UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
KELLEY AMADEI, et. al,

Plaintiffs,

- against -

KIRSTJEN M. NIELSEN, et al.

Defendants.

----------X

Civil Action No.
17-CV-5967
(Garaufis, J)
(Scanlon, M.J.)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

RICHARD P. DONOGHUE
United States Attorney
Eastern District of New York
271 Cadman Plaza East, 7th Floor
Brooklyn, New York 11201
Attorney for Defendants

DARA A. OLDS
Assistant United States Attorney
Of Counsel

Date of Service: March 9, 2018

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Defendants Kirstjen M. Nielsen, Secretary of Homeland Security; Kevin K. McAleenan, Acting Commissioner of United States Customs and Border Protection ("CBP"); Leon Hayward, Acting Director, CBP New York Field Operations; Francis J. Russo, CBP Port Director, John F. Kennedy International Airport, Port of Entry; Thomas Homan, Acting Director, United States Immigration and Customs Enforcement ("ICE"); Thomas Decker, Director, New York Field Office, Enforcement and Removal Operations, ICE; and David Jennings, Director, San Francisco Field Office, ICE (collectively "Defendants") by and through their attorneys, RICHARD P. DONOGHUE, United States Attorney for the Eastern District of New York, and DARA A. OLDS, Assistant United States Attorney, of counsel, respectfully submit this memorandum of law in support of their Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiffs allege that on February 22, 2017, they were passengers on Delta Airlines Flight 1583, flying from San Francisco to John F. Kennedy Airport ("JFK") in New York. At the conclusion of the flight, Plaintiffs allege that they were required to show identification to CBP officers as they deplaned, and they allege that such a requirement constituted a search and seizure in violation of the Fourth Amendment. Plaintiffs also allege that, in conducting the identification check following Delta Flight 1583, the CBP officers acted pursuant to a CBP policy.

On October 12, 2017, Plaintiffs filed this action, requesting declaratory and injunctive relief pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A)-(C) (the "APA").

Defendants now move to dismiss the Complaint because the APA only permits review of "final agency action" (5 U.S.C. § 704), and the challenged acts do not qualify as "agency action"

under the APA, let alone agency action that is "final." In addition, Plaintiffs do not have standing to bring their claims. Indeed, they cannot show an injury in fact, let alone an injury that would be redressed by the broad prospective relief they request.[1]

STANDARD OF REVIEW

I. Dismissal for lack of subject-matter jurisdiction.

Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move the Court for dismissal of claims over which the Court lacks subject matter jurisdiction. Unless the Constitution or a statute grants the Court jurisdiction over a claim, the Court lacks the power to adjudicate that claim. *Durant, Nichols, Houston, Hodgson & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009). *See also Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it"). Statutes granting federal courts jurisdiction to hear claims against the United States must be strictly construed in order to protect the government's general sovereign immunity from lawsuits. *See United States v. Bormes*, 133 S. Ct. 12, 16 (2012) ("Sovereign immunity shields the United States from suit absent a consent to be sued that is 'unequivocally expressed'" (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)).

"As the party seeking to invoke the jurisdiction of the court, the plaintiff bears the burden of demonstrating that subject matter jurisdiction is proper based on facts existing at the time the complaint was filed." *Armstrong v. Breslin*, 05-CV-2876, 2006 WL 436009, at *2 (E.D.N.Y. Feb. 22, 2006) (citing *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 40 (2d Cir. 1996)); *see also Shenandoah*

[1] In the event that the claims against the Defendants are not dismissed pursuant to the instant motion, the Defendants reserve their right to assert affirmative defenses and to move to dismiss on additional grounds, including, but not limited to, that Plaintiff has failed to state a claim on which relief can be granted.

v. Halbritter, 366 F.3d 89, 91 (2d Cir. 2004), *cert. denied*, 544 U.S. 974 (2005). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). Subject matter "'jurisdiction must be shown affirmatively, and that showing [cannot be] made by drawing from the pleadings inferences favorable to the [plaintiff].'" *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (*aff'd* 561 U.S. 247 (2010) (quoting *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003).

When determining whether Plaintiffs have proved that the Court has jurisdiction over a claim, the Court may consider information outside of the pleadings. *M.E.S., Inc. v. Snell*, 712 F.3d 666, 671 (2d Cir. 2013).

A. Dismissal for Failure to State a Claim

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citation omitted). This rule "does not require 'detailed factual allegations.'" *Id*. (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). However, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555); *see also Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir.2006). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 555 U.S. at 557). When an asserted cause of action is not supported by factual allegations that plausibly state a claim upon which relief can be granted, a defendant may move for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

In reviewing a motion to dismiss under Rule 12(b)(6), a court must construe the complaint liberally, "accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Concord Assocs. L.P. v. Entm't Prop. Trust*, 817 F.3d 46, 52 (2d Cir. 2016) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 152 (2d Cir. 2002)); *see also Tsirelman v. Daines*, 794 F.3d 310, 313 (2d Cir. 2015) (quoting *Jaghory v. N.Y. State Dep't of Educ.*, 131 F. 3d 326, 329 (2d Cir. 1997)). To survive such a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 555 U.S. at 570). This "plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citation omitted).

In *Twombly*, 550 U.S. 544, 556 (2007), the Supreme Court abandoned the *Conley v. Gibson* pleading standard. *See Twombly*, 550 U.S. at 561-62 (rejecting the test "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). *Twombly* and its growing progeny confirm that a complaint based on speculative, implausible and conclusory allegations is subject to dismissal. *Iqbal v. Hasty*, 490 F.3d 143, 157-158 (2d Cir. 2007) (the "plausibility standard" resulting from *Twombly* "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."). Since *Twombly*, the Second Circuit has confirmed that "[t]o survive dismissal, the plaintiff must provide the grounds upon which [her] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Communications, Inc. v. Wolfson*, 493 F.3d 87, 98 (2d Cir. 2007) (emphasis added) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

ARGUMENT

I. PLAINTIFFS CANNOT SHOW FINAL AGENCY ACTION THAT IS REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT

Under the APA, agency action is subject to judicial review if it is either "made reviewable by statute" or if it is "final agency action for which there is no other adequate remedy in a court." 5 U.S.C.A. § 704. Here, Plaintiffs have not attempted to identify a statute that would make CBP's challenged conduct subject to judicial review. "Thus, judicial review is available only if the plaintiff seeks review of final agency action." *6801 Realty Co., LLC v. United States Citizenship and Immigration Services*, 15-cv-5958, 2016 WL 7017354, *2 (E.D.N.Y. Nov. 30, 2016) (AMD).[2]

In order for an agency action to be final, two conditions must be satisfied. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *see also U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (same). The court, thus, looks to whether the agency "completed its decisionmaking process," and whether the result of that process will "directly affect the parties." *Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d Cir. 2008).

[2] The Second Circuit has treated the APA final agency action requirement as jurisdictional. *See Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir. 1999). In light of subsequent Supreme Court precedent, it has more recently raised, but declined to answer, the question of whether the requirement is jurisdictional, or rather an essential element of an APA claim for relief. *See Sharkey v. Quarantillo*, 541 F.3d 75, 87-88 & n.10 (2d Cir. 2008). Regardless of whether the "final agency action requirement is jurisdictional or an element of a claim under the APA, and therefore subject to a Rule 12(b)(6) motion, the Court should find that the Complaint fails because plaintiffs have not alleged final agency action subject to APA review.

Here, in their futile attempt to assert a claim susceptible to APA review, Plaintiffs allege that CBP conducted the identification check in question pursuant to a policy that amounts to a final agency action. However, the Complaint does not plausibly allege an official policy. Instead, Plaintiffs have merely "alleged that Defendants took certain action with respect to it and asks the Court to surmise therefrom the existence of a broader policy. That is, however, not enough for purposes of § 704." *See Pearl River Union Free Sch. Dist. v. King*, No. 12-cv-2938-KMK, 2016 WL 5867063, at *13 (S.D.N.Y. Oct. 6, 2016) (quoting *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) ("Plaintiffs appear to have attached a 'policy' label to their own amorphous description of the [defendant government agency's] practices. But a final agency action requires more.")).

Plaintiffs make a few attempts to support their claim of final agency action. First, they point to fragments of articles in Rolling Stone, the Gothamist and other publications concerning the subject identification check. *See* Plaintiffs' Complaint Dkt. No. 1 ("Compl."), ¶¶ 61-64. Second, the Complaint alleges that Plaintiff Amadei asked a CBP officer about the identification check and the CBP officer responded that "'we do it from time to time,' or words to that effect." Compl. ¶ 50. Third, Plaintiffs point to an email exchange between CBP JFK International Airport Port Director Francis J. Russo and New York Civil Liberties Union attorney Jordan Wells. Compl., Exhibit B. Specifically, they emphasize a portion in the email where Port Director Russo says "we do this every day. Someone took a picture and put it on twitter. That's what led to the hysteria." *Id*. As explained in further detail below, these allegations do not establish final agency action, as required for review under the APA.

With respect to the articles cited in the Complaint, the writers of Rolling Stone, the Gothamist and the Independent (Compl., ¶ ¶ 61-64) do not speak on behalf of CBP. Notably, the

articles all refer to the same identification check and do not indicate more than one instance where such a check has occurred. Additionally, in response to media inquiries, CBP issued a statement concerning Delta Flight 1583. Compl., ¶ 57. That statement refers to cooperation between law enforcement agencies, but makes no mention of a CBP policy requiring passengers exiting a domestic flight to present identification, as Plaintiffs allege.

Moreover, with respect to the claimed conversation between Plaintiff Amadei and a CBP officer, the officer's vague, alleged response that something occurs from time to time does not indicate final agency action on the part of CBP. Similarly, Director Russo's comments within an email do not establish a decisionmaking process, guidance, or any written implementation[3] to suggest final agency action. *See Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014). In fact, Director Russo's email was not an expression of any CBP policy. *See* Director Russo's Declaration annexed hereto as Exhibit A ("Russo Decl."), ¶ 4.

The only actual CBP policy Plaintiffs include in the Complaint is 19 C.F.R. § 162.6, which discusses CBP's authority to conduct searches at the border. Compl., ¶ 68. However, as Plaintiffs admit, this regulation is not relevant to the review of the identification of passengers arriving on a domestic flight. *Id*. With no citations to any other CBP policies, Plaintiffs do not plausibly allege that the identification check of the passengers on Delta Flight 1583 occurred pursuant to final agency action. Accordingly, the identification check alleged in the Complaint is not subject to APA review.

[3] While there is no requirement that final agency action be written, there must a plausible allegation that such a policy exists. *See R.I.L.-R v. Johnson*, 80 F. Supp.3d 164, 175, 184 (D.D.C. Feb. 20, 2015) (finding that even though there was no written policy, defendants essentially conceded that they were engaged in the policy plaintiffs alleged).

II. PLAINTIFFS DO NOT HAVE STANDING TO BRING THEIR CLAIMS

Plaintiffs' claims must be dismissed because they lack standing for the declaratory and injunctive relief they seek, including a broad, permanent injunction barring defendants from ever checking the identification of passengers disembarking from a domestic flight absent a warrant or suspicion.[4] Compl., p. 20.

A. Legal Standard Governing Standing For Injunctive and Declaratory Relief

Article III, Section 2 of the United States Constitution limits the subject matter jurisdiction of federal courts to actual cases and controversies. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). As part of the case or controversy requirement, a party seeking relief "must establish . . . standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Moreover, the Supreme Court has found that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20. *See also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

"To establish Article III standing, [Plaintiffs] must demonstrate: (1) injury in fact, which is a concrete and particularized harm to a legally protected interest; (2) causation in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the

[4] A request for such a broad injunction is improper because "while th[e] Court's jurisprudence has often recognized that to accommodate public and private interests, some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,' … the Fourth Amendment imposes no irreducible requirement of such suspicion.'" *Palacios v. Burge*, 589 F.3d 556, 562–63 (2d Cir. 2009) (emphasis in the original) (quoting *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)). Accordingly, there are instances where a warrantless and/or suspicionless identification check of domestic passengers by law enforcement will be consistent with the Fourth Amendment.

defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 95 (2d Cir. 2017) (internal citations omitted). As explained in more detail below, Plaintiffs cannot show an injury in fact, and accordingly, they cannot establish Article III standing.

Specifically, Plaintiffs "cannot rely on past injury to satisfy the injury requirement, but must show a likelihood that [they] will be injured in the future." *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998). In fact, to satisfy the injury requirement in a case where a plaintiff seeks declaratory or injunctive relief, as Plaintiffs do in the instant case, "the plaintiff 'must demonstrate *both* a likelihood of future harm and the existence of a policy or its equivalent.'" *Peck v. Baldwinsville Cent. School Dist.*, 351 F. App'x 477, 479 (2d Cir. 2009) (emphasis in the original) (citing *Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004)).

With respect to a likelihood of future harm, the threatened injury must be "'*certainly* impending to constitute an injury in fact,' and … 'allegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. at 409 (emphasis added by the *Clapper* court) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

B. Plaintiffs Cannot Allege A Certainly Impending Injury

As mentioned above, a showing of a certainly impending injury requires that Plaintiffs establish both a likelihood of future harm and the existence of a policy or its equivalent. Because Plaintiffs cannot show either, they cannot establish standing.

1. Plaintiffs cannot show a likelihood of future harm.

Plaintiffs attempt to show a likelihood of future harm by alleging that they are "regular travelers on domestic flights within the United States, and that they intend to take other domestic flights." Compl., ¶ 74. However, these vague allegations fall short. Indeed, "[s]uch 'some day'

intentions – without any description of concrete plans, or indeed even any specification of when the some day will be do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. at 564 (internal citations omitted). Plaintiffs do not specify any point at which they intend to fly, nor do they define regular traveling. Instead they state ambiguous goals to take domestic flights at some unnamed time. These indefinite intentions, devoid of actual plans, are exactly what the court rejected in *Lujan*, finding that they were not sufficient to establish a certainly impending injury. *See also Clapper v. Amnesty International USA*, 568 U.S. 398, 410 (2013) (holding that even an "objectively reasonable likelihood" that a future injury will occur "is inconsistent with our requirement that threatened injury must be certainly impending to constitute an injury in fact.") (internal citations omitted). Establishing a certainly impending injury is required where plaintiffs seek prospective relief, in part because "[a]n action for declaratory judgment does not provide an occasion for addressing a claim of alleged injury based on speculation as to conduct which may or may not occur at some unspecified future date." *Abidor v. Napolitano*, 990 F. Supp. 2d 260, 272 (E.D.N.Y. Dec. 31, 2013). Here, Plaintiffs claim only one incident in which their identification was checked following a domestic flight and they do not plausibly allege that they will be subject to a similar check in the future.

Courts have found that other plaintiffs lacked standing in similar cases where they had alleged only one incident and where the proffered facts were insufficient to show a certainly impending injury. *See Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004); *McLennon v. City of New York*, 171 F. Supp.3d 69 (E.D.N.Y. Mar. 2016); *Williams v. City of New York*, 34 F. Supp. 3d 292 (S.D.N.Y. July 2014) (Caproni, J.); *Abidor v. Napolitano*, 990 F. Supp. 2d 260 (E.D.N.Y. Dec. 31, 2013); *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870 S.D.N.Y.

July 16, 2004) (court denied plaintiffs' preliminary request to enjoin the use of the NYPD mounted unit at protests; even though the NYPD generally deployed the unit at protests, plaintiffs alleged only one occasion in which they were injured as a result of the mounted unit in the past, and could not show a likelihood that they faced injury from the use of the mounted unit in the future).

For example, in *Abidor v. Napolitano*, 990 F. Supp.2d 260 (E.D.N.Y. Dec. 31, 2013), the court dismissed claims brought by plaintiffs who alleged that ICE and CBP had a practice of violating their First and Fourth Amendment rights by inspecting electronic devices at the border without reasonable suspicion. Mr. Abidor's electronic devices were checked during a border search pursuant to CBP and ICE directives. The court found that plaintiffs plausibly alleged that CBP conducted such checks slightly less than once per day. The court contrasted this number with the approximately 1.1 million passengers and pedestrians processed through CBP border searches daily. The court found that the chances of Mr. Abidor or the association plaintiffs ("the National Association of Criminal Defense Lawyers and the National Press Photographers Association") having their electronic devices searched at the border was unlikely. In dismissing the claim for lack of standing, the court found the probability that any of the plaintiffs' devices would be subject to such a future search was not significant enough to show a certainly impending injury, as required to establish standing. *See also Clapper v. Amnesty International USA*, 568 U.S. 398 (dismissing claims for lack of standing, finding that plaintiffs' fears that their communications would be subject to surveillance as a result of the directive at issue were conjectural).

In the instant case, CBP processes approximately sixteen million international air passengers and crew members per year at JFK airport. Russo Decl. ¶ 3. Director Russo, who oversees 1800 CBP employees, along with national security and anti-terrorism operations, immigration and agricultural inspections, and CBP's commercial trade enforcement efforts

throughout JFK Airport, is not aware of any other incident, aside from the incident underlying the Complaint, in which CBP has checked the identification of all passengers deplaning from a domestic flight at JFK. Russo Decl., ¶ ¶ 3, 5. Additionally, Plaintiffs do not point to any other such incident. [5]

This court considered a similar claim in *McLennon v. City of New York,* finding that standing was lacking where the plaintiffs sought declaratory and injunctive relief concerning the conduct of NYPD officers, who had allegedly stopped plaintiffs while they were traveling on New York City highways and such stops occurred "without any individualized suspicion of wrongdoing at *de facto* vehicle checkpoints." *McLennon,* 171 F. Supp.3d at 79. Plaintiffs claimed that they had all been stopped at the same location. Plaintiff McLennon alleged that he had been stopped by police in 2011 and plaintiffs Price and Augustine claimed that they had been stopped on separate occasions in 2014. *McLennon*, 171 F. Supp.3d at 79-81. The plaintiffs also alleged that various judges presiding over criminal cases had suppressed evidence from similar vehicle checkpoint stops at the same location during separate incidents in 2012, 2013, and 2014. *McLennon v. City of New York*, 171 F. Supp.3d at 81. Plaintiffs requested that the court issue a "declaration that the checkpoints violated the Fourth and Fourteenth Amendments and a class-wide injunction enjoining Defendants from continuing such policies, practices, and/or customs." *McLennon*, 171 F. Supp.3d at 78. In support of their argument that they had standing to request injunctive relief, two of the plaintiffs stated that they were New York City residents who "regularly travel on the streets, highways, thoroughfares, and/or service ramps in the City of New York where the NYPD conducts

[5] The *Gothamist* article referenced in the Complaint (Compl., ¶ 63), quotes plaintiff Matt O'Rourke. "'I flew almost 200,000 miles last year," O'Rourke said. 'I've never had my ID checked getting off a domestic flight.'"
http://gothamist.com/2017/02/23/jfk_domestic_flight_id_checks.php

its suspicionless checkpoint stops." *McLennon*, 171 F. Supp.3d at 105. In assessing these allegations, this court found that plaintiffs had sufficiently alleged a past injury based on the unlawful stops, but that "their allegations fail[ed] to allege a sufficient likelihood of a future concrete injury." *McLennon*, 171 F. Supp.3d at 105. The court so found even though the plaintiffs had alleged that the NYPD made such stops regularly, including six separate stops of which plaintiffs were aware. The court found that the allegations, if true, established "some minimal likelihood of future harm given the repeated instances of unlawful Step-Out Enforcement Checkpoints," but "those allegations do not rise to the level required to establish standing for injunctive relief." *McLennon*, 171 F. Supp.3d at 106. The court further noted that the complaint contained only one incident involving each plaintiff (*id.*), and dismissed the claims for lack of standing in spite of the fact that plaintiffs had credibly alleged that the NYPD had notice of the operation of the illegal checkpoints as far back as 2012. *McLennon*, 171 F. Supp.3d at 100.

The court dismissed an analogous claim for injunctive relief for lack of standing in *Williams v. City of New York*. In *Williams*, the plaintiff requested an injunction requiring the NYPD to provide accommodations to hearing impaired persons upon arrest and incarceration. *Williams*, 34 F. Supp. 3d at 293. Plaintiff herself was hearing impaired and was visiting New York when she was arrested by the NYPD. *Williams*, 34 F. Supp. 3d 293, 297. She alleged that following her arrest, NYPD officers did not accommodate her hearing impairment, in violation of the Americans with Disabilities Act. *Id.* Plaintiff requested that the NYPD be required "to adopt policies and procedures to provide accommodations to hearing-impaired persons upon arrest and incarceration." *Id.* Even though plaintiff lived in Maryland, owned property in New York, and sufficiently alleged an intent to return to New York in the future, the court found those allegations were insufficient to establish standing. *Williams*, 34 F. Supp. 3d at 297. The court noted that

plaintiff had alleged only incident where she had contact with the NYPD, and she did not allege any other contact "since the filing of this suit, peaceful or otherwise." *Williams*, 34 F. Supp. 3d at 297. The court further found that even if plaintiff had requested broader injunctive relief, such as requiring that the NYPD provide services any time it encountered a person who was hearing impaired, and not just upon arrest, plaintiff still could not allege facts sufficient to establish that she had an injury in fact because she would not necessarily have contact with the NYPD again. *Id*. Accordingly, she did not plausibly allege that she was "'immediately in danger of sustaining some direct injury as the result of the challenged official conduct.'" *Williams*, 34 F. Supp. 3d at 295 (quoting *Shain v. Ellison*, 356 F.3d at 215). The court dismissed the claim for lack of standing.

Similarly here, Plaintiffs do not allege facts sufficient to show that they are immediately in danger of sustaining a direct injury. The possibility that they may take a domestic flight one day in the future is not sufficient to show that they will be subject to a similar identification following a domestic flight. *Williams v. City of New York*, 34 F. Supp. 3d 292. Even the allegation that Plaintiffs "intend to take domestic flights regularly" (Compl., ¶ 86) falls short of establishing a real and imminent injury. *McLennon v. City of New York*, 171 F. Supp.3d 69. In short, Plaintiffs' allegations are insufficient to establish a certainly impending injury. As a result, they do not have standing for the injunctive relief they request.

2. Plaintiffs cannot show an official policy or its equivalent.

Plaintiffs attempt to bolster their claims of standing by alleging that CBP conducted the identification check pursuant to a policy. Compl., ¶ 81. However, as mentioned above in the discussion of Plaintiffs' APA claim, the factual allegations in the Complaint do not plausibly allege an official policy or its equivalent.

Because Plaintiffs cannot show a "certainly impending" injury, as required to establish standing for the exceedingly broad injunctive relief they seek, the Complaint must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request dismissal of Plaintiffs' Complaint in its entirety.

Dated: Brooklyn, New York
March 9, 2018

Respectfully submitted,

RICHARD P, DONOGHUE
United States Attorney
Eastern District of New York
Attorney for Defendants
271 Cadman Plaza, East, 7th Fl.
Brooklyn, New York 11201
By: s/ Dara A. Olds
DARA A. OLDS
Assistant United States Attorney
dara.olds@usdoj.gov