IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

AARON TOBEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:11cv154-HEH**
	)	
JANET NAPOLITANO, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF
FEDERAL DEFENDANTS' MOTION TO DISMISS

Plaintiff alleges that certain federal officials violated his First, Fourth, and Fifth Amendment rights when he removed his clothing and displayed the text of the Fourth Amendment on his chest upon entering the security screening checkpoint prior to boarding a flight from Richmond International Airport. The First Amended Complaint states claims against Janet Napolitano, Secretary of the Department of Homeland Security (DHS), and John Pistole, Administrator of the Transportation Security Administration (TSA), in their official capacities and also names two Transportation Security Officers (TSOs), "Rebecca Smith" and Terri Jones"[1] in their official as well as individual capacities. The only bases plaintiff asserts to support his claims are the decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983.[2] The First Amended Complaint also

[1] Pursuant to a Stipulated Protective Order, the parties have agreed that use of pseudonyms will continue to be used on the public record until after the Court rules on the federal defendants' motion to dismiss.

[2] The instant motion is brought only on behalf of the federal defendants. In addition to these federal officials, plaintiff also has named as defendants the Capital Region Airport Commission (CRAC); Victor Williams, Director of Public Safety and Operations, Richmond

purports to sue the TSOs in their individual capacities under *Bivens*.

Plaintiff's claims against the federal defendants in their official capacities under *Bivens* are barred by sovereign immunity and, thus, the First Amended Complaint should be dismissed with prejudice with respect to the official capacity defendants for lack of subject matter jurisdiction. Further, with respect to these federal defendants and those sued also in their individual capacity, plaintiff has not set out a claim for relief under 42 U.S.C. § 1983. Moreover, with respect to the individual capacity federal defendants, plaintiff's First Amended Complaint should be dismissed under the doctrine of qualified immunity. Even accepting all the factual allegations as true, the individual capacity defendants did not violate any right secured by the Constitution. In addition, even if this Court were to hold that the individual capacity defendants violated plaintiff's constitutional rights, they are entitled to qualified immunity because at the time they acted it was not clearly established that their actions were improper. Thus, plaintiff's claims should be dismissed with prejudice.

BACKGROUND

A. Federal Authority Over Aviation Security Systems and Passenger Screening

Following the terrorist attacks of September 11, 2001, Congress created TSA, now a component within DHS, to better protect all modes of transportation, and specifically charged the Administrator of TSA with overall responsibility for civil aviation security. 49 U.S.C. § 114(d); 6 U.S.C. § 202(1). As part of this responsibility, the Administrator of TSA must "assess current

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International Airport Police (hereinafter referred to as "RIC Police"); Quentin Trice, Chief of Police, RIC Police; and Calvin Vann, Anthony Mason, and Jeffrey Kandler, officers, RIC Police. Separate counsel represents these defendants, hereinafter collectively referred to as the "state defendants."

and potential threats to the domestic air transportation system," including the "extent to which there are individuals with the capability and intent to carry out terrorist or related unlawful acts against that system and the ways in which those individuals might carry out those acts." 49 U.S.C. § 44904(a). Recognizing the ever-changing nature of aviation threats, Congress required TSA to engage in a "continuous analysis and monitoring" of such security threats. *Id.* The Administrator of TSA is further charged with taking "necessary actions to improve domestic air transportation security by correcting any deficiencies" that are discovered through this continuous monitoring. *Id.* § 44904(e); *see also* 49 U.S.C. § 44903(b).

To fulfill its responsibility for securing the nation's aviation system, TSA relies on multiple mechanisms and layers of defense. *See* TSA Management Directive 100.4 (hereinafter "TSA MD 100.4") (Exh. A) at 5-6.[3] For example, Congress requires that passengers be pre-screened by comparing passenger information to No-Fly or Selectee lists maintained by the federal government. 49 U.S.C. § 44903(j). Further, Congress has directed TSA to provide for "the screening of all passengers and property . . . before boarding," in order to ensure that no passenger is unlawfully carrying a dangerous weapon, explosive, or other destructive substance. *Id.* §§ 44901(a), 44902(a), 114(e). In addition, TSA regulations prohibit passengers or others from interfering with screening personnel. 49 C.F.R. § 1503.401 (allowing TSA to assess civil penalties for such interference).

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[3] A court may consider documents integral to plaintiff's claims and "documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed." *Witthohn v. Fed. Ins. Co.*, 164 Fed. Appx. 395, 396-97 (4th Cir. 2006). This includes documents "attached to the motion to dismiss, so long as they are integral to the complaint." *Sec'y of State For Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006) (same).

Passenger compliance with security procedures is a mandatory precondition for boarding and flying on commercial airlines. 49 C.F.R. §§ 1540.105(a)(2) (prohibiting individuals from entering a secured or sterile airport area "without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas."); 1540.107(a) ("No individual may . . . board an aircraft without submitting to the screening and inspection of his or her person . . . in accordance with the procedures being applied to control access to that area or aircraft . . . ."); *see also* 49 U.S.C. §§ 44901-44903.

B. Plaintiff's Allegations

Plaintiff acknowledges that TSA is responsible for maintaining the security of commercial air travel and for promulgating policies relating to and conducting security screening at airports. 1st Am. Compl. ¶¶ 5, 6, 13. Plaintiff claims that the official capacity defendants, Napolitano and Pistole, are responsible for "the administration and management of TSA's programs, policies, [and] procedures," including those programs, policies, and procedures relating to "security screening at airports," for supervising employees, and for "ensuring compliance by TSA with applicable law." *Id.* ¶¶ 5, 6. TSA works with local airport authorities, such as CRAC and the RIC Police, to provide security at airports. *Id.* ¶¶ 21-23.

The First Amended Complaint alleges that, on his way to his grandfather's funeral on December 30, 2010, plaintiff determined to protest his objections to TSA's use of AIT and "enhanced" pat-downs by writing a paraphrased version of the Fourth Amendment on his chest and abdomen. 1st Am. Compl. ¶¶ 25-26. Plaintiff alleges that, upon reaching the passenger screening location, a TSO directed him away from the magnetometer (or metal detector) and toward an AIT unit. Instead of entering the AIT unit, plaintiff removed his T-shirt and sweat

pants, placed them on the conveyor belt, and stood in athletic running shorts, revealing the Fourth Amendment-related message to TSA screening agents and other persons present in the checkpoint screening area. *Id.* ¶¶ 30-31. Plaintiff alleges that TSO "Rebecca Smith" informed him that removal of his clothing was unnecessary, but plaintiff responded that he wished to so do to express his view that the enhanced screening procedures, including AIT, are not constitutional. *Id*. ¶ 32. Plaintiff claims that defendant Smith then radioed for assistance and that either defendant "Terri Jones" (or another Supervisory TSO (STSO)) directed plaintiff to stay where he was in front of the AIT unit, "whereupon Defendant Jones sought intervention" by the RIC Police. *Id*. ¶ 33. Plaintiff alleges the RIC Police officers detained him, but that he eventually was cleared and permitted to board a flight. *Id.* ¶¶ 55-64.

In addition to bringing this lawsuit against CRAC, the RIC Police, and certain named and unnamed individual state officers, plaintiff has sued Napolitano and Pistole in their official capacities only, and the individual TSOs involved in their official and personal capacities. 1st Am. Compl. ¶¶ 7-8, 10-11. Plaintiff alleges violations of his First, Fourth, Fifth, and Fourteenth Amendment rights against all defendants pursuant to *Bivens* and/or Section 1983, in addition to state law false imprisonment and malicious prosecution claims against the individual CRAC officers. *Id.* ¶¶ 98-128.

Specifically with respect to Napolitano and Pistole, plaintiff alleges that, by "removing unnecessary clothing" to display the Fourth Amendment "painted" on his chest, he was engaging in political expression to protest airport checkpoint screening policies he believes to be unconstitutional. 1st Am. Compl. ¶ 79. Plaintiff asserts that these defendants failed to prevent their agents from interfering with plaintiff's exercise of his First Amendment rights. *Id.* ¶ ¶ 86-

87, 106. Plaintiff further claims that Napolitano and Pistole failed to "train, supervise, and oversee the personnel acting under their authority" to avoid plaintiff's "improper arrest" in violation of the Fourth Amendment. *Id.* ¶ 100. Plaintiff also alleges that these official capacity defendants violated the Fifth Amendment because they failed to "train, supervise, and oversee" personnel to make sure that TSA MD 100.4 and other checkpoint screening policies are implemented in a manner so as not to deprive plaintiff equal protection under the law. *Id.* ¶ 113.

Plaintiff claims that the TSOs sued in their individual capacities, "acting individually or in concert" with each other and with certain CRAC or RIC employees, caused him to be arrested and seized in violation of the Fourth Amendment. 1st Am. Compl. ¶ 99. Further, plaintiff alleges that the individual capacity defendants "engaged in content and/or viewpoint discrimination" in violation of the First Amendment when they denied plaintiff of his "fundamental right to engage in free speech" by protesting TSA's screening policies and practices. *Id.* ¶ 105. Plaintiff also alleges that, by treating him differently than "other air travelers subject to the same screening process," the individual TSO defendants violated his equal protection rights. *Id.* ¶¶ 111-112.

ARGUMENT

I. ALL CLAIMS FOR DAMAGES AGAINST THE FEDERAL DEFENDANTS IN THEIR OFFICIAL CAPACITY ARE BARRED BY SOVEREIGN IMMUNITY

The federal defendants, all of whom are sued in their official capacities, move to dismiss plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter

jurisdiction.[4] A suit against a federal officer in his or her official capacity is treated as a suit against the agency itself. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("the real party in interest in an official-capacity suit is the governmental entity and not the named official"); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The federal government may waive its sovereign immunity, but such waiver must be "unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Waivers of sovereign immunity must be "strictly construed... in favor of the sovereign," *Lane,* 518 U.S. at 192, and a limited waiver of sovereign immunity may not be "enlarge[d]... beyond what the language requires." *United States v. Nordic Village, Inc*., 503 U.S. 30, 34 (1992). *See also Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89 (1990).

The federal government has not waived its sovereign immunity from suit for monetary damages arising from constitutional violations. While an action based on *Bivens,* 403 U.S. 388 (1971), may lie against a government official in his individual capacity, the Supreme Court has expressly declined to extend a *Bivens* damages remedy against a federal agency or a government official in his official capacity. *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994). *See also Correctional Services Corp. v. Malesko*, 534 U.S. 61, 71-72 (2001). Sovereign immunity and the logic of *Bivens* itself bars such claims from being brought against either agencies of the United States or government officials in their official capacity. *See Meyer*, 510 U.S. at 473, 484-86

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[4] In deciding whether to grant a motion under Rule 12(b)(1), the Court may consider matters outside the pleadings. *Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004).

(*Bivens* does not apply to agencies); *Reinbold v. Evers*, 187 F.3d 348, 355 n.7 (4th Cir. 1999); *see also Graham*, 473 U.S. at 165-66 (1985) (official capacity suit is suit against government).

Plaintiff is seeking to assert a respondeat superior tort claim against the United States, which he alleges is liable for constitutional violations by federal employees acting within the scope of their federal employment. As noted above, a determination of whether there is a waiver of sovereign immunity depends on the type of claim asserted. In this case, plaintiff seeks to recover money damages due to his alleged personal injuries. For this tort claim, the only waiver of sovereign immunity that would apply is the Federal Torts Claims Act (FTCA), 28 U.S.C. § 1346. Under the FTCA, the United States may be liable on a respondeat superior basis for tortious conduct by federal employees, but the FTCA's waiver of sovereign immunity is limited to conduct which is negligent or wrongful under state tort law. 28 U.S.C. § 1346(b)(1). Inasmuch as plaintiff has neither perfected a claim nor filed this action under the FTCA, this Court may not exercise subject matter jurisdiction over any constitutional tort claim against the United States and, thus, plaintiff's constitutional claims against the federal defendants in their official capacities should be dismissed.[5]

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[5] Even if the claims against Napolitano and Pistole in their official capacities were not determined to be barred by sovereign immunity, the First Amended Complaint fails to make out sufficient claims against these officials. Plaintiff conclusorily alleges that Napolitano and Pistole "failed, and/or have been deliberately indifferent, in their respective duties to train, supervise, and oversee the personnel acting under their authority" so as to avoid actions resulting in the deprivation of constitutional rights. 1st Am. Compl. ¶¶ 100, 106, 113. Under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), however, government officials may not be held responsible for the misconduct of their subordinates under a broad theory of "supervisory liability." *Id.* at 1949. Rather, a supervisory official may be held liable under *Bivens* only if a plaintiff demonstrates that the supervisor "through [his or her] own actions, has violated the Constitution." *Id.* at 1948. Plaintiff has not alleged that the official federal defendants were involved in the incidents that occurred at the Richmond International Airport on December 30, 2010. Nor has plaintiff asserted that either Napolitano or Pitole had a direct role in supervising or training the TSOs

II. PLAINTIFF'S CLAIM UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Three of plaintiff's claims (the First, Second, and Third) in the First Amended Complaint are against all federal defendants.[6] Each of these claims is brought "under 42 U.S.C. § 1983 and/or *Bivens*." 1st Am. Compl. ¶¶ 103, 109, 116. Under Rule 12(b)(6), plaintiff fails to state a claim against the federal defendants because 42 U.S.C. § 1983 operates only against persons acting under color of state, not federal, law. *See, e.g., Kotmair v. Gray*, 505 F2d 744, 746 (4th Cir. 1974). In order to find a violation of § 1983, a district court must find that the defendants acted 'under color of state law' and deprived the plaintiffs of their rights under federal law." *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992). But because federal officials "generally do not act under 'color of state law,'" they are usually not liable under Section 1983. *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir. 1988). *See also District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973) (because § 1983 only deals with acts accomplished under color of state law, the "actions of the Federal Government and its officers are at least facially exempt from its proscriptions").

Here, the federal defendants acted exclusively under federal law when implementing and administering checkpoint screening policies at the Richmond International Airport. 49 U.S.C. §§ 44901(a), 44902(a), 114(e). Further, although federal officials must "establish procedures for notifying . . . appropriate State and local law enforcement officials" of individuals suspected of posing a threat to airline safety, 49 U.S.C. § 114(h)(2), this level of cooperation does not mean

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named in their personal capacities. For these reasons, plaintiff has failed to make out sufficient claims in his First Amended Complaint against Napolitano and Pistole.

[6] These claims, as well as the Fourth and Fifth claims, lie against the state defendants.

federal officers are acting under color of state law, nor does it subject their actions to liability under § 1983. *See Strickland v. Shalala*, 123 F.3d 863, 866 (6th Cir. 1997) (participating in, and implementation of, a "cooperative federalism scheme" is insufficient to subject federal officers to § 1983 liability). Nor can the mere act of radioing the RIC Police for assistance support plaintiff's claim that the federal and state defendants conspired to deprive him of his constitutional rights. Such activity cannot and does not amount to a "conspiracy" sufficient to impose liability on federal officers under § 1983. *See Cabrera*, 973 F.2d at 743; *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir. 1983). Thus, plaintiff cannot prevail on his § 1983 claims against the federal defendants.

III. THIS COURT SHOULD DISMISS PLAINTIFF'S PERSONAL LIABILITY, CONSTITUTIONAL TORT (*BIVENS*) CLAIMS AGAINST THE INDIVIDUAL FEDERAL DEFENDANTS BECAUSE THEY ARE PROTECTED FROM SUIT BY THE DOCTRINE OF QUALIFIED IMMUNITY

Under the doctrine of qualified immunity, government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*. 457 U.S. 800, 818 (1982). The doctrine of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent and those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *Accord Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

The qualified immunity defense has two steps. *Al-Kidd*, 131 S. Ct. at 2080; *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, a court must decide whether "the facts alleged show the

officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201; *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). Second, if such a violation exists, the court must decide whether that right was "clearly established" at the time the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202; *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

A. Plaintiff Has Established No Constitutional Violation At All

A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Jean v. Collins*, 221 F.3d 656, 658 (4th Cir. 2000) (citation omitted). Deciding this issue first can save a defendant from having to engage in expensive and time consuming preparation to defend the suit on its merits. It also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public. *Collins*, 221 F.3d at 659. In this case, accepting all well pleaded factual allegations as true, it is clear the individual capacity federal defendants did not violate the Constitution when they undertook common sense efforts to prevent plaintiff from interfering with their efforts to screen the passengers behind him at the checkpoint by disrupting the screening process at the checkpoint.

1. Fourth Amendment

Plaintiff's First Amended Complaint fails to offer any well-pleaded factual allegations showing that any federal official acted in a manner inconsistent with the Fourth Amendment. In his First Claim, plaintiff asserts that defendants Smith and Jones "acting individually or in concert, arrested Plaintiff, and/or collaborated in causing his arrest and seizure, without probable cause to believe he had violated any Law" in violation of the Fourth Amendment. 1st Am.

Compl. ¶¶ 99.[7] Contrary to plaintiff's claim of a Fourth Amendment violation, the individual capacity defendants acted in a manner consistent with the Constitution.

Once a traveler enters the security checkpoint screening process he cannot withdraw. *United States v. Herzbrun*, 723 F.2d 773, 776 (11th Cir. 1984); *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973). Here, plaintiff refused TSO Smith's direction to proceed through the AIT. Even viewing these allegations in the light most favorable to plaintiff, his actions amounted to a request to opt out of the scanner. 1st Am. Compl. ¶¶ 32-33; *Davis*, 482 F.2d at 913. At this point, plaintiff could not opt out of the screening process and TSA protocols dictate that plaintiff undergo secondary screening, *see, e.g., United States v. Hartwell*, 436 F.3d 174, 178-79 (3d Cir. 2006), to which plaintiff objected. 1st Am. Compl. ¶ 26.

Under clearly established law, officials such as the TSOs reasonably could have assumed that the Fourth Amendment permits them to call airport police if a passenger fails to follow their instructions and, thus, to comply with checkpoint screening procedures. Air passengers are on notice that they will be searched. *Hartwell*, 436 F.3d at 178-79 (quoting *Singleton v. Comm'r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979) (approving a search where passengers "were given advance notice that the search was to be conducted, and could elect not to be searched by deciding not to board the aircraft"). *See also* 49 C.F.R. § 1540.107(a) (no individual may board

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[7] Pleading the constitutional claims in conspiracy terms yields no leverage. Courts have expressly rejected efforts to plead civil rights conspiracy claims with "only bare allegations." *See, e.g., Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977); *Granville v. Hunt,* 411 F.2d 9, 11 (5th Cir. 1969). A conspiracy claim must contain facts "show[ing] a link between the alleged conspirators," and "overt acts related to the promotion of the claimed conspiracy." *Granville*, 411 F.2d at 11. Plaintiff supplies only broad brush assertions that defendants Smith and Jones "acting individually or in concert" with the state defendants. 1st Am. Compl.¶ ¶ 99, 105, 111. These conclusory statements plainly are insufficient.

an aircraft without complying with security checkpoint procedures). In addition, air passengers choose to fly, and screening procedures of this kind have existed in every airport in the country since the 1970s. *Herzbrun*, 723 F.2d at 776 ("those presenting themselves at a security checkpoint thereby consent automatically to a search and may not revoke that consent if the authorities elect to conduct a search.") (citing *United States v. Skipwith*, 482 F.2d 1272, 1281 (5th Cir. 1973)). *See also Davis*, 482 F.2d at 913 (if a passenger chooses to proceed with the checkpoint screening process by placing his items on the belts and removing outer garments, he has consented to a search, "granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment."). The events since September 11, 2001 have only increased the necessity for such screening, as the traveling public is well aware. *United States v. Aukai*, 497 F.3d 955, 956, 958-59 (9th Cir. 2007) (en banc); *Hartwell*, 436 F.3d at 181.

The Fourth Amendment is not violated where passengers are not permitted to disengage from an administrative search. *Aukai*, 497 F.3d at 961 ("The constitutionality of an airport screening search, however, does not depend on consent . . . requiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by 'electing not to fly' on the cusp of detection until a vulnerable portal is found."); *see also Hartwell*, 436 F.3d at 181 n.12 ("Hartwell argues that once the TSA agents identified the object in his pocket and he refused to reveal it, he should have had the right to leave rather than empty his pockets. We reject this theory."); *Torbet v. United Airlines*, 298 F.3d 1087, 1090 (9th Cir. 2002) (after entering a security checkpoint screening and, thus, consenting to a search, "the Fourth Amendment does not require that passengers be given a safe exit once

detection is threatened.").

The decision in *Aukai* is particularly instructive here. In that case, Aukai did not have a government-issued identification and, thus, his boarding pass contained a "No ID" notation. 436 F.3d at 957. A TSO directed Aukai to a roped-off area near the checkpoint security screening area for secondary screening. *Id.* Although Aukai initially complied, he complained he was in a hurry to catch his flight and did not remain in the roped-off area. *Id.* When the TSO noticed that Aukai had left the area to obtain his belongings, she would not permit him either to retrieve his property or to leave the roped-off area. *Id.* The Ninth Circuit concluded that, under the circumstances, the "duration of the detention associated with this airport screening search," which lasted approximately 18 minutes, was reasonable because "it was not prolonged beyond the time reasonably required to rule out the presence of weapons or explosives." *Id*. at 962-63 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (a seizure can become unlawful if it is "prolonged beyond the time reasonably required to complete [its] mission")).

Like in *Aukai*, plaintiff here entered the checkpoint screening process when he "proceeded to the conveyor belt and as directed placed his belt, shoes, wallet, phone, computer, carry on bag and sweatshirt on the conveyor belt." 1st Am. Compl. ¶ 29. After being directed to an AIT machine, plaintiff removed his T-shirt and sweatpants, and placed these articles of clothing on the conveyor belt. At that point, rather than proceed through the AIT machine as directed, plaintiff stood in the security line revealing the paraphrased language of the Fourth Amendment on his person. *Id.* ¶¶ 30-31. Given that plaintiff had entered the security checkpoint screening process, TSO Smith and STSO Jones detained plaintiff; "shortly thereafter," members of the RIC Police arrived at the checkpoint security screening area and took plaintiff into

custody. 1st Am. Compl. ¶ 34. Thus, as in *Aukai*, the TSO defendants here detained plaintiff for a reasonable period of time. Therefore, plaintiff has not established that TSO Smith and STSO Jones violated the Fourth Amendment and they are entitled to qualified immunity.

2. First Amendment

Plaintiff's Second Claim is that the individual capacity federal defendants acted "individually or in concert" with other to deprive him of his First Amendment right to engage in free speech. 1st Am. Compl. ¶ 105. Plaintiff alleges he was engaging in nonviolent expression of his objection to TSA's deployment of AIT and the enhanced pat-down procedures, and that he was seized as a result of this protest and political expression in violation of the First Amendment. *Id.* Plaintiff's allegations are not sufficient to establish that plaintiff's detention by the TSOs violated the First Amendment.

Under regulations, TSA prohibits interference with screening personnel, 49 C.F.R. § 1540.109, and may impose a civil penalty if such interference occurs. 49 C.F.R. § 1503.401 (allowing TSA to assess civil penalties of $10,000 against an individual for violation of any TSA requirement). Section 1540.109 states that "[n]o person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter."

In *Rendon v. Transportation Security Administration*, 424 F.3d 475 (6th Cir. 2005), plaintiff raised a First Amendment challenge to a civil penalty assessed for violation of section 1540.109. In that case, plaintiff was a passenger who became increasingly belligerent during an extended wait for a TSO to conduct secondary screening. The passenger's behavior, which consisted of escalating loud and profane comments, was so disruptive that TSA personnel

determined that they needed to close the lane so that they could handle the situation. After an administrative judge upheld the penalty, the plaintiff filed a petition for review with the Sixth Circuit claiming that Section 1540.109, as applied to him, was a content-based regulation in violation of his First Amendment right to freedom of speech.

The court disagreed, and rejected plaintiff's argument that section 1540.109 is a content-based regulation. The court relied heavily on the regulatory history of this provision, which expressly disavowed enforcement against "good-faith questions from individuals seeking to understand the screening of their persons or their property," distinguishing such behavior from "abusive, distracting behavior, and attempts to prevent screeners from performing required screening." 424 F.3d at 478 (citing 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002)). Thus, the court concluded that "the regulation (on its face and as applied) is a content-neutral regulation, 'as it is justified without reference to the content of the regulated speech.'" *Id.* at 479 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, (1989)). Further, the court found that the record supported TSA's argument that the regulation's incidental burden on speech was justified. "It is clear that this regulation serves a substantial government interest, as its purpose is to prevent individuals from interfering with screeners in the performance of their duties, which are to both ensure that those screened are not potentially carrying weapons and to conduct the screening of passengers as efficiently as possible." *Id.* The court also determined that "it goes without saying that this regulation (prohibiting interfering with screeners) directly and effectively advances the government's interest in ensuring that screeners are not interfered with in the performance of their screening duties." *Id.*

As in *Rendon,* plaintiff here engaged in "distracting behavior" that prevented TSO Smith

from "performing required screening" when he failed to follow her direction to proceed through the AIT scanner. The prevention of interference with screeners and the checkpoint security screening process serves a valid governmental interest to prevent acts of terrorism on commercial airlines. Thus, plaintiff has not established a claim that his First Amendment rights have been violated.

3. Fifth Amendment

In his Third Claim, plaintiff alleges that, by exceeding their authority under TSA MD 100.4, statutes, and regulations, the individual capacity federal defendants treated him differently from other air travelers by failing to follow applicable guidelines. 1st Am. Compl. ¶ 111. By plaintiff's own admission, he was directed to an AIT machine but instead removed his outer articles of clothing. *Id.* ¶¶ 30-32. At that point, TSO Smith called her supervisor, who then called the RIC Police. *Id.* ¶ 33.

Plaintiff has not adequately stated a claim of disparate treatment by noting that other passengers who took the same actions he took and who engaged in similar expression were treated in a different manner by TSOs at an airport checkpoint screening location. Further, nothing in TSA MD 100.4 specifically precludes the actions taken by the TSO and the STSO. Exh. A. In fact, MD 100.4 states that "TSA's layered security strategy includes an overlapping system of screening and searches. No single security measure or method is sufficiently reliable to be depended upon in isolation." *Id.* at 6. Given this language, it is clear that there is no right or wrong way to handle a specific issue as it arises during the security screening process. TSA's checkpoint screening policies are applied to all members of the air traveling public who wish to fly via commercial airlines. 49 U.S.C. §§ 44901-44903; 49 C.F.R. §§ 1540.105(a)(2);

1540.107(a). *Compare Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984). The requirement simply obligates a person who wants to travel on an airplane to consent to the checkpoint screening requirements, which has nothing whatsoever to do with freedom of expression or petitioning the Government. *See*, *e.g., Arcara v. Cloud Books*, 478 U.S. 697, 706-07 (1986) ("[W]e have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."); *id.* at 708 (O'Connor, J., concurring) ("Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment."). Therefore, plaintiff has not stated a claim of disparate treatment.

B. Even if The Court Finds the Individual Capacity Defendants Violated the Constitution, There Was No Clearly Established Law

Even if the Court were to determine that the individual capacity defendants violated the Constitution, public officials are entitled to qualified immunity so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Court must decide whether that right was "clearly established" at the time the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202; *Anderson,* 483 U.S. at 641. It is not enough for the plaintiff to identify some generalized constitutional right that was established at the time of the relevant conduct. *Saucier*, 533 U.S. at 201-202.

In this case, the facts alleged in the First Amended Complaint do not demonstrate that any

clearly established rights of plaintiff were violated. Because of TSA's responsibility for ensuring civil aviation security combined with heightened security concerns in the post-9/11 era, it was reasonable for the TSOs to take action to detain plaintiff until the RIC Police arrived in order to discontinue the interference that plaintiff had caused at the security screening checkpoint. As already discussed, statutes, regulations and policies authorize TSA in general, and TSOs in particular, to screen passengers before they enter the secure area of an airport in order to minimize the threat of a terrorist act. Included among these regulations is 49 C.F.R. § 1540.109, which specifically prohibits any person, including passengers, from interfering with the security checkpoint screening process.

As demonstrated above, the case law applying the statutes, rules, and regulations relating to TSA's responsibility for civil aviation security is inconsistent with a determination that the TSOs violated a clearly established constitutional right. To the contrary, the facts plaintiff has alleged cannot lead to the conclusion that there was law under the First, Fourth, Fifth Amendments that prevented the TSOs from detaining plaintiff at the screening area for the reasonable amount of time that it took the RIC Police to arrive on the scene after he failed to compy with TSO Smith's direction to enter the AIT scanner and then removed his outer garments. Further, plaintiff has not identified any statute, regulation, or other policy that affects, or even regulates, a person's right to enter into the security screening process and then to interfere with the screening efforts by refusing to follow the TSO's directions and standing without moving in the security screening checkpoint area. TSA engages in a multi-layered security checkpoint screening process which, by its very nature, requires compliance by passengers with TSA's procedures. TSA MD-100.4. Plaintiffs' conclusory claims of constitutional violation are

insufficient to demonstrate that, given the actions the TSOs took for national security-related reasons, that the individual capacity defendants violated plaintiff's known constitutional rights.[8]

WHEREFORE, Defendants respectfully request that the Court dismiss plaintiff's First Amended Complaint, with prejudice, as to the federal defendants and for such further relief as the Court deems appropriate.

DATED this 27th day of June, 2011.

Respectfully submitted,

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[8] Plaintiff's First Amended Complaint (at 29-30) also seeks declaratory and injunctive relief. Plaintiff states no causes of action to support these claims for relief. Further, plaintiff has not demonstrated standing to assert a claim for either injunctive or declaratory relief because there is no allegation that past conduct has continued or will be repeated in the future. *See generally City of Los Angeles v. Lyons*, 461 U.S. 95, 108-11 (1983).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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