enforcement actions); *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 478 (2024) (extending the scope of relief for claims brought against agencies under the Administrative Procedure Act).

Application of this Court's holdings in the above cases, as well as in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), demonstrates the inconsistency created by the instant holding. This Court emphasized the necessity of showing a "substantial"—not guaranteed—risk of future harm to establish standing. *TransUnion*, 141 S. Ct. at 2210 (recognizing the right of plaintiffs "exposed to a risk of future harm" to pursue forward-looking injunctive relief to prevent the harm from occurring"). Yet many courts, particularly in the jurisdiction applicable as the "home" jurisdiction for many government agencies, will now need to abide by precedent that contradicts this Court's rulings.

B. The Lower Court Rulings Place an Unnavigable Burden on Individuals

DHS TRIP applies to all travelers who complain about their treatment during travel, not just those currently on a watchlist at the time they file for redress. Therefore, plaintiffs need not do the impossible and establish their presence on a list that government agencies neither make public nor confirm applies to any one individual. Plaintiffs must only be subject to the same challenged set of procedures again in the future. Furthermore, as

demonstrated in *Fikre*, risks still remain even if not on a particular list, where the government retains the ability to unilaterally return the individuals to the same list in the future at any time, for any reason, known to the individuals or not. *Fikre*, 601 U.S. at 242 (refusing to terminate case based on government declaration that it would not relist plaintiff based on "currently available information" since the declaration did not "speak[] to whether the government might relist him if he does the same or similar things in the future").

The current holding in this matter creates precedent that places an untenable burden on future individual plaintiffs like the Jibrils who receive DHS TRIP responses consistent with individuals on the watchlist but lack access to that information. Not only will they have by definition endured harm for which they seek a remedy in the courts, but they will not know, and have no ability to learn, whether they are on the Selectee list and therefore—by virtue of the current holding—have no standing to bring their suit. And for the Jibril family, the litigation continued for four years before the government decided to share coveted facts with even the court. That standard does not promote open courts, nor does it create a standard which any non-governmental individual could ever effectively navigate—with or without counsel. And that obtuse barrier to our system of open courts conflicts with well-established legal principles. *See Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070–71 (1985) (Stevens, J. concurring) ("Freedom of access to the courts is a cherished value in our democratic society. . . . This Court, above all, should uphold the principle of open access.").

C. Religious Travel and Demonstrated Travel History Establish Likely Future Harm

The D.C. Circuit and the District Court both ignored the D.C. Circuit's previous recognition that the need to travel for religious reasons and a pattern of past international travel to visit family members both established that the Jibrils faced a reasonable likelihood of future harm:

> Mr. Jibril's history of visiting relatives in Jordan between twelve and fifteen times over the past twenty-five years provides support for this inference. It is also noteworthy that the family's sincerely held religious beliefs require them to travel to Saudi Arabia to fulfill religious obligations. These allegations lead to the reasonable inference that the Jibrils will soon travel again, particularly if their names are removed from the Selectee List and they can secure protection from the court against undue searches and interrogations.

Pet. App. 67a. And, the Supreme Court already acknowledged that residual past harms caused by government action, like those endured by the Jibrils, may confer standing, particularly where the courts' actions could prevent a recurrence and provide a remedy. *See Doe v. Chao*, 540 U.S. 614 (2004).

D. Courts Must Still Require that Agencies Create Sufficient Records and Not Purely Rely on *in camera* Submissions

Even when utilizing *in camera* review, agencies must still show their work, and "delineate the path by which

[they] reached [their] decision." *Am. Near E. Refugee Aid v. U.S. Agency for Int'l Dev.*, No. 21-CV-03184, 2024 U.S. Dist. LEXIS 93094, at *15 (D.D.C. May 24, 2024) (citing *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338 (D.C. Cir. 1989)); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) ("[T]he generally applicable standards of [5 U.S.C.] § 706 require the reviewing court to engage in a substantial inquiry . . . a thorough, probing, in-depth review").

II. The questions presented are of exceptional importance and require immediate resolution.

This case requires this Court's urgent review. Absent this Court's intervention, plaintiffs may be left to blindly navigate the untenable situation the government agencies created. Any delay in addressing these questions will lead to uncertainty for litigants and will jeopardize fundamental rule-of-law principles, while also contradicting this Court's precedent.

This case presents an excellent vehicle for deciding the issues of law presented. The case squarely implicates the key issue of legal standing and under what circumstances individuals may gain access to our courts. *Talamini*, 470 U.S. at 1071.

Only this Court can address how its recent holdings cited above apply in the circumstances of challenges to the application of the DHS TRIP process. The lower courts' deference to the agency's factual *in camera* presentation of facts purportedly supporting its standing challenge contradict this Court's mandate that federal courts exercise independent judgment. Furthermore,

the current ruling allows agencies to force individuals to guess whether they may or may not have standing at the time of filing litigation, when the same agency may hold an answer and refuses to reveal it.

Finally, the questions presented implicate significant legal issues warranting this Court's action. As referenced above, the opaque legal test for standing created by the current holding prohibitively restricts the ability of individuals to know or learn whether they properly possess standing to bring their claims. The government would have the law protect the right of agencies to withhold material and dispositive factual information, even for years, with no repercussions. Pet. App. 40a-41a; *contrast Talamini*, 470 U.S. at 1071.

This Court may grant this Petition in order to reverse, and remand for further proceedings consistent with this Court's recent rulings as identified above. Granting the Petition in this matter will allow the Court to fully clarify how courts across the country should apply this Court's recent holdings on standing and the need for independent judicial judgment in this important context.

CONCLUSION

The Jibril family members are "real persons" who suffered "a real controversy with real impact" on their lives, just as this Court envisions for proper standing. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring). They reasonably deduced they had been included in the Terrorist Watchlist—even the two-year-old. And, whether at this moment they remain on a list or not, they reasonably fear their harm could recur.

They could be put back on a watchlist at any time, again for reasons they do not know and cannot refute. *See Fikre*, 601 U.S. at 242. The Jibrils seek injunctive and declaratory relief as they challenge the DHS TRIP process as applied to them, which remains the only recourse they must utilize for harm as travelers in the future. They have no guarantees of explicit harm. They should not need them. While their case may be difficult as they proceed, they have the right to try via access to the court system.

Petitioners respectfully request this Court grant their Petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED MAY 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5074

MOHAMMED JIBRIL, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN Y.J., AND O.J., *et al.*,

Appellants,

v.

ALEJANDRO N. MAYORKAS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Appellees.

March 12, 2024, Argued;
May 14, 2024, Decided

Appeal from the United States District Court
for the District of Columbia.
(No. 1:19-cv-02457).

Before: HENDERSON, *Circuit Judge*, and EDWARDS and GINSBURG, *Senior Circuit Judges*.

Appendix A

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: In 2018, seven members of the Jibril family ("the Jibrils" or "Appellants") suffered extensive and intrusive security screenings and were forced to endure significant delays during their domestic and international airline travels. The Jibrils surmised that they had suffered these personal indignities and related disruptions in their travel because they had been wrongfully placed on the so-called "Selectee List," one of the U.S. Government's terrorist watchlists. Because they were concerned about their welfare during future trips that they planned to take, the Jibrils invoked a Department of Homeland Security ("DHS") administrative redress process to challenge their alleged inclusion on the Selectee List. When federal officials refused to share information on their watchlist status, the Jibrils filed suit in the District Court alleging violations of the Fourth and Fifth Amendments and the Administrative Procedure Act ("APA"). The Jibrils named the Secretary of the DHS and various other federal officials in their official capacities as defendants (collectively, "Government"), and sought declaratory and injunctive relief for their injuries.

In the first iteration of this case, the Government neither confirmed nor denied the Jibrils' Selectee List status, and the District Court dismissed the Jibrils' complaint for lack of standing. *Jibril v. Wolf* ("*Jibril I*"), 2020 U.S. Dist. LEXIS 81926, 2020 WL 2331870, at *2-3 (D.D.C. May 9, 2020). This court reversed in part and remanded, holding that the Jibrils plausibly alleged that

they were on a terrorist watchlist and faced imminent risk of undue Government actions sufficient to support most of their claims for prospective relief. *Jibril v. Mayorkas* ("*Jibril II*"), 20 F.4th 804, 812-13, 455 U.S. App. D.C. 127 (D.C. Cir. 2021). On remand, the Government filed a renewed motion to dismiss, this time submitting an *ex parte* declaration to the District Court for *in camera* review. *See* Robinson Declaration ("Decl."), *reprinted in* Joint Appendix ("J.A.") 50-64 (redacted version). Based on this *ex parte* submission, the District Court held that the Jibrils lacked standing to pursue their complaint for prospective relief. *Jibril v. Mayorkas* (*"Jibril III")*, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, *5 (D.D.C. Feb. 27, 2023). The District Court reasoned, without explicitly confirming or denying the contents of the *ex parte* submission, that "[i]f the government provided evidence that satisfied this Court that no member of the family is now on the Selectee List, nor is there any reason they should be added to that list absent some future development," then "the Jibrils could not adequately allege an imminent threat of future injury for those claims challenging the Government's policies and the alleged lack of adequate redress process." 2023 U.S. Dist. LEXIS 32199, [WL] at *8 (quotation omitted). Appellants once again appealed the District Court's dismissal of their case.

In this second appeal, Appellants argue that the District Court's resolution of the case based on the Government's *ex parte* submission was inappropriate, because the court should have treated the complaint's factual allegations as true at the motion to dismiss stage, and because the court's reliance on *ex parte* information

deprived Appellants of a chance to respond. Appellants also argue that they have standing regardless of the contents of the *ex parte* submission, because they need not be on a government watchlist to establish imminent risk of future harm and to bring a facial challenge to the Government's policies. In the alternative, Appellants argue that the District Court erred in denying their motion for leave to amend their complaint.

A week after this court heard oral argument, the Supreme Court decided *FBI v. Fikre*, 144 S. Ct. 771, 218 L. Ed. 2d 162 (2024). In that case, the Court held that the plaintiff's claims challenging his inclusion on a "No Fly List" were not moot simply because the Government removed him from the No Fly List *after* he filed suit and promised not to relist him based on currently available information. *Id.* at 778. Following the Supreme Court's decision in *Fikre*, this court directed the parties here to provide supplemental briefing addressing the applicability, if any, of *Fikre* to the issues in this case.

Upon consideration of the original and supplemental briefs, including the Government's *ex parte* submission, we agree with the District Court that Appellants lack standing to seek forward-looking relief. In short, if, hypothetically, the Government's *ex parte* declaration revealed that Appellants were not on the Selectee List when they filed suit, they would have standing to seek prospective relief only if they could show a "sufficiently imminent and substantial" likelihood of being added in the future. *Jibril III*, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, at *7 (quoting *TransUnion LLC v. Ramirez*, 594

U.S. 413, 435, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021)). Appellants have not met this burden. We therefore affirm the District Court's dismissal of Appellants' claims for want of standing. We also hold that the District Court did not abuse its discretion in relying on the Government's *ex parte* submission to address matters implicating national security concerns. Finally, we find no error in the District Court's denial of Appellants' motion for leave to amend their complaint.

I. Background

The factual and procedural background of this case has been extensively covered by this court and the District Court in prior opinions. *See Jibril I*, 2020 U.S. Dist. LEXIS 81926, 2020 WL 2331870, at *3 (dismissing for lack of standing); *Jibril II*, 20 F.4th at 812-13 (finding standing for most claims and reversing); *Jibril III*, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, at *5 (dismissing again on remand for lack of standing). Therefore, we assume familiarity with the prior opinions and limit our recitation of the facts and procedural history to the matters most relevant to this appeal.

A. Factual History

The Federal Bureau of Investigation ("FBI") administers the multi-agency Terrorist Screening Center, which maintains the Terrorist Screening Dataset (formerly known as the Terrorist Screening Database, and commonly referred to as the terrorist watchlist). *See Jibril II*, 20 F.4th at 808; *see also* J.A. 40. The terrorist

watchlist contains at least two subset categories intended to identify known or suspected terrorists: the "No Fly List" and the "Selectee List." *See Jibril II*, 20 F.4th at 808. The Transportation Security Administration ("TSA") prohibits individuals on the No Fly List from boarding a U.S. commercial aircraft or flying within the United States. Robinson Decl. ¶ 11. In contrast, individuals on the Selectee List may board a commercial aircraft but are subject to enhanced screening. *Id.* ¶ 12. The exact criteria for inclusion on the Selectee List are not public. *Id.* The Government has represented that it places individuals on the Selectee List who "meet the reasonable suspicion standard applicable to known or suspected terrorists and also satisfy additional specific criteria, but do not meet the criteria required for inclusion on the No Fly list." *Id.*

"If an individual believes he or she has been improperly or unfairly delayed or prohibited from boarding an aircraft" because of placement on a watchlist, the individual may seek redress through the DHS Traveler Redress Inquiry Program ("TRIP"). 49 C.F.R. § 1560.205(a), (b). The TSA then coordinates with the Terrorist Screening Center and other federal agencies as necessary to "review all the documentation and information requested from the individual, correct any erroneous information, and provide the individual with a timely written response." *Id.* § 1560.205(d). However, for security reasons, the Government generally neither confirms nor denies an individual's status on the Selectee List, though it sometimes informs individuals of their placement on the No Fly List. *See* J.A. 47.

Appendix A

The facts, as the Jibrils allege them, are as follows. *See Casey v. McDonald's Corp.*, 880 F.3d 564, 567, 434 U.S. App. D.C. 60 (D.C. Cir. 2018) ("On a motion to dismiss, we must assume that the allegations of the complaint are true."). The Jibrils are a family of U.S. citizens of Jordanian origin, comprising two parents, three of their adult children, and two of their minor children. The Jibrils have routinely traveled to Jordan at least every two to three years; the father, Mr. Mohammed Jibril, has visited relatives in Jordan between 12 to 15 times over the past 25 years. Additionally, the Jibrils are Muslims with sincerely held religious beliefs that require traveling to Saudi Arabia to complete Hajj and pilgrimage obligations.

In 2018, the Jibrils traveled to the Middle East to visit family in Jordan. However, during their airline trips, the Jibrils were subjected to extensive and intrusive security screenings at airports within the United States and abroad. After waiting an hour at the Los Angeles airport for their departing flight, the Jibrils all received boarding passes with "SSSS" printed on them. The Jibrils, including their minor children, were then searched for about two hours, causing them to almost miss their flight. Once the Jibrils landed in Jordan, they were interrogated for another two hours. Similarly, on their trip home after their two-month stay in Jordan, the Jibrils again received boarding passes with "SSSS" stamped on them. During their layover in the United Arab Emirates, Abu Dhabi officials interrogated the family for roughly 45 minutes. U.S. Customs and Border Protection agents in Abu Dhabi then detained the Jibrils and interrogated them separately for at least another four hours. Because of

their prolonged detention, the Jibrils missed their flight and stayed in Abu Dhabi overnight. When they returned the next day, their electronic devices were searched again for at least an hour.

All seven family members submitted complaints to DHS TRIP based on these experiences. Five received identical responses that DHS TRIP could "neither confirm nor deny any information about [them] which may be within federal watchlists." *Jibril II*, 20 F.4th at 810-11 (quotation omitted). The Jibrils believe this is the standard response sent to people who are not on the No Fly List, but who could be on the Selectee List. O.J., a minor, received a different response that his experience was most likely caused by misidentification or random selection. And one family member never received a response.

B. Procedural History (Including the Findings of the District Court)

On August 13, 2019, the Jibrils filed suit in the District Court. The complaint alleged violations of the Fourth Amendment right against unreasonable searches and seizures; violations of the Fifth Amendment right to due process because of their apparent placement on the Selectee List and the allegedly inadequate DHS TRIP redress procedures; and violations of the APA due to the detention conditions and the inadequacy of the DHS TRIP process. Complaint ¶¶ 146-200, J.A. 25-31.

On May 9, 2020, the District Court dismissed the case for lack of standing. *Jibril I*, 2020 U.S. Dist. LEXIS 81926,

2020 WL 2331870, at *3. On appeal, this court reversed in part and remanded, holding that the Jibrils had standing to pursue most of their claims for prospective relief. *See Jibril II*, 20 F.4th at 813 (holding that the Jibrils only lacked standing to challenge the Government's allegedly unlawful pat-down searches of minors and the separation of minors from their families). This court reasoned that the Jibrils alleged facts plausibly indicating that they were all on the Selectee List in 2018, remained on the watchlist, and would soon travel again. *Id.* at 814-15. The court explained that it "infer[red] from the Jibrils' factual allegations that the family members remain on the watchlist," "[b]ecause the Government ha[d] provided no information to the contrary." *Id.* at 816. Accordingly, "[o]n the record before [it]," this court concluded that the Jibrils adequately alleged an imminent risk of future injury from the challenged Government actions. *Id.* at 817.

On remand, the Government filed a renewed motion to dismiss for want of standing, this time supporting its motion with an *ex parte* declaration from FBI Special Agent and Associate Deputy Director of the Terrorist Screening Center, Samuel P. Robinson. *Jibril III*, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, at *3. The Jibrils protested that the *ex parte* submission was inappropriate. 2023 U.S. Dist. LEXIS 32199, [WL] at *5. However, the District Court maintained that *ex parte* , *in camera* review was "permissible in certain extraordinary circumstances implicating national security concerns," such as in this case. *Id.* (citing *Jifry v. FAA*, 370 F.3d 1174, 1181-82, 361 U.S. App. D.C. 450 (D.C. Cir. 2004)).

Based on the Government's *ex parte* submission, the District Court dismissed the case again for lack of standing. *Id.* In doing so, the court expressed reluctance "to indulge what almost seems to be a sick sense of delight the government has taken in withholding from the Jibrils information that is key to the resolution of a jurisdictional question in their case." *Id.* Nonetheless, the District Court avoided explicitly disclosing information about any individual's status on the Selectee List, instead explaining its reasons for dismissing the case as follows:

> If, hypothetically, Mohammed Jibril were placed on the Selectee List but his family members were not, the other Jibrils would lack standing to seek prospective relief on any of their claims for that reason alone, unless they could adequately allege concrete future plans to travel with him in particular. It is conceivable given the Circuit's reasoning in *Jibril II* that the other Jibrils could make that showing. However, that would not be enough to survive a motion to dismiss for lack of subject-matter jurisdiction if their intended travel partner were no longer on the Selectee List himself.
>
> If, hypothetically, Mohammed Jibril were placed on the Selectee List prior to the family's 2018 trip to Jordan and subsequently removed from that list after initiating his DHS TRIP inquiry but prior to the filing of the complaint, the Jibrils would lack standing to seek prospective relief because they could

> not demonstrate a substantial risk of future injury. In that case, standing, not mootness, would be the proper framework for evaluating the problem with subject-matter jurisdiction, because standing is judged at the filing of the complaint and mootness is judged during the pendency of the action. And if the government satisfied the Court with an affidavit given under penalty of perjury that it would not add Mohammed Jibril back to the Selectee List unless new information provided a reason for doing so, any apprehension that the Jibrils might be subjected to similar enhanced screening measures on a future trip (Counts I, II, and IV), or have any reason to make further attempts to contest their potential watchlist status (Counts III and V), would depend on the hypothetical possibility that the government might receive new information in the future convincing it that Mohammed Jibril once again met the criteria for inclusion on the Selectee List. Without a way of demonstrating that a threatened inquiry was certainly impending or there was a substantial risk that the harm will occur, the Jibrils would be unable to meet their burden of establishing standing.

2023 U.S. Dist. LEXIS 32199, [WL] at *6 (alterations, citation, and quotations omitted).

The District Court further rejected the Jibrils' argument that they would have standing to bring a facial

challenge to the DHS TRIP process itself under the Due Process Clause and the APA, even if they were not on the Selectee List when they filed suit:

> The Jibrils' due process and APA challenges to the DHS TRIP program do not allege that it is that program that deprives them of a protected liberty or property interest without due process. Rather, those challenges allege that the DHS TRIP program is a constitutionally inadequate process for a deprivation effected by their alleged placement on the Selectee List. The Jibrils allege that the government has deprived them, and continues to deprive them, of a protected liberty interest within the meaning of the due process clause by "chilling" their exercise of their right to travel and to freely practice their religion. . . . They also argue that the government has deprived them, and continues to deprive them, of a protected reputational interest by disseminating their alleged placement on the Selectee List to government officials and potentially private institutions, and by making that alleged placement apparent to fellow travelers at airports who may witness the enhanced screening measures in application—a so-called "stigma-plus" claim.
>
> Even if the interests cited by the Jibrils amount to constitutionally protected liberty interests, the alleged injuries to those interests

> would be ongoing only if the Jibrils were in fact currently on the Selectee List. And if the Jibrils were not on the Selectee List, they would have standing to seek prospective relief only if they could demonstrate a "sufficiently imminent and substantial" risk of being added to it in the future. *TransUnion*, 141 S. Ct. at 2210. Put more concretely, the Jibrils would not be subjected to enhanced screening, listed as suspected terrorists, or pulled out of line in front of other travelers because of the Selectee List if none of them were on the Selectee List. And if the challenged policy did not continue to injure the Jibrils, nor could they demonstrate a substantial likelihood that it would injure them again in the future, they would not have standing to challenge that policy.

Jibril III, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, at *7 (footnote and citations omitted).

Finally, the District Court denied the Jibrils' motion for leave to amend their complaint to seek nominal damages. The District Court noted that "the Jibrils might theoretically have standing to pursue retrospective, monetary relief to redress the alleged injuries they suffered during their 2018 trip to Jordan." 2023 U.S. Dist. LEXIS 32199, [WL] at *8. However, the District Court held that the proposed amendment would be futile, because the Jibrils sued federal officers in their official capacity and they had not identified a waiver of sovereign immunity to support a claim for monetary relief. 2023 U.S.

Dist. LEXIS 32199, [WL] at *8 & n.3. The District Court thus denied the Jibrils' motion to amend their complaint and dismissed the case. The present appeal followed.

This court heard oral argument on March 12, 2024. A week later, the Supreme Court held in *FBI v. Fikre* that the Government could not moot a case simply by removing the plaintiff from the No Fly List after he filed suit and promising the plaintiff that he "w[ould] not be placed on the No Fly List in the future based on the currently available information." *Fikre*, 144 S. Ct. at 778 (quotation omitted). We then directed the parties in this case to submit supplemental briefing "addressing the applicability, if any, of the Supreme Court's recent decision in [*Fikre*] on the issues in this case." Order, *Jibril v. Mayorkas*, No. 23-5074, 2024 U.S. App. LEXIS 6817 (D.C. Cir. Mar. 21, 2024).

II. Analysis

A. Standard of Review

We review a district court's dismissal for lack of subject matter jurisdiction *de novo*. *Saline Parents v. Garland*, 88 F.4th 298, 303 (D.C. Cir. 2023). We review "[t]he fact-finding of the court to support or deny standing . . . under the clearly erroneous standard." *Haase v. Sessions*, 835 F.2d 902, 907, 266 U.S. App. D.C. 325 (D.C. Cir. 1987). And we review for abuse of discretion a district court's decision to review evidence *ex parte*, *Labow v. DOJ*, 831 F.3d 523, 533, 425 U.S. App. D.C. 54 (D.C. Cir. 2016), and to deny a motion for leave to amend a complaint, *Williams*

v. Lew, 819 F.3d 466, 471, 422 U.S. App. D.C. 119 (D.C. Cir. 2016).

B. The District Court's *Ex Parte, In Camera* Review

Appellants contend that the District Court's reliance on *ex parte* evidence was improper because it should have treated the complaint's factual allegations as true at the motion to dismiss stage. Appellants also argue that *ex parte*, *in camera* review wrongfully deprived them of their right to challenge the facts upon which the Government moved for dismissal. We find no merit in these claims.

"It is well-settled that [a court] may consider materials outside the pleadings to determine [its] jurisdiction." *Kareem v. Haspel*, 986 F.3d 859, 866 n.7, 451 U.S. App. D.C. 1 (D.C. Cir. 2021). In assessing whether a plaintiff has standing, a court can "test the asserted theory of injury, causation, and redressability at the factual, evidentiary level." *Haase*, 835 F.2d at 907. "[T]he court can initiate this factual inquiry at the motion to dismiss stage" and "base its standing decision on its assessment of the facts." *Id.* (citing *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 67-68, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978)). Here, the District Court recognized that it had "an 'independent obligation' to assure itself that it ha[d] subject-matter jurisdiction." *Jibril III*, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, at *6 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010)). The District Court therefore reviewed the Government's *ex parte* submission, and then

concluded that it "s[aw] no conceivable way" for the Jibrils to challenge the Government's position "even with a full opportunity for adversarial testing." *Jibril III*, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, at *6.

The District Court's decision to accept and credit the Government's *ex parte* declaration was not improper. An authorized Government official signed the contested declaration under penalty of perjury. In these circumstances, we afford a presumption of regularity to the official acts of public officers in the absence of clear evidence to the contrary. *See Latif v. Obama*, 666 F.3d 746, 748-49, 399 U.S. App. D.C. 1 (D.C. Cir. 2011) (holding that intelligence reports produced by government official and contested by Guantanamo detainee were entitled to a presumption of regularity).

Furthermore, the District Court did not abuse its discretion in reviewing the Government's declaration *ex parte* and *in camera*, without giving Appellants an opportunity to challenge its contents. *Ex parte* submissions "generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires a reasonable opportunity to know the claims of the opposing party and to meet them." *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1464, 312 U.S. App. D.C. 378 (D.C. Cir. 1995) (quotations omitted). However, "in cases in which sensitive materials may be in issue, . . . 'the court has inherent authority to review [such] material *ex parte*, *in camera* as part of its judicial review function.'" *Olivares v. TSA*, 819 F.3d 454, 462, 422 U.S. App. D.C. 107 (D.C. Cir. 2016) (quoting *Jifry*, 370 F.3d at 1181-82).

As relevant here, there are legal and policy constraints cabining the disclosure of an individual's status on the Selectee List. Under 49 C.F.R. § 1520.5(b)(9)(ii), "[a]n individual's placement on the . . . Selectee list, as well as any explanation for the placement, is 'Sensitive Security Information' that is restricted from public access." *Matar v. TSA*, 910 F.3d 538, 540, 439 U.S. App. D.C. 107 (D.C. Cir. 2018); *see also Jibril II*, 20 F.4th at 817 (noting that "Selectee List status constitutes Sensitive Security Information") (citing 49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(a)). In addition, courts generally "do not second-guess expert agency judgments on potential risks to national security." *Olivares*, 819 F.3d at 462. "Rather, we defer to the informed judgment of agency officials whose obligation it is to assess risks to national security." *Id.* In this case, the Government's declaration reasonably explained the national security concerns motivating the *ex parte* filing. For instance, the Government maintained that disclosure of an individual's watchlist status "would arm terrorists with the knowledge of who would be required to undergo additional screening and who would not," which could facilitate terrorists in evading enhanced security screening. Robinson Decl. ¶ 29. Disclosure could also compromise ongoing counterterrorism investigations by "giving members of terrorist groups the opportunity to gauge whether a particular individual is the subject of counterterrorism, intelligence, or investigative interest, causing the person to alter his or her behavior, destroy evidence, take new precautions against surveillance, or change the level of any terrorism-related activity in which he or she is engaged." *Id.* ¶ 26. Therefore, given the legitimate security concerns at issue, the District Court

did not err in conducting an *ex parte*, *in camera* review of the Government's declaration.

C. Standing

The Government contends that the Jibrils lack standing to pursue prospective relief because they have not plausibly alleged an imminent risk of future injury. In the Jibrils' first appeal, "the Government neither confirmed nor denied the Jibrils' Selectee List status." *Jibril II*, 20 F.4th at 812. Consequently, we reasoned that Appellants had standing to pursue most of their prospective-relief claims because their factual allegations led this court to the reasonable inference that the family members were on the Selectee List during their 2018 travels and remained on the list when we first heard this case. *Id.* at 816. We noted that we would "presume that the family members' watchlist status 'remains the same' '[u]nless the [G]overnment provides documentation' to the contrary." *Id.* (alterations in original) (quoting *Shearson v. Holder*, 725 F.3d 588, 593 (6th Cir. 2013)). On remand, the Government then submitted an *ex parte* declaration for *in camera* review, and again moved to dismiss for lack of standing. Upon review of this new information, the District Court once again dismissed the case. Based on this court's assessment of the Government's *ex parte* submission, we agree that the Jibrils lack standing to pursue their claims for prospective relief.

"The Constitution grants federal courts jurisdiction to decide 'Cases' or 'Controversies.'" *Fikre*, 144 S. Ct. at 777 (quoting Art. III, §§ 1, 2). To satisfy the case-or-

controversy requirement under Article III, a "plaintiff must have a personal stake in the case—in other words, standing." *TransUnion*, 594 U.S. at 423 (quotations omitted). A plaintiff establishes standing by showing "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* As relevant here, an alleged future injury may suffice to meet the injury-in-fact element of standing if the threatened injury is "certainly impending" or there is a "substantial risk" it will occur. *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 36 F.4th 278, 290, 457 U.S. App. D.C. 126 (D.C. Cir. 2022) (citing *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627, 431 U.S. App. D.C. 273 (D.C. Cir. 2017)).

We understand that, in addressing matters presented to the court, federal judges generally "are not free to take up hypothetical questions that pique a party's curiosity or their own." *Fikre*, 144 S. Ct. at 777. However, given the unusual constraints of this case — which include national security concerns, *in camera* review, and critical evidence supported by an *ex parte* submission — the District Court usefully employed hypotheticals to impartially assess the matters in dispute while avoiding explicitly disclosing the contents of the Government's *ex parte* submission. The Government has not contested the District Court's "hypothetical" characterizations, nor has it objected to any of the District Court's findings. The District Court wisely understood that hypotheticals would be a thoughtful way to meaningfully respond to Appellants' quest for redress in a case in which important information is beyond their

reach due to national security concerns. Appellants are not left with "no response" as they were in the first round of this case. Appellants may not be satisfied with the judgment in this case, but they will likely have a better understanding of their situation. What follows are critical findings that defeat Appellants' claims.

The District Court first held that Appellants have not sufficiently alleged a "certainly impending" or "substantial risk" of injury in their future travels. *See Jibril III*, 2023 U.S. Dist. LEXIS 32199, 2023 WL 2240271, at *6. As the District Court reasoned, any member of the Jibril family who has never been on the Selectee List would lack standing to seek prospective relief, unless they could show concrete plans to travel again with a family member on the Selectee List.

> If, hypothetically, Mohammed Jibril were placed on the Selectee List but his family members were not, the other Jibrils would lack standing to seek prospective relief on any of their claims for that reason alone, unless they could adequately allege concrete future plans to travel with him in particular. . . . However, [even] that would not be enough to survive a motion to dismiss for lack of subject-matter jurisdiction if their intended travel partner were no longer on the Selectee List himself.

Id.

The District Court then concluded that if *no* member of the Jibril family was on the Selectee List when the Jibrils filed suit — either because they were never on the list to begin with or because they were removed from the list before they filed suit — then none of the Jibrils would be able to show an "imminent and substantial" risk of future harm sufficient to support a claim for prospective relief. 2023 U.S. Dist. LEXIS 32199, [WL] at *7 (quoting *TransUnion*, 594 U.S. at 435).

> If, hypothetically, Mohammed Jibril were placed on the Selectee List prior to the family's 2018 trip to Jordan and subsequently removed from that list after initiating his DHS TRIP inquiry but prior to the filing of the complaint, the Jibrils would lack standing to seek prospective relief because they could not demonstrate a substantial risk of future injury. . . . [I]f the government satisfied the Court with an affidavit given under penalty of perjury that it would not add Mohammed Jibril back to the Selectee List unless new information provided a reason for doing so, any apprehension that the Jibrils might be subjected to similar enhanced screening measures on a future trip (Counts I, II, and IV), or have any reason to make further attempts to contest their potential watchlist status (Counts III and V), would depend on the hypothetical possibility that the government might receive new information in the future convincing it that Mohammed Jibril once again met the criteria

> for inclusion on the Selectee List. Without a way of demonstrating that a threatened inquiry was certainly impending or there was a substantial risk that the harm will occur, the Jibrils would be unable to meet their burden of establishing standing.

2023 U.S. Dist. LEXIS 32199, [WL] at *6 (alterations and quotations omitted).

The District Court additionally rejected Appellants' contention that removal from the Selectee List would not affect their standing to bring a facial challenge to the DHS TRIP process itself on due process and APA grounds. The District Court explained that if, hypothetically, none of the Jibrils were on the Selectee List when the suit was filed, then they would not face a substantial risk of harm from the allegedly inadequate DHS TRIP process sufficient to establish standing for their facial challenge.

> The Jibrils' due process and APA challenges to the DHS TRIP program do not allege that it is that program that deprives them of a protected liberty or property interest without due process. Rather, those challenges allege that the DHS TRIP program is a constitutionally inadequate process for a deprivation effected by their alleged placement on the Selectee List. . . .
>
> [However,] the Jibrils would not be subjected to enhanced screening, listed as suspected terrorists, or pulled out of line in

> front of other travelers because of the Selectee List if none of them were on the Selectee List. And if the challenged policy did not continue to injure the Jibrils, nor could they demonstrate a substantial likelihood that it would injure them again in the future, they would not have standing to challenge that policy.

2023 U.S. Dist. LEXIS 32199, [WL] at *7 (footnote omitted).

We agree with the District Court's reasoning and adopt its analysis. In addition, we amplify two points. First, importantly, Appellants' complaint does not raise any claims for retrospective relief. In the hearings before both courts, the Government did not doubt the possibility of Appellants seeking retrospective relief; rather, the Government contended, and we have found, that Appellants' submissions in this case do not support a claim for retrospective relief. In consequence, we do not opine on whether a claim for retrospective relief would be viable if properly raised. For instance, the District Court posed a hypothetical regarding individuals subjected to multiple intrusive and extensive screenings, despite not being on the Selectee List. We leave for another day the question of whether plaintiffs could successfully seek damages in such situations.

Second, the Supreme Court's decision in *Fikre* does not affect the outcome of this case. *Fikre* concerned the Government's ability to show that plaintiff's claims were moot. The plaintiff in *Fikre* was on the No Fly List when

he sued the Government to challenge his placement, and he was removed from the watchlist during the pendency of the litigation. *See Fikre*, 144 S. Ct. at 775-76. There was no doubt that the plaintiff had standing to request prospective relief when he filed suit while still on the No Fly List. "The only question" before the Supreme Court was "whether the government's [removal of Mr. Fikre from the No Fly List] suffice[d] to render Mr. Fikre's claims moot." *Id.* at 775. The Court answered in the negative, reasoning that the Government failed to show it would not relist the plaintiff for doing the same or similar things that landed him on the list the first time. *Id.* at 778. The Court explained that "a defendant's 'voluntary cessation of a challenged practice' will moot a case only if the defendant can show that the practice cannot 'reasonably be expected to recur.'" *Id.* at 777 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

Unlike *Fikre*, this case concerns whether Appellants have made the requisite showing of standing. The Supreme Court has made it clear that while a defendant carries the "formidable burden" of showing that a once-live case is now moot, *id.* (quotation omitted), the plaintiff bears the burden of establishing standing at the outset of the litigation, *Friends of the Earth*, 528 U.S. at 190. Thus, contrary to Appellants' arguments, the issue in this case is not whether the Government has satisfied its burden of demonstrating mootness under the voluntary cessation doctrine. Rather, the issue is whether Appellants have satisfied their initial burden of establishing the three elements of standing. As discussed above, Appellants have

not. If, unlike the plaintiff in *Fikre*, no Appellant was on a terrorist watchlist when they filed suit, and none of them can show an imminent risk of being placed on a watchlist in the future, then they would not have a "concrete stake" in the litigation sufficient to satisfy the injury-in-fact requirement of standing. *Id.* at 191. The District Court therefore correctly dismissed Appellants' claims for lack of standing.

D. Motion for Leave to Amend Complaint

In the alternative, Appellants argue that the District Court abused its discretion in denying them leave to amend their complaint. Appellants primarily "seek leave to amend to add a request for nominal damages in accordance with the post-original filing holding of *Uzuegbunam v. Preczewski*, that 'nominal damages can satisfy the redressability requirement [of standing] . . . and can keep an otherwise moot case alive.'" Plaintiffs' Opposition to Motion to Dismiss at 38-39, *Jibril v. Mayorkas*, No. 1:19-cv-02457 (D.D.C. May 26, 2022), ECF No. 23 (quoting *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802, 209 L. Ed. 2d 94 (2021) (Kavanaugh, J., concurring)). In reviewing a district court's denial of a motion to amend a complaint for abuse of discretion, we "requir[e] only that the court base its ruling on a valid ground." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099, 317 U.S. App. D.C. 281 (D.C. Cir. 1996). A district court "may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss." *Id.*

Here, the District Court did not abuse its discretion in holding that Appellants' proposed amendment would be futile. Appellants framed their original complaint as one for prospective relief, suing federal officials in their official capacity and alleging facts relevant to their claims for declaratory and injunctive relief. Belatedly, Appellants now wish to add a request for nominal damages. Yet, because the original complaint was set up to seek prospective relief, Appellants' proposal to seek nominal damages falls short. The complaint does not sue the right individuals, nor does it offer a legal theory or allege the facts necessary to support a claim for retrospective relief.

Appellants' complaint includes claims under the APA, but the APA does not authorize suits seeking "money damages" against the Government. *See* 5 U.S.C. § 702. Appellants also bring claims under the Fourth and Fifth Amendments, but they do not assert a legal theory in support of their damages request for alleged constitutional violations. Although the Supreme Court in *Bivens* has recognized an implied cause of action under the Constitution for monetary damages against federal officials sued in their individual capacities, *Bivens* does not extend to claims against officials sued in their official capacities, as is the case here. *See Kim v. United States*, 632 F.3d 713, 715, 394 U.S. App. D.C. 149 (D.C. Cir. 2011) (discussing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)). Furthermore, a *Bivens* claim must "allege that the defendant federal official was personally involved in the illegal conduct." *Simpkins v. Dist. of Columbia Gov't*, 108 F.3d 366, 369, 323 U.S. App. D.C.

312 (D.C. Cir. 1997). But consistent with their original request for only prospective relief, Appellants' complaint names only agency heads in their official capacities. Appellants' proposed amended complaint does not name any defendants in their individual capacities, nor does it allege facts indicating that any of the defendant agency heads personally carried out the allegedly unlawful searches.

In sum, Appellants have not suggested a viable claim for retrospective, monetary relief. Accordingly, the District Court's denial of Appellants' motion for leave to amend their complaint was not an abuse of discretion.

III. Conclusion

For the reasons set forth above, we affirm the dismissal of Appellants' action for lack of Article III standing.

So ordered.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED FEBRUARY 27, 2023

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1:19-cv-2457-RCL

MOHAMMED JIBRIL, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

February 27, 2023, Decided;
February 27, 2023, Filed

MEMORANDUM OPINION

This case concerns the alleged placement of plaintiffs, the Jibril family, on a government-maintained terrorist watchlist, and the allegedly unlawful treatment they suffered at the hands of security officials on an international trip to Jordan in 2018 as a result. Plaintiffs filed suit in 2019 against various federal officers (together, "the government"), alleging violations of the Administrative Procedure Act ("APA") and various constitutional rights and seeking declaratory and injunctive relief. In 2020, this

Court dismissed the complaint in full for want of subject-matter jurisdiction, holding that plaintiffs lacked Article III standing. On appeal, the Circuit affirmed in part, reversed in part, and remanded to this Court.

Before the Court on remand are Defendants' Renewed Motion [20] to Dismiss and Plaintiffs' Motion [24] for Leave to File an Amended Complaint. For the reasons that follow, the motion to dismiss will be **GRANTED**, the motion for leave to amend will be **DENIED**, and the case will be **DISMISSED** for lack of subject-matter jurisdiction.

I. BACKGROUND

This Court and the Circuit have already explained the background of this case in detail in prior opinions. *See Jibril v. Wolf* ("*Jibril I*"), No. 19-cv-2457-RCL, 2020 U.S. Dist. LEXIS 81926, 2020 WL 2331870, at *l-2 (D.D.C. May 9, 2020); *Jibril v. Mayorkas*, 20 F.4th 804, 808-12, 455 U.S. App. D.C. 127 (D.C. Cir. 2021). Accordingly, the Court will provide only as much background here as is necessary to resolve the renewed motion to dismiss.

A. Statutory and Regulatory Background

The Terrorist Screening Center ("TSC"), a multi-agency executive organization overseen by the Federal Bureau of Investigation ("FBI"), maintains a database known as the Terrorist Screening Dataset ("TSDS"). Overview of Government's Watchlisting Process and Procedures ("Watchlisting Overview") at 2, Ex. 1 to Defs.'

Mot. to Dismiss, ECF No. 20-2. That dataset includes two subsets relevant here: the No Fly List and the Selectee List. *Id.* Pursuant to its statutory mandate to "assess" and "deal[] with threats to transportation," 49 U.S.C. § 114(f), and to utilize the No Fly List and Selectee List in doing so, *see id.* § 44903 (j)(2)(C)(ii), the Transportation Security Administration ("TSA") prohibits individuals on the No Fly List from flying into, out of, or over the United States and subjects individuals on the Selectee List to enhanced screening before entering the secure areas of airports, Watchlisting Overview at 2. The government does not publicly disclose who is on either TSDS list, nor even the criteria for placement on the Selectee List. *Id.* at 4, 9.

The government has a policy against informing individuals of their placement on or removal from the Selectee List, although it does sometimes inform individuals of their placement on the No Fly List. *Id.* at 9. Regardless, any individual who "believes he or she has been improperly or unfairly delayed or prohibited from boarding an aircraft or entering a sterile area" because of placement on either list may submit an inquiry through the Department of Homeland Security's ("DHS") Traveler Redress Inquiry Program ("TRIP"). 49 C.F.R. § 1560.205(a), (b). The DHS TRIP program office forwards the inquiry to the TSC's Redress Office, which then reviews the traveler's record, if any, to determine whether the individual's status on either watchlist should be modified. Watchlisting Overview at 8-9. When the inquiry is complete, DHS TRIP sends "a determination letter advising the traveler of the results of the adjudication of the redress inquiry," but still does not confirm or deny the

traveler's status on the Selectee List. *Id.* Individuals who are not on the No Fly List, but who may be on the Selectee List, are therefore often unable to receive a response that meaningfully informs them of the results of their DHS TRIP inquiry.

B. Factual Background

The Jibril family consists of husband and wife Mohammed Jibril and Aida Shahin and their five children: two adults named Ala'a Jibril and Khalid Jibril and three minors named H.J., Y.J., and O.J. Compl. ¶¶ 1-7, ECF No. 1. All seven are United States citizens. *Id.* ¶ 92.

In the spring and summer of 2018, the Jibrils traveled to Jordan to visit family. *Id.* ¶ 94. When the Jibrils went through security for their departing flight from Los Angeles, all seven, including the minor children, were searched and patted down for two hours. *Id.* ¶¶ 97-101. They were also interrogated for two hours upon arrival in Jordan. *Id.* ¶ 102.

When the Jibrils arrived at the airport for their return flight from Jordan, they were told by Jordanian officials "that American officials have an issue with [Mohammed Jibril] and that the family's names would need to be cleared prior to the family boarding the plane." *Id.* ¶ 104. Upon arriving for a layover in the United Arab Emirates, the family was interrogated for roughly 45 minutes by Emirati officials. *Id.* ¶ 106. They then endured an additional four hours of interrogation by U.S. Customs and Border Patrol ("CBP") officials "at the Preclearance

location in Abu Dhabi." *Id.* ¶ 107. HJ. was interrogated by himself for some time without his parents. *Id.* ¶ 111. O.J. was left without his parents at multiple points during the family's detention. *Id.* ¶ 112. The CBP officials searched all the Jibrils' electronic devices, including their cell phones, without warrants. *Id.* ¶¶ 113-14. Because the ordeal lasted so long, the Jibrils missed their flight and had to stay in Abu Dhabi overnight. *Id.* ¶ 118. When they returned to the airport, their phones were searched again. *Id.* ¶ 120.

On March 1, 2019, Mohammed Jibril and Aida Shahin, through counsel, initiated inquiries through the DHS TRIP program. *Id.* ¶ 126. On March 20, 2019, the couple's children, through the same counsel, initiated their own inquiry. *Id.* ¶ 127. In June and July of that year, DHS sent "standard response letter[s] for persons who are not on the No Fly List, but who could be on the Selectee List," to Mohammed Jibril, Aida Shahin, Ala'a Jibril, Khalid Jibril, and Y.J. *Id.* ¶¶ 135-37. None of those letters confirmed or denied whether the person referenced was on the Selectee List. *Id.* O.J. received a slightly different letter additionally stating that "[y]our experience was most likely caused by a misidentification against a government record or by random selection." *Id.* ¶ 137 n.13. As of the date of the complaint, H.J. had never received a determination letter. *Id.* ¶ 38.

C. Procedural History

The Jibrils filed suit in this Court against the Secretary of Homeland Security and various other federal officers on August 13, 2019. *See* Compl. The complaint

alleged six counts: (1) violation of the Fourth Amendment right against unreasonable searches and seizures through detentions and pat-downs, *id.* ¶¶ 146-54; (2) violation of the same right through warrantless cell phone searches, *id.* ¶¶ 155-163; (3) violation of the Fifth Amendment right to due process through placement on the Selectee List and inadequacy of DHS TRIP procedures as a remedy, *id.* ¶¶ 164-79; (4) violation of the APA due to detention conditions, *id.* ¶¶ 180-93; (5) violation of the APA due to placement on the Selectee List and inadequacy of DHS TRIP procedures as a remedy, *id.* ¶¶ 194-200; and (6) a claim for an award of attorneys' fees under the Equal Access to Justice Act ("EAJA"), *id.* ¶¶ 201-03. Apart from the award of attorneys' fees, the complaint sought only declaratory and injunctive relief. *Id.* Prayer for Relief ¶ 1-9.

On November 25, 2019, the government filed its first motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim. ECF No. 8. The Court granted that motion on May 9, 2020, holding that the Jibrils lacked standing—and thus the Court lacked subject-matter jurisdiction—because they had not established that they would likely experience a similar travel ordeal in the future. *Jibril I*, 2020 U.S. Dist. LEXIS 81926, 2020 WL 2331870, at *3-5. Specifically, the Court reasoned that the Jibrils did not adequately allege concrete future travel plans, 2020 U.S. Dist. LEXIS 81926, at *3-4, and that given the Jibrils' extensive history of traveling to Jordan with only one trip going awry, any future threat of similar treatment on a hypothetical future trip was speculative, 2020 U.S. Dist. LEXIS 81926, at *4-5.

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On appeal, the Circuit affirmed in part, reversed in part, and remanded to this Court. *Jibril II*, 20 F.4th at 817. The Circuit reasoned that the Jibrils alleged a likelihood of future travel given that they have in the past traveled to Jordan every two years, *id.* at 814-15, and that, with respect to most of their claims, they adequately alleged a likelihood of similar treatment in the future because they alleged facts giving rise to a reasonable inference that they were on the Selectee List, which necessarily triggers enhanced screening measures when traveling, *id.* at 815-17. However, the Circuit affirmed this Court's dismissal of the Jibrils' claims insofar as they challenged the patting down of minor children and separation of those children from their parents, because the complaint alleged that the TS A had a policy of minimizing those practices, and thus it was unlikely that they would recur even if the Jibrils were subject to enhanced screening in the future. *Id.* at 813.

On remand, the government filed a renewed motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim on April 28, 2022. ECF No. 20. In support of that motion, the government submitted to the Court for *ex parte, in camera* review an affidavit of FBI Special Agent and TSC Associate Deputy Director Samuel P. Robinson, a redacted version of which it also filed on the public docket. *See* Not. of Lodging, ECF No. 21; Redacted Decl. of Samuel P. Robinson, Ex. 2 to Defs.' Mot. to Dismiss, ECF No. 20-3. In the government's view, Agent Robinson's declaration establishes a separate reason, which neither this Court nor the Circuit has yet had occasion to consider, why the Jibrils lack standing to

bring any of their claims. The Jibrils filed their opposition to the renewed motion to dismiss, along with an alternative motion to amend the complaint to seek nominal damages, on May 26, 2022, ECF Nos. 23, 24, and a supplemental opposition brief on June 28, 2022, ECF No. 30. The government filed its reply on July 8, 2022. ECF No. 31. The renewed motion to dismiss and the motion to amend are now ripe for review.

II. LEGAL STANDARDS

A. Rule 12(b)(1) Motions and Article III Standing

A defendant in a civil action may move to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(1) for "lack of subject-matter jurisdiction." A court considering such a motion must take all the well-pleaded allegations in the complaint as true and draw all reasonable inferences in the plaintiffs favor. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000). "However, those factual allegations receive closer scrutiny than they do in the Rule 12(b)(6) context," and "a court that is assessing a motion brought under Rule 12(b)(1) may look to documents outside of the complaint in order to evaluate whether or not it has jurisdiction to entertain a claim," including to "resolve factual disputes concerning jurisdiction." *Doe v. Wash. Metro. Area Transit Auth.*, 453 F. Supp. 3d 354, 361 (D.D.C. 2020) (K.B. Jackson, J.) (internal quotation marks and citations omitted).

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One way a court might lack subject-matter jurisdiction is if a plaintiff lacks Article III standing. *See Haase v. Sessions*, 835 F.2d 902, 906, 266 U.S. App. D.C. 325 (D.C. Cir. 1987). The plaintiff bears the burden of establishing standing by demonstrating (1) a concrete injury in fact that is (2) traceable to the complained-of conduct and (3) redressable by the relief sought. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Furthermore, "[i]n a case of this sort, where the plaintiffs seek declaratory and injunctive relief, past injuries alone are insufficient to establish standing," *Dearth v. Holder*, 641 F.3d 499, 501, 395 U.S. App. D.C. 133 (D.C. Cir. 2011), and "a threatened injury must be 'certainly impending' or there has to be a 'substantial risk that the harm will occur,'" *Union of Concerned Scientists v. Dep't of Energy*, 998 F.3d 926, 929, 452 U.S. App. D.C. 245 (D.C. Cir. 2021) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)).

Relatedly, a court lacks subject-matter jurisdiction if a case becomes moot—that is, if "[t]he requisite personal interest that must exist at the commencement of the litigation (standing)" does not "continue through its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (internal quotation marks and citation omitted). The defendant, not the plaintiff, "bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607, 213 L. Ed. 2d 896 (2022). A notable exception to the doctrine of mootness exists where "[t]he only conceivable basis

for a finding of mootness in [the] case is [the defendant's] voluntary conduct." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). "'[V]oluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *West Virginia*, 142 S. Ct. at 2607 (alteration added) (quoting *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701,719, 127 S. Ct. 2738, 168 L. Ed. 2d 508(2007)).

B. Rule 12(b)(6) Motions

A defendant in a civil action may also move to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A claim is plausible on its face if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A court evaluating a Rule 12(b)(6) "motion presumes that the complaint's factual allegations are true and construes them liberally in the plaintiff's favor." *Alemu v. Dep't of For-Hire Vehicles*, 327 F. Supp. 3d 29, 40 (D.D.C. 2018). However, "[a] court need not accept a plaintiffs legal conclusions as true, . . . nor must a court presume the veracity of legal conclusions that are couched as factual allegations." *Id.* (citation omitted).

C. Motions to Amend a Complaint

A plaintiff may amend a complaint as a matter of course 21 days after serving it or 21 days after service of a responsive pleading or motion under Federal Rule of Civil Procedure 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Thereafter, a plaintiff may amend a complaint "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Although courts should grant such leave freely when justice so requires, *id.*, "[a] court may deny as futile a motion to amend a complaint when the proposed complaint would not survive a motion to dismiss," *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002).

III. DISCUSSION

The government moves to dismiss the complaint on the ground that, based on facts relayed in its *ex parte* submission, the Jibrils lack standing to pursue any of their claims, and thus the Court lacks subject-matter jurisdiction. *See* Def.'s Mem. in Support of Mot. to Dismiss at 13-15 ("Mot. to Dismiss Mem."), ECF No. 20-1.[1] In the

1. The government also argues that the Court lacks subject-matter jurisdiction to review the Jibrils' due process clause claim and their coextensive APA claim because 49 U.S.C. § 46110 gives the Courts of Appeals exclusive jurisdiction to review orders issued "in whole or in part" by the TSA. *See* Mot. to Dismiss Mem. at 15-16. But as the government acknowledges, the Circuit has held that § 46110 does not apply to challenges to the TSC-administered watchlisting process, *see Ege v. Dep't of Homeland Security*, 784 F.3d 791, 795-96, 415 U.S. App. D.C. 8 (D.C. Cir. 2015), and this Court is bound by that precedent.

alternative, the government moves to dismiss all claims on the merits for failure to state a claim. *See id.* at 16-31. In addition to defending their claims on the merits, *see* Pls.' Opp'n to Mot. to Dismiss at 20-37, ECF No. 23, the Jibrils argue that *ex parte, in camera* review is inappropriate, *see id.* at 18, that what they believe to be in the *ex parte* submission—a statement that the Jibrils are not on the watchlist—does not in fact deprive the Court of subject-matter jurisdiction because the voluntary cessation doctrine applies, *see id.* at 14-17, and that at the very least they have standing to challenge the government's broader watchlisting and DHS TRIP policies, *see id.* at 15-16. In the alternative, the Jibrils move for leave to amend their complaint to cure any problem with standing to pursue prospective relief by adding a request for nominal damages, a retrospective form of relief. *See id.* at 37-39.

Based on its *ex parte, in camera* review of the government's submission, the Court agrees with the government that the Jibrils lack standing and the Court therefore lacks subject-matter jurisdiction. Accordingly, the Court has no occasion to consider the merits of the government's Rule 12(b)(6) motion. The Court further concludes that amending the complaint as the Jibrils propose would be futile, because the government has not waived its sovereign immunity with respect to the nominal damages the Jibrils would seek.

A. The Jibrils Lack Standing to Pursue Any of their Claims

The government now argues as a factual matter, independently from the reasons it relied on in its first

motion to dismiss, that the Jibrils lack Article III standing to pursue their remaining claims on remand. It does so on the basis of an *ex parte* submission to the Court for *in camera* review. The government argues that national security concerns justify *in camera* review of that *ex parte* submission, as well as keeping its contents secret. The Court reluctantly agrees.

"*Ex parte, in camera* resolution of dispositive issues should be avoided whenever possible." *Ellsberg v. Mitchell*, 709 F.2d 51, 69 n.78, 228 U.S. App. D.C. 225 (D.C. Cir. 1983). However, it is permissible in certain extraordinary circumstances implicating national security concerns. *See, e.g., Jifry v. FAA*, 370 F.3d 1174, 1181-82, 361 U.S. App. D.C. 450 (D.C. Cir. 2004). On that ground, at least some district courts have conducted *in camera, ex parte* review of submissions involving the TSDS and potentially revealing plaintiffs' placement on or removal from that list. *See Nur v. Unknown CBP Officers*, No. 22-cv-169-AJT, 2022 U.S. Dist. LEXIS 202807, 2022 WL 16747284, at *6-7 (E.D. Va. Nov. 7, 2022); *Kovac v. Wray*, No. 3:18-cv-110-X, 2022 U.S. Dist. LEXIS 42433, 2022 WL 717260, at *l-4 (N.D. Tex. Mar. 10, 2022).

This Court has serious misgivings about allowing the government to rely on information that it refuses to disclose to the Jibrils to have their case dismissed. It seems only fair if the Court is to dismiss this case that the plaintiffs and their counsel, who have expended great effort and resources litigating it at multiple levels of the court system, should know the basis for the Court's reasoning. Moreover, the Court is reluctant to indulge what

almost seems to be a sick sense of delight the government has taken in withholding from the Jibrils information that is key to the resolution of a jurisdictional question in their case, with government counsel suggesting at oral argument before the Circuit that "if the Jibrils would like to determine whether they remain on a terrorist watchlist, some or all members of the family can book another trip to see whether they endure the same problems that they faced in 2018." *Jibril II*, 20 F.4th at 817.

Nevertheless, the Court has an "independent obligation" to assure itself that it has subject-matter jurisdiction. *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010). Based on the information the government has submitted *ex parte*, the Court sees no conceivable way that the Jibrils could demonstrate that they have standing, even with a full opportunity for adversarial testing of the government's position. Furthermore, the government has explained at length in its *ex parte* submission, and to some extent in the redacted, public version of the same document, *see* Redacted Robinson Decl. ¶¶ 25-26, 28-32, why, in general, disclosure of an individual's status on the Selectee List might pose a threat to national security, especially by facilitating circumvention of law enforcement and national security investigations. While the government has not entirely explained why that concern would exist in this particular case, particularly with respect to the plaintiffs who are minor children, the Court recognizes that sometimes courts must keep private highly sensitive information that could compromise the executive's exercise of ongoing national security duties. Accordingly, the Court

will grant the government's request that the Court conduct an *ex parte, in camera* review of the materials submitted and will endeavor to explain its reasoning as clearly as possible without expressly confirming or denying any individual's status on the Selectee List.

If, hypothetically, Mohammed Jibril were placed on the Selectee List but his family members were not, the other Jibrils would lack standing to seek prospective relief on any of their claims for that reason alone, unless they could adequately allege concrete future plans to travel with him in particular. It is conceivable given the Circuit's reasoning in *Jibril II* that the other Jibrils could make that showing. However, that would not be enough to survive a motion to dismiss for lack of subject-matter jurisdiction if their intended travel partner were no longer on the Selectee List himself.

If, hypothetically, Mohammed Jibril were placed on the Selectee List prior to the family's 2018 trip to Jordan and subsequently removed from that list after initiating his DHS TRIP inquiry but prior to the filing of the complaint, the Jibrils would lack standing to seek prospective relief because they could not demonstrate a substantial risk of future injury. In that case, standing, not mootness, would be the proper framework for evaluating the problem with subject-matter jurisdiction, because standing is judged at the filing of the complaint and mootness is judged during the pendency of the action. *See Arizonans for Official English*, 520 U.S. at 68 n.22. And if the government satisfied the Court with an affidavit given under penalty of perjury that it would not

add Mohammed Jibril back to the Selectee List unless new information provided a reason for doing so, any apprehension that the Jibrils might be subjected to similar enhanced screening measures on a future trip (Counts I, II, and IV), or have any reason to make further attempts to contest their potential watchlist status (Counts III and V), would depend on the hypothetical possibility that the government might receive new information in the future convincing it that Mohammed Jibril once again met the criteria for inclusion on the Selectee List. Without a way of demonstrating that "a threatened inquiry [was] 'certainly impending' or there [was] a 'substantial risk that the harm will occur,'" the Jibrils would be unable to meet their burden of establishing standing. *Union of Concerned Scientists*, 998 F.3d at 929 (quoting *Susan B. Anthony List*, 573 U.S. at 158).

The Jibrils argue that removal from the Selectee List at least would not affect their standing to bring their due process and APA challenges to the "policy itself"—that is, the DHS TRIP procedures for redressing one's possible placement on the Selectee List—because "singular relief on one aspect of a claim does not moot the party's challenge to that policy or practice as a whole." Pls.' Opp'n at 16. But both cases they cite for that proposition are inapposite here. In *Cause of Action Inst. v. Dep't of Justice*, the Circuit held that its own conclusion that the Department of Justice ("DOJ") violated the Freedom of Information Act ("FOIA") in the plaintiffs case did not moot that plaintiff's more general challenge to DOJ's FOIA procedures, because "[i]t is generally understood that 'even though a party may have obtained relief as to a

specific request under the FOIA, this will not moot a claim that an agency *policy or practice* will impair the party's lawful access to information in the future.'" 999 F.3d 696, 703-04, 452 U.S. App. D.C. 327 (D.C. Cir. 2021) (alterations in original) (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491, 267 U.S. App. D.C. 63 (D.C. Cir. 1988)). But the Circuit also made clear that "to pursue its challenge to the [agency's FOIA policy] once its request for specific relief is no longer at issue, [the plaintiff] must still demonstrate standing to challenge the disputed policy or practice." *Id.* at 704. The plaintiff in *Cause of Action Inst*, met that bar because it had "additional FOIA requests pending with DOJ" and thus was "at risk of receiving the same improper treatment in the future." *Id.* (internal quotation marks omitted). Similarly, the Supreme Court held in *Super Tire Engineering Co. v. McCorkle* that when a plaintiff challenges a policy, "[i]t is sufficient" for mootness purposes "that the litigant show the existence of [a] . . . policy that has adversely affected and *continues to affect* a present interest." 416 U.S. 115, 125-26, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974) (emphasis added).

Those cases would not help the Jibrils if any family member who was ever on the Selectee List were removed. Even setting aside the fact that the cases are about mootness rather than standing, there would be no agency policy "continu[ing] to affect a present interest" asserted in the complaint. *Id.* at 126. And under the proper framework of standing, any risk of future harm to the interests the Jibrils assert would not be "sufficiently imminent and substantial" to supply standing to seek prospective relief. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210, 210 L. Ed. 2d 568 (2021).

Appendix B

The Jibrils' due process and APA challenges to the DHS TRIP program do not allege that it is that program that deprives them of a protected liberty or property interest without due process. Rather, those challenges allege that the DHS TRIP program is a constitutionally inadequate process for a deprivation effected by their alleged placement on the Selectee List. *See* U.S. Const, amend. V. The Jibrils allege that the government has deprived them, and continues to deprive them, of a protected liberty interest within the meaning of the due process clause by "chilling" their exercise of their right to travel and to freely practice their religion. *See* Pls.' Opp'n at 22-23 ("Although future travel will happen, the Jibril family members' experiences had a significant chilling effect on their willingness to travel and sense of well-being while doing so."); *id.* at 24 ("[The Jibrils] allege that [their] belief [in making a pilgrimage to Mecca] is burdened by the government's policies and actions of placing the entire family on a Terrorist Watchlist, making it difficult . . . to travel or attempt to travel."). They also argue that the government has deprived them, and continues to deprive them, of a protected reputational interest by disseminating their alleged placement on the Selectee List to government officials and potentially private institutions, and by making that alleged placement apparent to fellow travelers at airports who may witness the enhanced screening measures in application—a so-called "stigma-plus" claim. *See id.* at 25-28.

Even if the interests cited by the Jibrils amount to constitutionally protected liberty interests, the alleged injuries to those interests would be ongoing only if the

Jibrils were in fact currently on the Selectee List. And if the Jibrils were not on the Selectee List, they would have standing to seek prospective relief only if they could demonstrate a "sufficiently imminent and substantial" risk of being added to it in the future. *TransUnion*, 141 S. Ct. at 2210. Put more concretely, the Jibrils would not be subjected to enhanced screening, listed as suspected terrorists, or pulled out of line in front of other travelers because of the Selectee List if none of them were on the Selectee List. And if the challenged policy did not continue to injure the Jibrils, nor could they demonstrate a substantial likelihood that it would injure them again in the future,[2] they would not have standing to challenge that policy.

That conclusion is entirely consistent with the Circuit's reasoning in *Jibril II*. Noting that "the Jibrils allege facts supporting the conclusion that they appeared on

2. As noted above, although it is the defendant who bears the burden of establishing that a case has become moot during its pendency, it is the plaintiff who bears the burden of demonstrating that standing exists at the filing of the complaint. *West Virginia*, 142 S. Ct. at 2607. For that reason, if standing were the proper framework, the cases that the parties cite concerning application of the voluntary cessation exception to mootness to an affidavit promising that a plaintiff would not be added back to a TSDS watchlist would not provide a helpful analog. *See Fikre v. FBI*, 35 F.4th 762, 770-73 (9th Cir. 2022); *Long v. Pekoske*, 38 F.4th 417, 422-26 (4th Cir. 2022). Unlike in those cases, it would not be incumbent on die government to make "absolutely clear that die allegedly wrongful behavior" of returning a plaintiff to a watchlist "could not reasonably be expected to recur." *West Virginia*, 142 S. Ct. at 2607 (quotation marks and citation omitted).

the Selectee List during their 2018 travels," the Circuit "simply [drew] the reasonable inference from those facts that this remains the case today, particularly since the Government has provided no evidence to the contrary." *Jibril II*, 20 F.4th at 816-17. If the government provided evidence that satisfied this Court that no member of the family is now on the Selectee List, nor is there any reason they should be added to that list absent some future development, that inference would no longer be reasonable, and the Jibrils could not "adequately allege an imminent threat of future injury for those claims challenging the Government's policies and the alleged lack of adequate redress process." *Id.* at 817.

The Court regrets that in granting the government's request not to expressly confirm or deny the contents of the *ex parte* submission, it must leave the Jibrils in the dark as to precisely on what factual basis their case will be dismissed for a second time. But based on the Court's *in camera* review of that submission and the legal principles outlined above, the Court concludes that none of the Jibrils have standing to pursue any of their claims for declaratory and injunctive relief. Because the Court lacks subject-matter jurisdiction over any of the Jibrils' claims, it has no occasion to consider whether the complaint also fails to state a claim upon which relief can be granted.

B. Amending the Complaint Would Be Futile

As an alternative to their opposition to the government's motion to dismiss, the Jibrils move for leave to amend their complaint to seek nominal damages, based on

the Supreme Court's recent holding in *Uzuegbunam v. Preczewski* that "a request for nominal damages satisfies the redressability element of standing where a plaintiffs claim is based on a completed violation of a legal right." 141 S. Ct. 792, 802, 209 L. Ed. 2d 94 (2021); *see* Pls.' Opp'n at 37-39. That proposed amendment would be futile. While the Jibrils might theoretically have standing to pursue retrospective, monetary relief to redress the alleged injuries they suffered during their 2018 trip to Jordan, they have not identified a waiver of sovereign immunity that would allow them to pursue claims for monetary damages against the government.[3] The APA's waiver of sovereign immunity does not apply to suits for "money damages," 5 U.S.C. § 702, including nominal damages, *see Leonard v. Dep't of Defense*, 38 F. Supp. 3d 99, 104 n.2 (D.D.C. 2014). Because "the proposed complaint would not survive a motion to dismiss," the Court will "deny as futile [the Jibrils'] motion to amend [their] complaint." *Robinson*, 211 F. Supp. 2d at 114.

IV. CONCLUSION

For the foregoing reasons, the Court will **GRANT** the government's motion to dismiss for lack of subject-matter jurisdiction, **DENY** the Jibrils' motion to amend the complaint, and **DISMISS** the case. A separate Order shall issue this date.

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3. Although the defendants are all individual federal officers, the proposed amended complaint names them in their official capacities. *See* Proposed Am. Compl. ¶¶ 9-13. The Jibrils' claims must therefore be treated for purposes of sovereign immunity as claims against the United States. *See Zaidan v. Trump*, 317 F. Supp. 3d 8, 21 (D.D.C. 2018).

Appendix B

Date: February 27, 2023

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED DECEMBER 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5202

MOHAMMED JIBRIL, INDIVIDUALLY,
AND ON BEHALF OF THEIR MINOR CHILDREN
Y.J., AND O.J., *et al.*,

Appellants,

v.

ALEJANDRO N. MAYORKAS, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF THE
DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Appellees.

September 20, 2021, Argued
December 21, 2021, Decided

Appeal from the United States District Court for the District of Columbia. (No. 1:19-cv-02457).

Before: HENDERSON and WALKER, Circuit Judges, and EDWARDS, *Senior Circuit Judge*.

Appendix C

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: In 2018, during extended airline trips, the members of the Jibril family ("Jibrils" or "Appellants"), a family of U.S. citizens, were forced to endure extensive and intrusive security screenings at domestic and international airports. As a result of these encounters with Government agents, the Jibrils believed that they were on a terrorist watchlist maintained by the U.S. Government. They initially invoked an administrative redress process to challenge their alleged inclusion on the watchlist. However, Government officials refused to disclose the family's watchlist status.

Finding the Government's response inadequate to safeguard them from similar treatment in the future, the Jibrils filed suit in the District Court against the Secretary of the Department of Homeland Security and various other federal Government officials (collectively, "Government"). Their complaint alleges violations of the Fourth and Fifth Amendments and the Administrative Procedure Act, and it seeks declaratory and injunctive relief. The Government filed a motion to dismiss, which the District Court granted, with prejudice, on the ground that Appellants lacked Article III standing. *Jibril v. Wolf*, No. 19-cv-2457, 2020 U.S. Dist. LEXIS 81926, *9 (D.D.C. May 9, 2020), *reprinted in* Joint Appendix ("J.A.") 161-65. The Jibrils now appeal.

Before this court, the Government contends that the judgment of the District Court should be affirmed

because the Jibrils' complaint fails to adequately allege any imminent threat of future injury. We disagree. The Jibrils have plausibly alleged that they have future travel plans. We easily infer from the family's travel history that they will soon fly again, particularly if they secure the relief they now seek.

Furthermore, the Jibrils' uncontested factual allegations, combined with the reasonable inferences we draw from them, plausibly indicate that the family likely appeared on a terrorist watchlist in 2018. The Jibrils also plausibly allege that the treatment they endured went well beyond what typical travelers reasonably expect during airport screenings. Finally, the Jibrils' factual allegations lead to the reasonable inference that the family's watchlist status remains the same today. Any information to the contrary is within the Government's exclusive control, and we must draw all reasonable inferences in the Jibrils' favor at this stage of the litigation.

Because the Jibrils plausibly allege that they will travel again soon and that they will again endure the alleged illegalities, they have established an imminent threat of future injury. Therefore, for the reasons that we explain below, we conclude that the Jibrils have standing to pursue most of their claims for prospective relief. However, we hold that the Jibrils lack standing to pursue prospective relief relating to certain actions taken by Government agents who detained them during their travel in 2018. The Jibrils claim that these actions violated established federal policies, but they lack standing because they have not plausibly alleged any impending or

substantial risk of future harm. Accordingly, we affirm in part and reverse in part the District Court's judgment and remand the case for further proceedings.

I. Background

A. Statutory and Regulatory Framework

The Federal Bureau of Investigation ("FBI") administers the multi-agency Terrorist Screening Center, which manages and operates the Terrorist Screening Database ("Database"). *Terrorist Screening Center*, FBI, https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc (last visited Nov. 29, 2021). The Database has at least two subsets intended to identify individuals who may pose a threat to civil aviation: the "No Fly List" and the "Selectee List." *See Matar v. Transp. Sec. Admin.*, 910 F.3d 538, 540, 439 U.S. App. D.C. 107 (D.C. Cir. 2018). "Individuals on the No Fly [L]ist are prohibited from boarding airplanes that are traveling to the United States, while individuals on the Selectee List" may fly but "are subject to more rigorous screening" than most passengers. *Id.* People appearing on the Selectee List are not notified about their placement on or removal from the list. Compl. ¶ 76, J.A. 14.

Selectee List travelers almost always receive enhanced screening at border crossings, including airports. *Id.* ¶ 61, J.A. 12. They typically have "SSSS" printed on their boarding passes, which stands for Secondary Screening Security Selection. *Id.* ¶¶ 62-63, J.A. 12; *see also* 49 C.F.R. § 1560.105(b)(2) (2018) (requiring airlines to identify

passengers selected by the Transportation Security Administration ("TSA") for enhanced screening). Usually, Selectee List travelers cannot obtain boarding passes at kiosks or on their cell phones and instead must speak with airline staff at ticketing counters, who then must contact government agents before issuing the passes. Compl. ¶¶ 64-65, J.A. 13.

An individual who "believes he or she has been improperly or unfairly delayed or prohibited from boarding an aircraft" because he or she appears on the Selectee List may seek redress through the Traveler Redress Inquiry Program ("TRIP") administered by the Department of Homeland Security ("DHS"). 49 C.F.R. § 1560.205(a), (b) (2018). The individual must submit "personal information and copies of the specified identification documents" to the TRIP office, and TSA may request additional information as needed. *Id.* § 1560.205(c).

"[I]n coordination with the [Terrorist Screening Center] and other appropriate Federal law enforcement or intelligence agencies, if necessary," TSA then "review[s] all the documentation and information requested from the individual, correct[s] any erroneous information, and provide[s] the individual with a timely written response." *Id.* § 1560.205(d). The response neither confirms nor denies the individual's inclusion on the Selectee List. Compl. ¶ 83, J.A. 15. According to the Government, an individual's Selectee List status is covered by the law enforcement privilege and statutorily protected as Sensitive Security Information restricted from public access. Final Br. for Appellees 11 (citing 49 U.S.C. § 114(r)

and 49 C.F.R. § 1520.5(a)); *see also Matar*, 910 F.3d at 540 (citing § 1520.5(b)(9)(ii)).

B. Facts and Procedural History

"Because we review the adequacy of the complaint as a matter of pleading, and not the truth of its allegations, the facts recited here are as [the Jibrils] allege[] them, with reasonable inferences drawn in the [Jibrils'] favor. We take no position on what might ultimately be proved." *VoteVets Action Fund v. U.S. Dep't of Veterans Affs.*, 992 F.3d 1097, 1102, 451 U.S. App. D.C. 371 (D.C. Cir. 2021).

Appellants are the married couple Mohammed Jibril ("Mr. Jibril") and Aida Shahin ("Ms. Shahin") and their adult and minor children: Ala'a Jibril, Khalid Jibril, Hamza Jibril, Y.J., and O.J. Compl. ¶¶ 1-7, J.A. 6; Final Br. in Chief for Appellants ii. The Jibrils have sued the following federal officials in their official capacities: Secretary of DHS, Administrator of TSA, Commissioner of Customs and Border Protection ("CBP"), Attorney General, Director of the FBI, and Director of the Terrorist Screening Center. Compl. ¶¶ 8-13, J.A. 6.

Ms. Shahin and Mr. Jibril are U.S. citizens of Jordanian national origin. *Id.* ¶¶ 1-2, J.A. 6. Their children are also U.S. citizens. *Id.* ¶¶ 3-7, J.A. 6. The Jibrils live in California. *Id.* ¶¶ 1-7, J.A. 6. The Jibril family has routinely traveled to Jordan every two to three years, *id.* ¶ 140, J.A. 20, and Mr. Jibril has visited relatives in Jordan between twelve and fifteen times over the past twenty-five years, *id.* ¶ 141, J.A. 20. The Jibrils are Muslims with sincerely

held religious beliefs that require traveling to Saudi Arabia to complete Hajj and pilgrimage obligations. *Id.* ¶ 122, J.A. 18. In addition to needing to travel overseas to fulfill these obligations, "the Jibril family wishes to travel to Jordan to see family in the near future, as consistent with their prior travel patterns." *Id.* ¶ 139, J.A. 20.

In 2018, the Jibrils traveled to the Middle East to visit family in Jordan. *Id.* ¶ 94, J.A. 16. After arriving at the airport in Los Angeles for their departing flight, they waited about one hour to receive their boarding passes, all of which had "SSSS" printed on them. *Id.* ¶ 96, J.A. 16. The family members were then searched for about two hours. *Id.* ¶ 97, J.A. 16. During the searches, all members of the family - including the minor children - were subject to pat-down searches. *Id.* Neither Mr. Jibril nor Ms. Shahin was asked for permission prior to the minor children's pat-down searches. *Id.* ¶ 98, J.A. 16. DHS agents then met the Jibrils at the gate for their departing flight. *Id.* ¶ 99, J.A. 16. The agents took the family to a private area and searched their luggage. *Id.* ¶ 100, J.A. 16. Due to this extensive screening, the Jibrils nearly missed their flight. *Id.* ¶ 101, J.A. 16. Once the family arrived in Jordan, they "were interrogated for about two hours," *id.* ¶ 102, J.A. 16, although the complaint does not specify by whom.

The Jibrils remained in Jordan for two months and then began their trip home to California. *Id.* ¶ 103, J.A. 17. "At the Jordanian airport, [Mr.] Jibril was told that American officials ha[d] an issue with him, and that the family's names would need to be cleared prior to the family boarding the plane." *Id.* ¶ 104, J.A. 17. All family members

again had "SSSS" printed on their boarding passes. *Id.* ¶ 105, J.A. 17.

The family's trip home involved a layover in Abu Dhabi, United Arab Emirates. *Id.* ¶ 103, J.A. 17. "After arriving in United Arab Emirates, the family was interrogated for roughly [forty-five] minutes by Abu Dhabi officials." *Id.* ¶ 106, J.A. 17. Customs and Border Protection "agents at the Preclearance location in Abu Dhabi" then detained the Jibrils, separated them from one another, and interrogated them for at least four hours. *Id.* ¶ 107, J.A. 17. Mr. Jibril, Ms. Shahin, and Khalid Jibril were interrogated by themselves. *Id.* ¶¶ 108-10, J.A. 17. Hamza Jibril, who was a minor at the time, was interrogated by himself. *See id.* ¶ 111, J.A. 17. O.J., a minor, remained in the waiting room without his parents at several points. *Id.* ¶ 112, J.A. 17. All electronic devices, including the Jibrils' cell phones, were searched. *Id.* ¶ 113, J.A. 17. The food and spices the Jibrils had packed were searched and thrown out. *Id.* ¶ 116, J.A. 18. The minor children were not offered any food upon their arrival in the CBP holding room. *Id.* ¶ 117, J.A. 18.

Due to their prolonged detention by CBP officials, the Jibrils missed their scheduled flight to Los Angeles and stayed in Abu Dhabi overnight. *Id.* ¶ 118, J.A. 18. No members of the family were asked that night if they had any medical conditions requiring treatment. *Id.* ¶ 119, J.A. 18. After returning to the Abu Dhabi airport the next day, the Jibrils' electronic devices were searched again. *Id.* ¶ 120, J.A. 18. The security measures involved a delay of at least one hour. *Id.* ¶ 121, J.A. 18.

The Jibrils believe the extensive and intrusive security screenings they endured are consistent with the Government's treatment of Selectee List travelers. *See id.* ¶ 123, J.A. 18. In March 2019, all family members initiated redress inquiries through the Traveler Redress Inquiry Program. *Id.* ¶¶ 126-34, J.A. 18-19. In June 2019, Ala'a Jibril received a response stating, in part:

> DHS has researched and completed our review of your case. DHS TRIP can neither confirm nor deny any information about you which may be within federal watchlists or reveal any law enforcement sensitive information. However, we have made any corrections to our records that our inquiries determined were necessary, including, as appropriate, notations that may assist in avoiding incidents of misidentification.

Id. ¶ 135, J.A. 19. According to the Jibrils, this is the standard response sent to people who are not on the No Fly List, but who could be on the Selectee List. *Id.* The next month, Mr. Jibril, Ms. Shahin, Khalid Jibril, and Y.J. received similar responses. *See id.* ¶¶ 136-37, J.A. 19-20. O.J. received a slightly different response, which stated, in relevant part, that O.J.'s experience "was most likely caused by a misidentification against a government record or by random selection." *Id.* ¶ 137 n.13, J.A. 20. According to the Jibrils, the response O.J. received "is consistent with persons who are either taken off the No Fly List, or who never were on the No Fly List, but is not standard for persons who believe they are on the Selectee List." *Id.* Hamza Jibril did not receive a responsive determination letter. *Id.* ¶ 138, J.A. 20.

Appendix C

Finding the TRIP responses inadequate to guarantee that they will not face similar treatment during their future travels, the Jibrils filed the instant action. They bring the following claims:

> **Count I**: violations of the Jibrils' Fourth Amendment rights due to unreasonable pat-down searches and prolonged detentions;
>
> **Count II**: violations of the Jibrils' Fourth Amendment rights due to warrantless searches of cell phones without probable cause;
>
> **Count III**: violations of the Jibrils' Fifth Amendment procedural rights to due process;
>
> **Count IV**: violations of the Administrative Procedure Act due to detention conditions; and
>
> **Count V**: violations of the Administrative Procedure Act due to lack of adequate procedural due process through policies and available administrative remedy.

Id. ¶¶ 146-200, J.A. 21-27. Counts I, II, and IV describe events that occurred during the 2018 trip. The Jibrils allege that, in some instances, Government agents failed to follow their own detention-related policies, which prohibit most pat-down searches of minors and require that family units with juveniles remain together in most instances. *Id.* ¶¶ 151, 184, 190, J.A. 22, 25, 26. Counts III and V allege the Jibrils lack an adequate mechanism to challenge their

apparent inclusion on the Selectee List because the TRIP procedures are insufficient. *Id.* ¶¶ 164-79, 194-200, J.A. 23-25, 26-27. The complaint also contains a sixth count, which seeks attorneys' fees. *Id.* ¶¶ 201-03, J.A. 27.

The Jibrils seek declaratory and injunctive relief. *See* Compl. 24-25, J.A. 28-29. First, they ask the court to declare that the Government's actions, policies, practices, and customs violate the Constitution and the Administrative Procedure Act. Compl. 24, J.A. 28; *see* 5 U.S.C. §§ 701-706. Second, they ask the court to order the Government to revise its TRIP policies and then re-examine the Jibrils' inquiries. Compl. 24, J.A. 28. Third, they seek an injunction barring the Government from conducting warrantless pat-down searches of them or searching their cell phones absent a warrant or probable cause. *Id.* Finally, they seek attorneys' fees and any additional relief the court deems proper. Compl. 25, J.A. 29.

Before the District Court, the Government moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (6). The trial court concluded that the Jibrils lacked Article III standing because they did not plausibly allege a risk of future injury. *Jibril v. Wolf*, No. 19-cv-2457, 2020 U.S. Dist. LEXIS 81926, *9 (D.D.C. May 9, 2020), *reprinted in* J.A. 161-65. In the District Court's view, the Jibrils failed to establish that they would soon travel again or that they would receive comparable treatment when they did. *Id.* at 6, J.A. 161. The court dismissed the case with prejudice for lack of subject matter jurisdiction

and did not reach the Government's argument that the complaint failed to state a claim. *Id.* at 10, J.A. 165; *see id.* at 6-10, J.A. 161-65.

The Jibrils timely challenged the District Court's judgment, and we have jurisdiction over their appeal. 28 U.S.C. § 1291.

II. Analysis

A. Standard of Review

We review de novo the District Court's standing determination. *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 110-11 n.3, 453 U.S. App. D.C. 199 (D.C. Cir. 2021) (citing *Arpaio v. Obama*, 797 F.3d 11, 19, 418 U.S. App. D.C. 163 (D.C. Cir. 2015)).

B. The Jibrils' Standing

We begin our analysis by noting that, because the Government neither confirmed nor denied the Jibrils' Selectee List status, the Government's responses to the Jibrils' TRIP inquiries did not moot the family's requests for declaratory and injunctive relief to safeguard them against alleged threats of *future injuries. See Cause of Action Inst. v. United States DOJ*, 999 F.3d 696, 703-04, 452 U.S. App. D.C. 327 (D.C. Cir. 2021) (holding that even if a party receives relief on a particular claim, this does not moot the party's challenge to the policy or practice that gave rise to the lawsuit) (citing *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491, 267 U.S. App. D.C.

63 (D.C. Cir. 1988))); *see also Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974); *Cierco v. Mnuchin*, 857 F.3d 407, 416-17, 429 U.S. App. D.C. 146 (D.C. Cir. 2017). The Government maintains, however, that the Jibrils lack standing to pursue prospective relief because they have failed to allege any imminent risk of future injury.

We agree with the Government that, "[f]or claims seeking prospective relief, a plaintiff must show a threatened injury that is certainly impending or a substantial risk that the future harm will occur." Final Br. for Appellees 24; *see also, e.g., Union of Concerned Scientists v. United States DOE*, 998 F.3d 926, 929, 452 U.S. App. D.C. 245 (D.C. Cir. 2021) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)). However, contrary to the Government's position, we find that Appellants' complaint adequately alleges facts sufficient to support most of their claims for redress against a substantial risk of future harm. This includes Appellants' claims that their cell phones were searched without probable cause, that they experienced unreasonable treatment and prolonged detention in violation of their constitutional rights, and that the TRIP redress process is inadequate and violates the Administrative Procedure Act and their constitutional rights.

The Jibrils' factual allegations, taken as true, lead to the reasonable inference that the family will again be subjected to many of the alleged illegalities they challenge in this action. The Jibrils' allegations plausibly support

their claim that they will soon fly again and that they remain on a terrorist watchlist. This exposes them to an imminent risk of invasive and undue Government actions that they plausibly allege the TRIP process will not prevent. The Jibrils easily satisfy the remaining aspects of our standing analysis. Therefore, for the reasons that we explain below, we conclude that Appellants have standing to pursue most of their claims for prospective relief.

There is one caveat, however. The Jibrils lack standing to pursue certain claims for prospective relief relating to Government agents allegedly violating established federal policies when they detained Appellants during their travel in 2018. In particular, Count I alleges that under CBP policies, "juveniles should not be subject to pat-down searches in almost any circumstance, and not without prior supervisory authorization, unless they are immediate pat-down searches akin to *Terry* frisks," and that "TSA states that it should keep pat-down searches of minors to a minimum." Compl. ¶¶ 151-52, J.A. 22. Count IV alleges that Government policies "require that family units with juveniles remain together unless they must be separated, such as if the family members have different immigration statuses." *Id.* ¶ 184, J.A. 25. The Jibrils claim that these policies were violated by Government agents in 2018. However, because the Jibrils do not plausibly allege that these alleged violations will recur, Appellants fail to establish any imminent injuries with respect to these purported policy violations. *See Cruz v. Am. Airlines Inc.*, 356 F.3d 320, 329, 360 U.S. App. D.C. 25 (D.C. Cir. 2004) (relying on *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983), to conclude

that plaintiffs challenging the prospective enforcement of American Airlines' lost-baggage policy lacked standing because it was "not likely" they "w[ould] again lose their luggage on an international American [Airlines] flight, much less again be denied compensation as a result of the misapplication of [American Airlines' lost-baggage] rule"). Accordingly, the District Court did not err by dismissing these claims.

Nevertheless, as the Government concedes, the District Court's dismissal of these claims should have been without prejudice, as dismissal of the claims for lack of standing is not an adjudication on the merits. *See Havens v. Mabus*, 759 F.3d 91, 98, 411 U.S. App. D.C. 282 (D.C. Cir. 2014) ("A jurisdictional dismissal—which is *not* an adjudication on the merits under Rule 41(b)—is, then, a dismissal without prejudice."). Finally, it should be noted that, although the Jibrils may have had standing to seek damages - including nominal damages - to redress the alleged harms they suffered during their travels in 2018, they have not sought such relief. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02, 209 L. Ed. 2d 94 (2021) (discussing the possibility of an award of nominal damages to redress a *past* injury). Accordingly, in our analysis below, we focus only on the Jibrils' standing to seek declaratory and injunctive relief to safeguard against cognizable alleged future harms.

1. Legal Framework

Article III of the United States Constitution "confines the federal judicial power to the resolution of 'Cases' and

'Controversies.' For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *TransUnion*, 141 S. Ct. at 2203 (quotation marks omitted) (quoting *Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)).

The party invoking federal jurisdiction bears the burden of demonstrating Article III standing. *Id.* at 2207-08 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The plaintiff must demonstrate standing for each claim that is being pressed and for each form of relief that is being sought. *Id.* at 2208 (citations omitted). "[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* at 2203 (citing *Lujan*, 504 U.S. at 560-61).

As discussed above, an alleged future injury may suffice to establish standing if the threatened injury is "certainly impending" or there is a "substantial risk" it will occur. *New Jersey v. EPA*, 989 F.3d 1038, 1047, 451 U.S. App. D.C. 180 (D.C. Cir. 2021) (quoting *Attias v. Carefirst, Inc.*, 865 F.3d 620, 626-27, 431 U.S. App. D.C. 273 (D.C. Cir. 2017)) (citing *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565, 204 L. Ed. 2d 978 (2019)); *see also TransUnion*, 141 S. Ct. at 2210 ("[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." (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) and *Lyons*, 461 U.S. at 102)). Although a plaintiff seeking prospective declaratory and injunctive relief "may not rest on past injury" alone, *Arpaio*, 797 F.3d at 19, "'[p]ast wrongs' may serve as 'evidence bearing on whether there is a real and immediate threat of repeated injury,'" *NB v. D.C.*, 682 F.3d 77, 84, 401 U.S. App. D.C. 184 (D.C. Cir. 2012) (alteration in original) (quoting *Lyons*, 461 U.S. at 102).

Each element of the standing analysis "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561 (collecting cases). At the pleading stage, "plaintiffs are required only to 'state a *plausible* claim' that each of the standing elements is present." *Attias*, 865 F.3d at 625-26 (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913, 420 U.S. App. D.C. 366 (D.C. Cir. 2015)) (citing *Lujan*, 504 U.S. at 561). "Accordingly, '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim [of standing] that is plausible on its face." *Kareem v. Haspel*, 986 F.3d 859, 866, 451 U.S. App. D.C. 1 (D.C. Cir. 2021) (alterations in original) (quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)), *cert. denied*, 142 S. Ct. 486, 211 L. Ed. 2d 294, 2021 WL 5284636 (2021). And the court "assume[s], for purposes of the standing analysis, that plaintiffs will prevail on the merits of their claim[s]." *Attias*, 865 F.3d at 629.

2. The Jibrils Have Standing to Pursue Their Claims for Relief to Safeguard Them from Substantial Risks of Future Harm

a. Future Travel Plans

The Jibrils' history of traveling to Jordan every two years to visit family, combined with their professed desire to continue that pattern, strongly suggests that they will travel internationally within the next year or two. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1176, 403 U.S. App. D.C. 1 (D.C. Cir. 2012) (concluding that plaintiffs who "w[ould] probably appear" "in the near future" "before selection boards" employing challenged policies and procedures sufficiently alleged they would "engage in the conduct they claim will cause them injury"). Mr. Jibril's history of visiting relatives in Jordan between twelve and fifteen times over the past twenty-five years provides support for this inference. It is also noteworthy that the family's sincerely held religious beliefs require them to travel to Saudi Arabia to fulfill religious obligations. These allegations lead to the reasonable inference that the Jibrils will soon travel again, particularly if their names are removed from the Selectee List and they can secure protection from the court against undue searches and interrogations.

In opposing Appellants' position, the Government points out that, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), the Supreme Court stated that plaintiffs' "'some day' intentions" to travel are insufficient to support standing.

Final Br. for Appellees 29-30 (quoting *Lujan*, 504 U.S. at 564). However, the facts in *Lujan* are quite different from the facts in this case. The plaintiffs in *Lujan* - "organizations dedicated to wildlife conservation and other environmental causes" - sought to prove future travel plans by pointing to affidavits from two members. *Lujan*, 504 U.S. at 559, 563. The first stated she had once visited Egypt and "intend[ed] to do so again." *Id.* at 563. The second averred she had once travelled to Sri Lanka and "intend[ed] to go back" but "had no current plans" to do so. *Id.* at 563-64. The instant case is easily distinguishable, as the Jibrils allege an extensive travel history supporting their future plans, which evince an imminence the *Lujan* plaintiffs' "'some day' intentions" lacked. *See Ghedi v. Mayorkas*, 16 F.4th 456, 465, 2021 U.S. App. LEXIS 32009 (5th Cir. 2021) (concluding that a plaintiff who purportedly appeared on the Selectee List and "allege[d] both a professional need for habitual travel and that his injuries [we]re tied to the *act of flying*, not his destination" plausibly alleged "that his next flight, and thus, injury, [wa]s both real and immediate").

b. 2018 Selectee List Status

The Jibrils also plausibly allege that they appeared on a terrorist watchlist in 2018. We infer from the inclusion of "SSSS" on the Jibrils' boarding passes and the extensive searches and interrogation the Jibrils endured during their international travels in 2018 that the family members appeared on a terrorist watchlist during that trip.

The Government does not dispute that the Jibrils' 2018 experience is consistent with its treatment of Selectee List passengers. It maintains, however, that the Jibrils' allegations are merely "compatible with," but not "more likely explained by," the family's Selectee List inclusion. Final Br. for Appellees 37 (quoting *Kareem*, 986 F.3d at 869). In support of this argument, the Government relies on: (1) declarations from Government officials purporting to establish that the majority of passengers designated for enhanced screening are so designated for reasons other than inclusion in the Database and (2) a Government report stating that 98% of TRIP inquires have no connection to any Database identity. *See, e.g.*, Final Br. for Appellees 4 n.1; J.A. 94-104. This material falls far short of justifying a rejection of Appellants' complaint at the pleading stage of this litigation on a motion to dismiss.

First, the declarations, which were filed in an unrelated out-of-circuit action, were not before the District Court, and we decline to take judicial notice of them. *See* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Hurd v. District of Columbia*, 864 F.3d 671, 686, 431 U.S. App. D.C. 83 (D.C. Cir. 2017) ("[A] court cannot take judicial notice of the truth of a document simply because someone put it in the court's files." (alteration in original) (quoting 21B Fed. Prac. & Proc. Evid. § 5106.4 (2d ed.))).

Second, the government report containing the 98% statistic is devoid of any meaningful context. *See Overview of the U.S. Government's Watchlisting Process and Procedures as of January 2018, reprinted in* J.A. 94-104. Although the report states that approximately 98% of TRIP inquiries have no connection to any watchlist identity, it does not indicate what proportion of the redress inquiries the Government receives are from travelers who experienced treatment as severe and time-delaying as what the Jibrils encountered. *See id.* at 8, J.A. 102.

The Government also argues that the Jibrils' extensive travel history undermines their purported inclusion on the Selectee List, as the family apparently traveled without incident before 2018. Final Br. for Appellees 35. This is a specious argument. The Jibrils' factual allegations lead to the reasonable inference that the Government placed the Jibrils on the watchlist after their pre-2018 travels but before their 2018 trip.

c. Current Selectee List Status

Finally, the Jibrils' factual allegations lead us to the reasonable inference that the family members remain on the Selectee List today. The Jibrils allege that although they have completed the only redress process available to them, they cannot determine their watchlist status because this information is in the Government's exclusive control, and the Government refuses to disclose it. Drawing all reasonable inferences in favor of the Jibrils, we presume that the family members' watchlist status "remains the same" "[u]nless the [G]overnment provides

documentation" to the contrary. *See Shearson v. Holder*, 725 F.3d 588, 593 (6th Cir. 2013). Because the Government has provided no information to the contrary, we infer from the Jibrils' factual allegations that the family members remain on the watchlist.

The Government argues that even assuming the Jibrils appeared on a watchlist in 2018, there is no indication they remain on such a list today, as the family has completed the TRIP redress process and Government agents consistently audit and update the Selectee List. Final Br. for Appellees 41-43. The Government maintains that presuming the Jibrils remain on such a list today is tantamount to finding standing based solely on the fact that necessary information is within a defendant's exclusive control. *Id.* at 47 n.11. We disagree.

In support of their argument, the Government points to our decision in *Kareem v. Haspel*, 986 F.3d at 861, in which a U.S. citizen journalist working in Syria claimed that he was mistakenly placed on a list of individuals the United States had determined were terrorists it could target and kill. The journalist, who sought prospective relief, claimed he had narrowly missed being hit by military strikes five times, and he believed he was the target of those strikes. *Id.* at 862. The court in *Kareem* noted that, although "[w]e have recognized that 'pleadings on information and belief are permitted when the necessary information lies within defendants' control,'" "we also require that the allegations based on information and belief 'be accompanied by a statement of the facts upon which the allegations are based.'" *Id.* at 866 (quotation

marks omitted) (quoting *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1279 n.3, 305 U.S. App. D.C. 60 (D.C. Cir. 1994)) (citing *Tooley v. Napolitano*, 586 F.3d 1006, 1007-08, 1010, 388 U.S. App. D.C. 327 (D.C. Cir. 2009)). We concluded that the journalist's factual allegations were insufficient to establish standing, as they did not "create a plausible inference that the described missile attacks were attributable to the United States and specifically targeted" him. *Id.* at 865.

The situation in this case is quite different. As explained above, the Jibrils allege facts supporting the conclusion that they appeared on the Selectee List during their 2018 travels. We simply draw the reasonable inference from those facts that this remains the case today, particularly since the Government has provided no evidence to the contrary.

At oral argument, Government counsel suggested that if the Jibrils would like to determine whether they remain on a terrorist watchlist, some or all members of the family can book another trip to see whether they endure the same problems that they faced in 2018. Whether this suggestion was meant to be a tongue-in-cheek quip or simply a heartless argument, it makes no sense. As explained above, the Supreme Court has 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." *TransUnion*, 141 S. Ct. at 2210 (emphasis added) (citations omitted). A plaintiff is not required to wait for an injury to occur

in order to satisfy Article III standing requirements. On the record before us, we find 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.

***

In sum, the Jibrils' future travel plans, combined with the reasonable inference that they remain on the Selectee List, indicate they will soon be subjected to the challenged Government actions again. Accordingly, the Jibrils adequately allege an imminent threat of future injury for those claims challenging the Government's policies and the alleged lack of adequate redress process. *See In re Navy Chaplaincy*, 697 F.3d at 1178 (holding that plaintiffs plausibly alleged a future injury where the defendant "neither dispute[d] plaintiffs' claims that they w[ould] expose themselves to potential injury . . . nor argue[d] that it ha[d] any plans to change the procedures alleged to injure plaintiffs"). This feared injury is concrete and particularized, as the harm is real, rather than abstract, and it affects the Jibrils "in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (collecting cases).

The Jibrils also satisfy the remaining aspects of our standing inquiry. The imminent injury is plainly traceable to the Government's actions, and the prospective relief the Jibrils seek, including revisions to the TRIP policies, would ameliorate the alleged future harms with respect to which they complain. We note, however, that because

Selectee List status constitutes Sensitive Security Information, *see* 49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(a), and the Government maintains that watchlist-status disclosure raises weighty national security concerns, Final Br. for Appellees 11, revisions to the TRIP policies may not exist that would allow the Jibrils to discover whether they are - or ever were - on the Selectee List.

Accordingly, the Jibrils have standing to pursue their claims for prospective relief discussed above.

III. Conclusion

For the foregoing reasons, we affirm in part and reverse in part the District Court's judgment and remand the case for further proceedings consistent with this opinion.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MAY 9, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:19-cv-2457-RCL

MOHAMMED JIBRIL, *et al.*,

Plaintiffs,

v.

CHAD WOLF, *et al.*,

Defendants.

May 9, 2020, Decided
May 9, 2020, Filed

MEMORANDUM OPINION

On August 13, 2019, plaintiffs Mohammed Jibril and Aida Shahin (individually and on behalf of their minor children H.J., Y.J., and O.J.), Ala'a Jibril, and Khalid Jibril brought suit against defendants Chad Wolf (in his official capacity as Acting Secretary of the Department of Homeland Security),[1] David Pekoske (in his official

1. The Complaint initially named Kevin McAleen, who was the Acting Secretary of the Department of Homeland Security at the time. ECF No. 1 at 1.

capacity as Administrator of the Transportation Security Administration), Mark Morgan (in his official capacity as Acting Commissioner of U.S. Customs and Border Protection), William Barr (in his official capacity as U.S. Attorney General), Christopher Wray (in his official capacity as Director of the Federal Bureau of Investigation), and Charles Kable, IV (in his official capacity as Director of the Terrorist Screening Center). ECF No. 1 at 3-4. On November 25, 2019, defendants filed a motion to dismiss. Upon consideration of the motion (ECF No. 8), opposition (ECF No. 9), and reply (ECF No. 10), the Court will **GRANT** the motion and dismiss the case with prejudice due to lack of subject-matter jurisdiction.

BACKGROUND[2]

Plaintiffs are seven members of the Jibril family, all of whom are U.S. citizens. ECF No. 1 at 13. In the spring and summer of 2018, the Jibril family traveled to Jordan to visit family members. *Id.* They departed from Los Angeles, California, connected in Abu Dhabi, United Arab Emirates, and landed in Amman, Jordan, where they stayed for over two months. *Id.* When they arrived in Los Angeles, they waited an hour to receive their boarding passes, all of which had "SSSS" printed on them. *Id.* The family was then searched for about two hours, and all seven of them were patted down. *Id.* Neither parent was asked for permission before the minor children were

2. At the motion to dismiss stage, the Court must assume that all of plaintiffs' allegations are true. Therefore, the Court is taking all of the facts set forth below directly from plaintiffs' Complaint (ECF No. 1).

searched. *Id.* When they arrived at their boarding gate, they were met by Department of Homeland Security ("DHS") agents and taken to a private area where agents searched their luggage. *Id.* This nearly caused the family to miss their flight to Abu Dhabi. *Id.* When the Jibrils arrived in Jordan, they were interrogated for about two hours. *Id.*

After being in Jordan for approximately two months, the Jibrils departed in August of 2018. *Id.* at 14. At the airport in Jordan, Mohammed Jibril was told that American officials had an issue with him, and all family members' names would need to be cleared prior to boarding the plane. *Id.* All family members had "SSSS" printed on the boarding passes they eventually received. *Id.* When they arrived in Abu Dhabi, they were interrogated for roughly 45 minutes by Abu Dhabi officials. *Id.* U.S Customs and Border Protection ("CBP") agents at the Preclearance location then separated the plaintiffs from one another and interrogated them for at least four hours. *Id.* Without a warrant or probable cause, the agents searched all electronic devices, including cell phones, and mishandled them in the process. *Id.* The food and spices in their luggage were searched and subsequently thrown away. *Id.* at 15. The minor children were not offered any food while in the CBP holding room, nor were they asked if they had any medical conditions. *Id.* The family had to stay overnight in Abu Dhabi because they missed their scheduled return flight to Los Angeles due to their detention by CBP officials. *Id.* When the family returned to the airport the next day, their electronic devices were searched again, and the extensive security measures involved a delay of at least one hour. *Id.*

Appendix D

Plaintiffs are Muslims with sincerely held religious beliefs that require traveling to Saudi Arabia to complete Hajj and pilgrimage obligations. *Id.* Due to the extensive security screenings they have undergone while traveling, they believe that they are being treated as persons on the Selectee List (also known as the Terrorist Watch List). *Id.* The family believes that this treatment burdens their religious exercise, and the minor children in particular felt that they were treated like criminals, which has led to extreme emotional distress for all family members. *Id.*

On March 1, 2019, Mohammed Jibril and Aida Shahin initiated redress inquiries through the DHS Traveler Redress Inquiry Program ("DHS TRIP") to acquire information as to why they received scrutinized treatment when traveling and a way to appeal this treatment. *Id.* at 15-16. On March 20, 2019, the other five members of the Jibril family also submitted TRIP complaints. *Id.* at 16. On June 13, 2019, in response to Ala'a Jibril's DHS TRIP inquiry, DHS TRIP sent its standard response letter for persons who are not on the No-Fly List but who could be on the Selectee List, which states in part:

> DHS has researched and completed our review of your case. DHS TRIP can neither confirm nor deny any information about which you may be within federal watchlists or reveal any law enforcement sensitive information. However, we have made any corrections to our records that our inquiries determined were necessary, including, as appropriate, notations that may assist in avoiding incidents of misidentification.

Id. On July 2, 2019, DHS sent the same type of letters in response to Mohammed Jibril's and Aida Shahin's TRIP complaints, and on July 23, 2019, DHS sent the same type of letters in response to Khalid Jibril, Y.J., and O.J. *Id.* at 16-17. These standard responses did not confirm or deny whether plaintiffs were on the Selectee List or if they can expect similar difficulties while traveling in the future. *Id.* H.J. never received a response to his TRIP complaint. *Id.* at 17.

In addition to needing to travel overseas to fulfill their sincerely held religious beliefs and the resulting obligations, the Jibril family wishes to travel to Jordan to see family in the near future, as consistent with their prior travel patterns. *Id.* The Jibril family has routinely traveled to Jordan every two to three years. *Id.* Mohammed Jibril has visited relatives in Jordan 12-15 times over the past 25 years. *Id.*

Count I alleges that defendants Wolf, Pekoske, and Morgan violated plaintiffs' Fourth Amendment rights by subjecting plaintiffs to unreasonable pat down searches and prolonged detentions. *Id.* at 18-19. Count II alleges that defendants Wolf, Pekoske, and Morgan violated plaintiffs' Fourth Amendment rights by conducting warrantless searches of their cell phones. *Id.* at 19-20. Count III alleges that all defendants violated plaintiffs' Fifth Amendment Procedural Due Process Rights. *Id.* at 20-22. Count IV alleges that defendants Wolf, Pekoske, and Morgan violated the Administrative Procedure Act ("APA") due to detention conditions. *Id.* at 22-23. Count V alleges that all defendants violated the APA due to lack of

adequate procedural due process through their policies and available administrative remedy. *Id.* at 23-24. Count VI alleges that plaintiffs are entitled to attorneys' fees and costs under the Equal Access to Justice Act. *Id.* at 24.

Plaintiffs ask this Court to grant the following relief: (1) Declare that defendants violated plaintiffs' rights under the Fourth Amendment to the U.S. Constitution; (2) Declare that defendants violated plaintiffs' rights under the Fifth Amendment to the U.S. Constitution; (3) Declare that defendants' actions against plaintiffs constitute an abuse of discretion and, accordingly, violate the APA; (4) Declare that defendants continuous actions against plaintiffs are arbitrary and capricious and, accordingly, violate the APA; (5) Declare that defendants' policies, practices, and customs, including but not limited to DHS TRIP, violate the APA and Constitution, and fail to allow for a meaningful opportunity for persons like the plaintiffs to be heard; (6) Order DHS TRIP to revise its policies to provide plaintiffs and persons like them with a meaningful opportunity to challenge their apparent inclusion within the TSDB and/or Selectee List; (7) Re-examine plaintiffs' DHS TRIP inquiries once DHS TRIP revises its procedures to remove constitutional violations; (8) Enjoin defendants from conducting warrantless pat-down searches of plaintiffs in the future, unless probable cause exists; (9) Enjoin defendants from conducting warrantless searches of the plaintiffs' cell phones in the future, unless probable cause exists; (10) Award plaintiffs attorneys' fees and costs as provided by any applicable provision of the law, against defendants; and (11) Any additional relief this Court deems just, proper, and equitable. *Id.* at 25-26.

Appendix D

LEGAL STANDARD

Article III of the Constitution requires that plaintiffs establish standing before the Court may consider the merits of the case. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). At a minimum, standing requires an injury in fact, causation, and redressability. *Id.* It is plaintiffs' burden to establish standing for each claim and form of relief sought. *Id.* at 561; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). Plaintiffs seeking prospective relief must demonstrate a risk of future injury that is both "real and immediate," not "conjectural" or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). Plaintiffs therefore must establish that a "threatened injury" is "certainly impending," or, at the very least, that the risk of future harm is substantial. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). "[A]llegations of *possible* future injury are not sufficient." *Id.* at 409. If plaintiffs do not prove that they have standing, the Court must dismiss the case pursuant to Rule 12(b)(1).[3]

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3. Although the parties present arguments regarding numerous other legal standards, it is not necessary to explain those standards in this Memorandum Opinion. Because plaintiffs have failed to establish Article III standing, the Court lacks subject-matter jurisdiction over this case. It would therefore be inappropriate for the Court to analyze other legal standards when only the details of Article III standing and Rule 12(b)(1) are necessary to resolve this motion.

Appendix D

ANALYSIS

Plaintiffs in this case have failed to establish that they have Article III standing, and thus Rule 12(b)(1) requires the Court to dismiss the case. There are two primary issues with plaintiffs' standing argument. First, they have failed to show concrete plans to travel again in the immediate future. Second, even if they do travel again in the immediate future, they have failed to demonstrate that they will be subjected to the same extensive searches as on their 2018 trip. Therefore, the Court lacks subject-matter jurisdiction over this case and must dismiss it in its entirety.

I. PLAINTIFFS HAVE FAILED TO ESTABLISH FUTURE TRAVEL PLANS THAT ARE CONCRETE AND IMMINENT.

Looking first at plaintiffs' argument that they will travel again in the future, they have alleged the following pertinent facts:

- The Jibril family "need[s] to travel overseas to fulfill their sincerely-held religious beliefs and the resulting obligations." ECF No. 1 at 17.

- "[T]he Jibril family wishes to travel to Jordan to see family in the near future, as consistent with their prior travel plans." *Id.*

- "The Jibril family has routinely traveled to Jordan every two to three years." *Id.*

- "Plaintiff Mohammed Jibril, in particular, has visited relatives in Jordan 12-15 times over the past 25 years." *Id.*

Noticeably absent from the Complaint are any allegations of purchased airline tickets, what travel route they will take, how long they plan to travel for, or even any specific travel dates.[4] They vaguely assert that they would like to visit Jordan again "in the near future," but they do not attempt to provide any specific time frame within which that visit might occur. *Id.* The Jibrils argue that because they "routinely travel[] to Jordan every two to three years" and because Mohammed Jabril "has visited relatives in Jordan 12-15 times over the past 25 years," the Court may infer that they will return.[5] These allegations, however, are insufficient for plaintiffs to meet their burden to establish standing.

The Supreme Court has been abundantly clear that "threatened injury must be *certainly impending* to constitute injury in fact," or, at the very least, there must be a substantial risk of future harm. *Clapper*, 568 U.S. at 409. "[A]llegations of *possible* future injury are not

4. The Court is not saying that plaintiffs need to establish any or all of these factors in order to prove that their travel plans are concrete. Rather, these are some examples of the kinds of information that could have been included in the Complaint to demonstrate concrete travel plans.

5. Even if the fact that Mohammed Jibril has visited Jordan 12-15 times in the past 25 years were sufficient to prove future travel plans, that fact certainly would not be sufficient to establish standing for the other six plaintiffs.

sufficient." *Id.* In *Lujan*, the Supreme Court specifically ruled that in order to prove future travel plans, plaintiffs must provide a "description of *concrete* plans." 504 U.S. at 564 (holding that plaintiffs could not establish future harm when they merely alleged that they intended to travel again "in the future" but failed to provide any "current plans," specific dates, etc.) (emphasis added). Although the plaintiffs in this case have certainly provided more details than the plaintiffs in *Lujan*, they still fall short of the Article III threshold.

Plaintiffs cite numerous out-of-circuit cases in their attempt to convince this Court that their prior travel patterns are sufficient to show that they will certainly travel again in the future, but the D.C. Circuit has made it clear that allegations of "a harm that may occur 'some day,' with no 'specification of when the some day will be,' do[] not establish standing." *Kansas Corp. Comm'n v. Fed. Energy Regulatory Comm'n*, 881 F.3d 924, 930, 434 U.S. App. D.C. 256 (D.C. Cir. 2018). This Court is bound by prior rulings of the D.C. Circuit, not by prior rulings of other circuits, meaning that the Jibrils do not have standing unless they can show that their future plans are specific and concrete. *See, e.g.*, *Jefferson v. Stinson Morrison Heckler LLP*, 249 F. Supp. 3d 76, 81-82 (D.D.C. 2017) (finding that even though the plaintiff alleged that he would be returning to the defendant's law firm in the near future for depositions in an ongoing litigation, his plans were not sufficiently specific); *Baz v. United States Dep't of Homeland Security*, 2019 U.S. Dist. LEXIS 177575, *12-13 (D.D.C. October 11, 2019) (finding that even if the plaintiff had alleged that he planned to travel in the "near

future," that would not have been sufficient to establish a substantial likelihood of future injury). The D.C. Circuit has explained that disputes about "speculative" harms "are properly left to the policymaking Branches, not the Article III courts." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295, 376 U.S. App. D.C. 443 (D.C. Cir. 2007). Additionally, the question of future travel plans goes beyond mere specificity. Plaintiffs must also show immediacy, which they have similarly failed to do. *See Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 500, 306 U.S. App. D.C. 188 (D.C. Cir. 1994) (explaining that the immediacy requirement "ensure[s] that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at all'") (quoting *Lujan*, 504 U.S. 564 n.2). Therefore, the Jibril family has not only failed to establish specific and concrete future travel plans, but also imminent future travel plans.

II. PLAINTIFFS HAVE FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD THAT THEY WILL BE SUBJECTED TO UNLAWFUL SEARCHES DURING FUTURE TRAVEL.

Even if the Complaint did sufficiently allege that the Jibril family has imminent, concrete travel plans, they still cannot show that future harm is certainly impending or that there is a substantial risk of future harm. The Jibrils attempt to argue that because they were subjected to extensive searches during their 2018 trip, they are substantially likely to be subjected to these same search measures again in the future. Although past harm is

relevant to establishing the likelihood of future harm, past harm alone is insufficient. Of course, the Court must assume at the motion to dismiss stage that all of the plaintiffs' factual allegations are true, but the Court should not "accept as true a legal conclusion couched as a factual allegation." *Papsan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). To accept that plaintiffs will suffer future harm simply because they have stated in their Complaint that they will be subjected to these practices in the future would be to do just that.

As defendants aptly point out, plaintiffs' own allegations undermine their argument that they are substantially likely to be subjected to these extensive searches again in the future. In their attempt to establish likelihood of future travel, they allege that they routinely travel to Jordan every two to three years, and Mohammed Jibril alleges that he has traveled to Jordan 12-15 times over the past 25 years. In all of their travels, however, they claim to have been subjected to these searches only during their 2018 trip to and from Jordan. Even when drawing all reasonable inferences in plaintiffs' favor, this does not suggest that they are substantially likely to be injured again in the future. Mohammed Jibril claims to have visited Jordan 12-15 times, yet he alleges that extensive searches have occurred during only one of those 12-15 trips. All plaintiffs claim to have travelled to Jordan every two to three years, yet only on one trip have they encountered these difficulties. These statistics, without more, do not suggest that defendants will subject plaintiffs to these supposedly unlawful searches in the future. The Jibril family's contention that they will suffer these harms

again is thus purely speculative and hypothetical. Their allegations of past harms are insufficient to establish any sort of pattern that could lead this Court to find a substantial likelihood of future repetition.[6] *See Reporters Committee for Freedom of Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1068-69, 192 U.S. App. D.C. 376 (D.C. Cir. 1978) (explaining that plaintiffs are usually required to show "a clear factual foundation" establishing "a pervasive pattern of past abuse" in order to prove that future harm is imminent). If the Court were to proceed to the merits of this case, it would risk "render[ing] an advisory opinion in 'a case in which no injury [will] occur[] at all.'" *Animal Legal Def. Fund, Inc.*, 23 F.3d at 500 (quoting *Lujan*, 504 U.S. at 564 n.2). Therefore, plaintiffs have failed to establish standing as required by Article III, and the Court must grant defendants' motion to dismiss.

CONCLUSION

Based on the foregoing, the Court will **GRANT** defendants' motion to dismiss (ECF No. 8).

It will be **ORDERED** that this case is **DISMISSED** with prejudice.

A separate Order accompanies this Memorandum Opinion.

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6. The Court recognizes that a past pattern of harm is not the only way to prove imminent future harm. It is, however, the means that plaintiffs have attempted to use to prove that they are entitled to declaratory and injunctive relief.

Appendix D

Date: May 9, 2020 /s/
Royce C. Lamberth
United States District Court Judge