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'S SECOND AMENDED COMPLAINT

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. In filing a Second Amended Complaint that is, except in a handful of instances, identical to his First Amended Complaint, plaintiff overlooks the Court's August 30, 2011 Memorandum Opinion and Order (docket #s 53, 54), which dismissed all of the official capacity claims against the federal defendants and all of the claims against the individual capacity defendants, except for plaintiff's claim of a First Amendment violation.

The federal defendants move for dismissal of the official and individual capacity claims against "Jane Doe,"[1] who plaintiff alleges was a supervisory employee of the Transportation Security Administration (TSA) at the Richmond International Airport on December 30, 2010,

[1] This memorandum uses the pseudonym "Jane Doe" in a manner consistent with plaintiff's Second Amended Complaint.

when plaintiff staged his protest of TSA's passenger security procedures. Because the Court already has dismissed identical official capacity claims as well as identical individual claims under the Fourth and Fifth Amendments, to the extent any responses are required with respect to such dismissed claims, the reasons supporting the federal defendants' Motion to Dismiss the First Amended Complaint and the Federal Defendants' Answer are incorporated herein by reference. This motion thus focuses on the only claim extant as a result of the Court's August 30 Memorandum Opinion, which consists of a First Amendment individual capacity claim.

With respect to the First Amendment claim, plaintiff's Second Amended Complaint does not give rise to a plausible inference that Doe took any action as a result of the message plaintiff had written on his chest. Even accepting all the factual allegations as true, Doe did not violate any right secured by the Constitution and is entitled to qualified immunity. In addition, even if this Court were to hold that Doe violated plaintiff's constitutional rights, she is entitled to qualified immunity because at the time she acted it was not clearly established that her actions were improper. Thus, plaintiff's claims should be dismissed with prejudice.

BACKGROUND

The federal defendants herein incorporate the Background discussion from the Memorandum in Support of the Motion to Dismiss Plaintiff's First Amended Complaint (docket # 33), except as follows:[2]

Plaintiff alleges that Doe was, on December 30, 2011, the "manager of the TSA security

[2] The Second Amended Complaint references federal defendant Doe in paragraphs 9, 33, 35, 36, 37, 38, 99, 105, 111, 112, and 113, as well as in subparagraph B of the Prayer for Relief. Except as noted in the text, the federal defendants' response to the allegations in these paragraphs on Doe's behalf is the same as for the other federal defendants.

checkpoint 'B'" at the Richmond International Airport. Pl.'s 2d Am. Compl. ¶ 9. In addition, after 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 claims that defendant Smith then radioed for assistance and that either defendant "Terri Jones" (or another Supervisory Transportation Security Officer) directed plaintiff to stay where he was in front of the AIT unit, "whereupon Defendants Jones and Doe sought intervention" by the RIC Police. *Id.* ¶ 33. Plaintiff further claims that Doe approached Richmond Airport Commission police officers Vann and Mason "to inform them of the incident involving Plaintiff and request that they take action against him." *Id.* In addition, plaintiff alleges that, shortly after plaintiff was "seized and handcuffed" by the Richmond Airport Commission police officers, Doe "searched Plaintiff's belongings at the security checkpoint, removing an unidentified item from those belongings." *Id.* ¶ 35.

There are several regulatory provisions that address the responsibilities of passengers and other individuals and persons in the context of security screening. *See* 49 C.F.R. part 1540, subpart B. Among those provisions are 49 C.F.R. § 1540.105, which addresses the security responsibilities of employees and other persons, and 49 C.F.R. § 1540.109, which addresses "interference that might distract or inhibit a screener from effectively performing his or her duties" in order to emphasize "the importance to safety and security of protecting screeners from undue distractions or attempts to intimidate." 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002) (transferring FAA regulatory provisions regarding civil aviation security to TSA).

ARGUMENT

I. FEDERAL DEFENDANT DOE IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFF'S SECOND AMENDED COMPLAINT DOES NOT SET FORTH A PLAUSIBLE CLAIM UNDER THE FIRST AMENDMENT

Qualified immunity shields government officials from discovery and the other burdens of litigation where a complaint fails adequately to allege that the defendant violated clearly established law. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). The threshold question in every such case is whether the plaintiff's complaint is legally sufficient to overcome that immunity. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946-47 (2009). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and in *Iqbal*, 129 S. Ct. 1937, the Supreme Court explained how Rule 8(a)(2) operates when assessing the legal sufficiency of a claim for relief. In *Twombly*, the Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1964-65. Instead, the "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*.

The Court in *Iqbal* explained that the "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully"; instead, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" 129 S. Ct. at 1949. Accordingly, ambiguous allegations of clearly illegal conduct are insufficient under *Iqbal*. *See id.* The "dispositive inquiry . . . is whether it would be clear to a

reasonable officer that his conduct was unlawful in the situation he confronted." *Brousseau v. Haugen*, 543 U.S. 194, 199 (2004). Thus, as *Iqbal* explained, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged- but it has not 'show[n]' -'that the pleader is entitled to relief.'" 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)); *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250,255 (4th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556).

The decision in *Iqbal*, however, did not disturb the established rule that "[i]n evaluating a Rule 12(b)(6) motion to dismiss, a court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint." *Nemet Chevrolet*, 591 F.3d at 255 (citations omitted). Additionally, the plaintiff is entitled to the benefit of all reasonable inferences to be drawn from the well-pled facts. *See, e.g., Giarratano v. Johnson*, 521 F.3d 298, 305 (4th Cir. 2008).

In applying *Iqbal*, the court's first task is to "'identif[y] the allegations' of the . . . complaint that are either extraneous or 'not entitled to the assumption of truth.'" *Giarratano*, 521 F.3d at 305 (quoting *Iqbal*, 129 S. Ct. at 1951). In performing this function, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. When "allegations [are] 'conclusory' restatements of the 'elements of a constitutional discrimination claim,' the Supreme Court [has] refused to accord them an assumption of truth for purposes of weighing a motion to dismiss." *Nemet Chevrolet*, 591 F.3d at 255 (quoting *Iqbal*, 129 S. Ct. at 1951). Courts "are not bound to accept as true a

legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. Thus, as the Fourth Circuit has explained, under *Iqbal* "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts." *Nemet Chevrolet*, 591 F.3d at 255.

Further, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 129 S. Ct. at 1950. In making this inquiry, "the complaint's factual allegations must produce an inference of liability strong enough to nudge the plaintiffs claims 'across the line from conceivable to plausible.'" *Nemet Chevrolet*, 591 F.3d at 256 (quoting *Iqbal*, 129 S. Ct. at 1952). "'[D]etailed factual allegations'" are not required, but the facts pled must "allow a court, drawing on 'judicial experience and common sense,' to infer 'more than the mere possibility of misconduct.'" *Id*. (quoting *Iqbal*, 129 S. Ct. at 1949-50). If "[t]here is nothing but [plaintiff's] speculation" to support a critical fact, the pleading is not adequate. *Id*. at 259; *see Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) ("[C]ourts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer").

Courts have been particularly skeptical of vague allegations that plead a nefarious motive for actions where the more likely explanation is reasonable law enforcement conduct. As the Supreme Court has explained, "[b]ecause an official's state of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials" and this "category of claims therefore implicates obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Crawford-El v. Britton*, 523 U.S. 574,

584-585 (1998). Based on such concerns, the Sixth Circuit recently explained in a First Amendment retaliation case that "vague and conclusory allegations of nefarious intent and motivation by officials . . . are not well-pleaded, and are therefore insufficient to 'plausibly suggest an entitlement to relief.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 377 (6th Cir. 2011); *see Moss v. U.S. Secret Serv*., 572 F.3d 962, 970 (9th Cir. 2009) ("The bald allegation of impermissible motive . . . , standing alone, is conclusory and is therefore not entitled to an assumption of truth."). Thus, a complaint will be dismissed when, other than an allegation of improper motive, "[n]othing in the alleged conduct of relevant federal law enforcement officers plausibly suggests that they were motivated by anything other than a proper law enforcement motive." *Ctr. for Bio-Ethical Reform*, 572 F.3d at 378.

Similarly, the Fourth Circuit requires plaintiffs bringing claims that turn on a defendant's motivation to "plead specific facts in a nonconclusory fashion to survive a motion to dismiss." *Gooden v. Howard County*, 954 F. 2d 960, 969-70 (4th Cir. 1992) (*en banc*). The court explained that given qualified immunity in this context, "the protection afforded officials by an objective test would be illusory if the simple allegation of discriminatory animus sufficed to set it aside." *Id*.; *see Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984) ("[I]n some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits."). Accordingly, as the Supreme Court has explained, "[w]hen a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense" by, among

other things, "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive . . . in order to survive a prediscovery motion for dismissal." *Crawford-El*, 523 U.S. at 597-98.

Like this case, *Iqbal* dealt with a claim that required proof of discriminatory intent. *See* 129 S. Ct. at 1948 (equating inquiry there with that in case alleging "discrimination in contravention of the First . . . Amendment[]" where "the plaintiff must plead and prove that the defendant acted with discriminatory purpose"). The Court explained that "to state a claim based on a violation of a clearly established right, [plaintiff] must plead sufficient factual matter to show that [the defendants] . . . implemented the . . . policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of' the protected conduct or quality." 129 S. Ct. at 1948-49. In turn, when there is a "'more likely explanation[] for the government action that is legitimate . . . ,'" the Court concluded that "[the] factual allegations did 'not plausibly establish' the 'purposeful, invidious discrimination'[plaintiff] asked [the court] to infer." *Nemet Chevrolet*, 591 F.3d at 254 (quoting *Iqbal*, 129 S. Ct. at 1951-52).

Plaintiff's Second Amended Complaint fails under these standards because it does not sufficiently allege that plaintiff's viewpoint (or, for that matter, the content of his speech) motivated TSA employee Doe (or, indeed, any of the TSA employees); instead, the Complaint is fully consistent with the much more likely explanation – that plaintiff's bizarre and disruptive behavior led the agents to seek the assistance of local authorities. *Cf.* Aug. 30 Memo Op. at 31-32 (noting plaintiff's behavior was "bizarre" and justified the TSOs' summoning of the airport police to investigate, in particular given government's heightened security interest at airport security checkpoints). The Second Amended Complaint should therefore be dismissed under

Iqbal. Indeed, plaintiff has not set forth any allegations that Doe acted as she did because of the content of the speech written on plaintiff's chest rather than his unusual behavior in removing his clothing (and in particular his removal of his pants, which could be viewed by an observer as an inappropriate action, and which went beyond his asserted interest in showing the message on his chest). 2d Am. Compl. ¶¶ 33, 35.[3] If anything, the Second Amended Complaint attributes the additional scrutiny plaintiff received to his removal of clothing (instead of proceeding through the AIT as requested); indeed, plaintiff alleges that once he removed his pants, Smith's only response was to "inform[] [Tobey] that removal of clothing was not necessary" for that process. *Id.* ¶ 32.[4]

Given plaintiff's bizarre behavior -- and in particular the fact that he removed his pants in public -- the facts as pled do not "allow a court, drawing on 'judicial experience and common sense,' to infer 'more than the mere possibility of misconduct.'" *Iqbal*, 129 S. Ct. at 1949-50. Further, these allegations simply do not rise to the level of "specific, nonconclusory factual allegations that establish improper motive." *Crawford-El*, 523 U.S. at 597-98. Indeed, there is no allegation in the factual section of his Second Amended Complaint relating to Doe's motivation. Accordingly, the allegations that Doe (like Defendant Jones) "sought intervention by the RIC Police," or requested "that they take action against him," 2d Am. Compl. ¶ 33, like

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[3] Indeed, plaintiff offers no allegation to suggest how Doe would have been aware of plaintiff's actions or the writing on his chest, as officers Vann and Mason "arrived at the area" were plaintiff stood undressed *after* Doe is alleged to have sought their intervention. *Id.* at ¶¶ 33-34. The Second Amended Complaint thus lacks any well-pled allegation that Doe was aware of plaintiff's message or putative expressive conduct.

[4] Plaintiff's own allegations make clear as a sequential matter that Smith only sought the assistance of her supervisor once he made clear that he intended to pursue his own agenda during the course of his screening. 2d Am. Compl. ¶ 35.

the "vague and conclusory allegations of nefarious intent and motivation by officials . . . are not well-pleaded, and are therefore insufficient to 'plausibly suggest an entitlement to relief.'" *Ctr. for Bio-Ethical Reform*, 648 F.3d at 377.

Nor can plaintiff's conclusory allegations demonstrate that Doe acted with improper intent. Plaintiff states that defendants, including Doe, "seized Plaintiff . . . without probable cause because of the message conveyed by Plaintiff's silent, nonviolent expression of objection to the TSA's screening policies that involve random application of AIT or enhanced pat-down procedures, and thereby engaged in content and/or viewpoint discrimination and deprived plaintiff of his fundamental right to engage in free speech. . . ." 2d Am. Compl. ¶ 105. This allegation does not satisfy the standard in *Iqbal* because the placement within the complaint and the language used in this sentence demonstrate that plaintiff is here describing his legal claim. In other words, plaintiff is not in this sentence making a specific factual allegation with respect to the motivation of Doe. Like some of the allegations rejected in *Iqbal*, this sentence comprises a "[t]hreadbare recital[] of the elements of a cause of action, supported by mere conclusory statements" and therefore "do[es] not suffice." *Iqbal*, 129 S. Ct. at 1949. The sentence above does little more than state plaintiff's preferred legal standard for the various causes of action he was pursuing: seizure "without probable cause" and "because of the message," therefore "engag[ing] in content and/or viewpoint discrimination" and violating "his fundamental right to engage in free speech. . . ." 2d Am. Compl. ¶ 105. Such a recitation of legal standards is precisely the sort of allegation that courts have specifically declined to credit as factual allegations. *See, e.g.*, *Monroe v. City of Charlottesville*, 579 F.3d 380, 387 (4th Cir. 2009) ("the allegations that Monroe was 'coerced, that his belief was 'objectively reasonable,' and that the

encounter 'was not [] consensual' are legal conclusions, not facts, and are insufficient"). Indeed, plaintiff's allegation is very similar to the allegation found inadequate in *Iqbal*, that defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" 129 S. Ct. at 1951. Buttressing this conclusion is the fact that plaintiff's more detailed factual allegations are in a different section of the complaint entitled "Facts Regarding December 30, 2010 Incident at RIC." 2d Am. Compl. at 11. Thus, to the extent allegations of fact are included within these legal claims in paragraph 105, a court should "refuse[] to accord them an assumption of truth for purposes of weighing a motion to dismiss." *Nemet Chevrolet*, 591 F.3d at 255.

Further, this statement regarding Doe's motivation is far too conclusory, ambiguous, and implausible to be credited. It is too conclusory because simply stating that defendants acted "because of the message conveyed" does not rise to the level of "'specific, nonconclusory factual allegations' that establish improper motive." *Crawford-El*, 523 U.S. at 597-98. It is insufficiently specific because plaintiff's speech was just one part of a series of actions that was unusual if not bizarre. Plaintiff's allegation that the agents acted "because of the message conveyed"could refer to both his bizarre conduct as well as the speech, and this ambiguity is fatal to his claim. *See Iqbal*, 129 S. Ct. at 1950 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged- but it has not 'show[n]'- 'that the pleader is entitled to relief'"). And it is implausible because the much more likely explanation for the agents' referral was plaintiff's unusual behavior in the screening area. Indeed, the Second Amended Complaint is bereft of any allegation that any TSA

employee made a statement to plaintiff or anyone else that would be indicative of their intent to retaliate against plaintiff based on his message. Absent some additional direct or circumstantial indicia that defendant had an impermissible motive for her actions such as these, plaintiff's allegations that Doe "sought intervention" or requested that officers "take action," 2d Am. Compl. ¶ 33, constitute ambiguous and conclusory assertions that necessarily cannot suffice as the predicate for a viable First Amendment violation.

Plaintiff's First Amendment claim against Doe must be dismissed because, under *Iqbal*, plaintiff's conclusory allegations of improper motive are inadequate. Indeed, as shown above, there is a much "'more likely explanation[ ]"' for the government action that is "legitimate" and the Second Amended Complaint therefore does "'not plausibly establish' the 'purposeful, invidious discrimination' [plaintiff] asked [the court] to infer." *Iqbal*, 129 S. Ct. at 1951-52.

In addition, plaintiff's allegation in paragraph 105 does not differentiate between any of the individual defendants in describing who acted "because of the message conveyed." But it is well established that a plaintiff must attribute facts to each particular defendant and cannot rest on general allegations like these that sweep in all of the defendants as a group. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (dismissing *Bivens* claims in part for failure to satisfy the standard of fair notice required by Rule 8 and explaining that "[g]iven the complaint's use of either the collective term 'Defendants'' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed").

II. PLAINTIFF HAS NOT ESTABLISHED A FIRST AMENDMENT VIOLATION

In an action for damages against government officials performing discretionary functions, courts afford the officers qualified immunity "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and is intended to limit the "substantial societal costs" of imposing monetary liability on government officials, including "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties," *Anderson*, 483 U.S. at 638. Thus, immunity stems from the potential injustice "of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

A qualified immunity defense is analyzed in two steps. First, a court may consider the "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). That first issue -- "whether the plaintiff alleges the violation of a clearly established constitutional right" --

is "purely a question of law" to be decided by the court. *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997). It is the plaintiff's burden to establish the violation of a constitutional right. *Sherwood v. Mulvihill*, 113 F.3d 396,399 (3d Cir. 1997).

The second step "is to ask whether the right was clearly established . . . . The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 201-02. In other words, even if the officer's actions did violate a constitutional right, the question is whether the officer "reasonably but mistakenly" concluded that his actions were lawful. *Anderson*, 483 U.S. at 641. The right cannot simply be generally stated, but "must have been 'clearly established' in a more particularized, and hence more relevant," sense. *Id*. at 640. In short, courts should not "define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). When making this two-part analysis, the Fourth Circuit has cautioned that the fact that "'differences' exist[] between the parties' factual allegations and [that] discovery [i]s not complete" should not forestall a grant of qualified immunity, which must turn on whether, "based on [the plaintiff's] allegations," the defendant's conduct "violated law that was clearly settled at the time the actions occurred." *DiMeglio v. Haines*, 45 F.3d 790, 803 (4th Cir. 1995). Ultimately, this too is a question of law for the court, and while these two analyses should ordinarily be considered in sequence, "judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009).

A. Plaintiff Has Not Established A Violation of a Clearly Established Law

Plaintiff cannot point to any clearly established law that would guide the TSA agents when facing a protest carried out during security screening and tell the agents that it was unconstitutional to refer such a protester to local law enforcement for further questioning. Without such clear authority identifying limits on an appropriate response to a person going through security screening who is staging a protest, Doe should not be held personally liable for damages. The Supreme Court has held, in the context of activity within an airport terminal but outside the security screening area, that restrictions on speech at airport terminals "need only satisfy a requirement of reasonableness." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992). Thus, "it is . . . black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007).

In the context of disruptive conduct in the security checkpoint screening area, "the constitutional question presented . . . is by no means open and shut." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). There is no case describing the contours of the right "in a . . . particularized, and hence more relevant" sense, *Anderson*, 483 U.S. at 640; in other words, there is no case establishing a First Amendment right where a plaintiff's actions involved both speech elements as well as the "bizarre" conduct engaged in here, namely undressing not just in public, but in a context like security screening checkpoint. Under these circumstances, a general standard of reasonableness provides insufficient guidance to TSA employees facing the particular circumstances before them. Instead, to establish potential liability, there must be a closely

analogous situation where it was held that a speech restriction violated the First Amendment. *See al-Kidd*, 131 S. Ct. at 2084 ("The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."). In reality, TSA agents must deal with disruptions in the screening area quickly and based on minimal information about the person, other than the behavior they are witnessing as events unfold, and a bright line regarding screening area disruptions should be established before an agent is to be held personally liable. No such line exists for the circumstances presented by plaintiff's Second Amended Complaint.

The only arguably similar case leads to the conclusion that there is no viable First Amendment violation here. In *Rendon v. Transportation Security Administration*, 424 F.3d 475 (6th Cir. 2005), the Sixth Circuit rejected a First Amendment challenge to a civil penalty assessed against a passenger who violated 49 C.F.R. § 1540.109 by becoming belligerent and cursing inside the screening area. The Sixth Circuit rejected a challenge to the regulation by the individual claiming that his speech was protected, and upheld the purpose of the rule, to prevent "abusive, distracting behavior, and attempts to prevent screeners from performing required screening." *Id*. at 424 F.3d at 478 (citing 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002)).

To conclude that plaintiff has made out a valid First Amendment claim, the Court would have to construe the allegations in the Second Amended Complaint to render an action that is reasonable (or at the very least, not inconsistent with clearly established law) unreasonable. Here, plaintiff did more than simply convey a message about the Fourth Amendment, he also undressed to reveal that message; took off his pants in the screening line (an action that was not necessary to conveying his written message); and kept them off even though he was told it was

not necessary. 2d Am. Compl. ¶ 32. Plaintiff further acknowledges that this behavior had the potential to cause a disturbance and concomitant delay. *Id.* ¶ 27. Because plaintiff himself alleges that these actions occurred and led to TSA's referral of him to the airport police, he has not made out a claim that the referral was based on the viewpoint of his speech alone.

B. Plaintiff Has Not Pled A First Amendment Violation

As demonstrated, the plaintiff has failed to allege the violation of a clearly established right, and Defendant Doe is entitled to qualified immunity. Even if the Court were to reach the First Amendment question, however, Plaintiff also has not set forth an actionable violation. Courts recognize that the "right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). Retaliation is forbidden because it "allow[s] the government to 'produce a result which [it] could not command directly.'" *Id*. (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). To state a retaliation claim the plaintiff must "establish three elements": (1) "that his or her speech was protected"; (2) "that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech"; and (3) "that a causal relationship exists between its speech and the defendant's retaliatory action." *Id*. at 685-86.

1. Plaintiff's Speech Was Not Protected

With respect to the first element of a First Amendment claim, it is not clearly established that, while standing at a security screening checkpoint, plaintiff's speech was protected. *Suarez Corp*., 202 F.3d at 685. Reasonable restrictions on speech are appropriate in this context under *Krishna Consciousness*, meaning the First Amendment does not confer a right to engage in a

"silent, nonviolent" protest, 2d Am. Compl. ¶ 105, while going through security screening at an airport, without inviting further inquiry by the authorities, such as here.

Several concerns unique to the screening environment support allowing further inquiry by authorities when a passenger engages in unusual conduct within the screening area. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) ("The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances."). It is entirely appropriate and lawful for screeners to consider a person's speech and behavior to determine if they present a higher risk to security, and to make further inquiries if that behavior is unusual or out of the ordinary. Expressive activity is often relevant to an officer's decision about whether an arrest would make sense under the circumstances. Further, plaintiff contends that his message contained not only speech, but also conduct, *i.e*. the removal of clothing in public. *See Cohen v. California*, 403 U.S. 15, 18 (1971) (recognizing harder issue presented when dealing with speech alone, "not upon any separately identifiable conduct which allegedly was intended . . . to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing [defendant's] ability to express himself").

In addition, attention-grabbing actions like those of the plaintiff in the screening area could well be expected to divert attention from the orderly screening process to a focus on that individual, possibly allowing others to evade scrutiny. *See* 67 Fed. Reg. 8340, 8344 (2002) ("A screener encountering such a situation [where a passenger is interfering with the screeners job] must turn away from his or her normal duties to deal with the disruptive individual, which may

affect the screening of other individuals"). Plaintiff admits that he understood his behavior would cause just that kind of disturbance. 2d Am. Compl. ¶ 27 (plaintiff waited "for the number of people in line to diminish" to "avoid the possibility of causing delay for his fellow passengers"). Moreover, plaintiff acknowledges that supervisory attention was required here (*id.* ¶ 33), and TSA has recognized that there is a disruption when the "screener may . . . need to summon a checkpoint screening supervisor and law enforcement officer, taking them away from other duties" and that "[c]heckpoint disruptions potentially can be dangerous in these situations." 67 Fed. Reg. 8344. Indeed, if one were going to attempt to sneak a person or item through airport security, staging some form of diversion, such as conduct like plaintiff's, would undeniably be helpful. Even if a protestor like plaintiff has no intention of creating a disturbance for nefarious purposes, a rule protecting such protests in the screening area could readily be manipulated by individuals or groups that do have evil intent. *See Cornelius*, 473 U.S. at 810 ("the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum"); *see also* 49 C.F.R. § 1540.105 (establishing that "[n]o person may . . . attempt to circumvent . . . any security system, measure, or procedure").

Further, an essential aspect of the TSA screening system is that threats be identified promptly and efficiently so that passenger travel is not delayed. Unusual behavior that is intended to draw attention will undeniably slow down the screening process, and a prompt referral of that behavior to local authorities avoids that slow down while still ensuring that a careful assessment of the threat is undertaken. *See Rendon*, 424 F.3d at 479 (recognizing legitimate and substantial interest served by TSA regulation barring interfering with TSA screeners, "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"). Moreover, restrictions in the screening area are reasonable because there are many "alternative channels" for speech like plaintiff's, such as the airport terminal itself. *Cornelius*, 473 U.S. at 809.

Given the function of security screening in identifying dangerous materials and the importance of avoiding disturbances to achieving this end promptly, it is reasonable to promptly refer unusual behavior to local authorities for further inquiry. It is common sense that attention-grabbing actions such as plaintiff's, staged in the security screening area, are by definition disruptive. TSA regulations reasonably provide that "[n]o person may interfere with . . . [TSA] screening personnel in the performance of their screening duties." 49 C.F.R. § 1540.109. The Supreme Court has recognized that it is reasonable to regulate speech so as to avoid disruptions in the general airport environment and more generally. *See Krishna Consciousness*, 505 U.S. at 682-83 (recognizing importance of goal that "terminals . . . will contribute to efficient air travel" and concluding that allowing solicitation in the terminal would "slow both [passengers] . . . and those around them" and "[d]elay[s] may be particularly costly in this setting") (plurality opinion); *id*. at 689 (O'Connor, J., concurring) (agreeing "that publicly owned airports are not public *fora*" and that solicitation "disrupts passage"); *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc*., 482 U.S. 569, 574 (1987) (striking down bar on all First Amendment activities at airport, but recognizing that authority could "regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX"). Such interests are significantly heightened

within the security screening area. *See Krishna Consciousness*, 505 U.S. at 681 (recognizing need for "a new inquiry [in each different type of transport facility] whether the transportation necessities are compatible with various kinds of expressive activity"). Thus, it is appropriate and reasonable to respond to disruptive conduct within the screening area by quickly moving to contain the individual(s) involved and enlisting local law enforcement to ensure that screening proceeds in an orderly fashion nevertheless. Given these interests, plaintiff's choice of expressive conduct was not constitutionally protected.

2. Defendant's alleged retaliatory action did not adversely affect plaintiff's constitutionally protected speech

The second element of a First Amendment claim requires the plaintiff to show "that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech." *Suarez Corp*., 202 F.3d at 686. In other words, the plaintiff must "show that the alleged retaliatory action deprived him of some valuable benefit." *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990). Significantly, "[n]ot every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory." *DiMeglio*, 45 F.3d at 806 (citing *ACLU of Md. v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir. 1993); *Stott v. Haworth*, 916 F.2d 134, 140 (4th Cir. 1990)).

Here, at most the Second Amended Complaint indicates that TSA employee Doe ensured that the Richmond Airport police knew about the disturbance at the security screening checkpoint and accompanied two officers to the checkpoint area, after which the local law enforcement took plaintiff into custody for questioning. 2d Am. Compl. ¶ 35. The allegation that Doe requested that the officers "take action" regarding plaintiff is simply insufficient to plausibly allege that the action was plaintiff's arrest, or that this request was motivated by the

content of his message, *supra* note 3, particularly given that plaintiff's "bizarre" behavior objectively justified his brief detention as a Fourth Amendment matter,[5] Aug. 30 Mem. Op. at 31-33. Indeed, the referral by the TSA employees to local law enforcement, as explained above, is justified by the substantial interests of further investigating unusual activity in the screening area and promptly clearing the area of any disturbances to allow efficient operation. Ultimately, as plaintiff alleges, he was able to go through screening and catch his flight. 2d Am. Compl. ¶ 64. Thus, the request for assistance by the airport police, by itself, is insufficient to state a claim.

3. There is no causal relationship between plaintiff's speech and defendants' alleged retaliatory action.

The third element of a First Amendment claim requires that plaintiff show "that a causal relationship exists between its speech and the defendant's retaliatory action." *Suarez Corp*., 202 F.3d at 686. The Fourth Circuit has held that the "causation requirement is rigorous; it is not enough that the protected expression played a role or was a motivating factor in the retaliation; claimant must show that 'but for' the protected expression the employer would not have taken the alleged retaliatory action." *Huang*, 902 F.2d at 1140. Significantly, if a plaintiff's allegations of retaliation do not indicate that the constitutionally protected conduct was the "but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, *despite proof of some retaliatory animus in the official's mind*." *Hartman v. Moore*, 547 U.S. 250, 259-60 (2006) (emphasis added). Plaintiff cannot satisfy this element for the reasons stated above: plaintiff has failed to adequately allege that his referral would not have

[5] Plaintiff's Second Amended Complaint makes no connection between his First Amendment claim and the allegation that Doe "remov[ed] an unidentified item from [his] belongings" after he was detained by airport police officers. 2d Am. Compl. ¶ 35.

occurred but for the agents' objection to the viewpoint presented in his speech. Instead, the much more likely cause of the referral was plaintiff's unusual behavior.

Separately, to the extent plaintiff's allegations are intended to give rise to an inference that Doe requested his arrest by airport police officers in retaliation for the content of his message, that theory implicates an open question of constitutional law: whether a plaintiff can allege a viable First Amendment violation based on retaliatory arrest where probable cause for that arrest exists.[6] *See, e.g.*, *Howards v. McLaughlin*, 634 F.3d 1131, 1147-48 (10th Cir. 2011) (describing circuit split on this issue), *petition for cert. filed, Reichel v. Howards*, 80 U.S.L.W. 3114 (U.S. Aug. 25, 2011) (No. 11-262). Where, as here, there does not appear to be settled Supreme Court or Fourth Circuit precedent on this point, and there is no consensus among federal courts regarding this aspect of the right in question, a defendant cannot be found to have violated a clearly established constitutional right. *See Rogers v. Pendleton*, 249 F.3d 279, 287-88 (4th Cir. 2001). As such, Doe is entitled to qualified immunity as to plaintiff's First Amendment claim.

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

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[6] Significantly, this Court previously noted that "the command to arrest Plaintiff came from" one of the airport police officers, and that the complaint was otherwise devoid of any facts suggesting that Smith or Jones made any similar assertion or otherwise indicated that they wanted plaintiff arrested. Aug. 30, 2011 Mem. Op. at 32-33.

DATED this 21st day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 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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