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.	)	
	)	

PLAINTIFF'S OPPOSITION AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DOE'S MOTION TO DISMISS

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PRELIMINARY STATEMENT[1]

Defendant Jane Doe, a supervisory employee with the Transportation Security Administration ("TSA") at the Richmond International Airport ("RIC") on December 30, 2010 (when Plaintiff peacefully protested what he perceived to be invasive enhanced security procedures at RIC), seeks to dismiss claims brought against her in Plaintiff's Second Amended Complaint.[2] Specifically, Plaintiff alleges that Defendant Doe was involved in the December 30, 2010 incident at RIC giving rise to Plaintiff's claims. In particular, Ms. Doe, was the TSA screening manager for checkpoint B who approached the Commission Defendant police officers Anthony Mason and Calvin Vann to request that they take action against Plaintiff.

The gravamen of Defendant Doe's motion is that a reading of the allegations against her in Plaintiff's Second Amended Complaint leads to the conclusion that she acted because of Plaintiff's behavior and not because of the message displayed on Plaintiff's chest. Therefore, Defendant Doe concludes that she is entitled to qualified immunity on Plaintiff's First Amendment claim. The fallacy in this argument, however, as this Court aptly noted in its August 30, 2011 Opinion and Order granting in part and denying in part Defendants' Motion to Dismiss Plaintiff's Complaint (Dkt. No. 53) (the "August 30 Order"), is that "this argument is based upon factual conclusions not reasonably inferred from the face of Plaintiff's Complaint, and which the Court cannot entertain at this procedural stage." August 30 Order at 33-34. As

[1] In order to conserve the Court's and Defendant Does's time and resources, except for the facts and argument set forth below as to Plaintiff's Second Claim regarding the First Amendment violation, Plaintiff incorporates by reference the facts and arguments contained in his Memorandum in Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. No. 38) with respect to the official capacity claims made against Defendant Doe and as to the First (Fourth Amendment) and Third (Equal Protection) Claims made against her in the Second Amended Complaint.

[2] During discovery in this action, Defendant Doe was identified by two of the Commission police officers by her first name. On October 4, 2011, and on several dates thereafter, Plaintiff's counsel contacted counsel for Defendant Doe in an effort to obtain her full name. At the time of this filing, however, Defendant Doe's counsel has yet to disclose Defendant Doe's full name.

the same allegations underlie Plaintiff's First Amendment claim against Defendant Doe, the same reasoning holds true here. Accordingly, Defendant Doe's motion to dismiss Plaintiff's First Amendment claim should be summarily denied.

FACTUAL ALLEGATIONS

Plaintiff herein incorporates the recitation of facts set forth in his Memorandum in Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. No. 38), except as follows:

On December 30, 2010, at approximately 2:00 p.m., Plaintiff entered the security checkpoint at the RIC terminal building for a scheduled flight to Wisconsin, to attend his grandfather's funeral. Second Am. Compl. at ¶ 25. The Second Amended Complaint alleges that in the RIC terminal building there was on display at that time "speech on clothing, and commercial speech, including without limitation numerous large advertisements and other pictorial and graphic displays and publications in and around the RIC terminal, concourse and screening areas, of bare-chested persons, persons in bathing suits, and persons dressed in running shorts and other athletic apparel." *Id.* at ¶ 70.

In anticipation of the possibility that Plaintiff would be randomly selected for enhanced secondary screening, Plaintiff had written the following message in black marker on his chest to communicate his objection to the enhanced secondary screening implemented by TSA: "AMENDMENT 4: THE RIGHT OF THE PEOPLE TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED." *Id.* at ¶ 26. To avoid the possibility of causing delay for his fellow passengers, Plaintiff waited for the number of people in line to diminish before entering the area at RIC established for TSA security screening. *Id.* at ¶ 27. When the line diminished, Plaintiff entered the area for security screening and submitted his boarding pass and identification to the pre-screening agent. *Id.* at ¶ 28.

Upon being cleared by the pre-screening agent, Plaintiff proceeded to the conveyor belt area and as directed placed his belt, shoes, wallet, phone, computer, carry-on bag and sweatshirt on the conveyor belt. *Id.* at ¶ 29. Upon reaching the passenger screening location, Defendant Rebecca Smith, a TSA officer responsible for passenger and baggage screening at RIC, directed Plaintiff away from the magnetometer (a metal detector used by TSA as the primary screening apparatus) and toward an Advanced Imaging Technology ("AIT") scanning unit. *Id.* at ¶¶ 9, 30. Before entering the AIT unit, Plaintiff removed his T-shirt and sweatpants, and placed them on the conveyor belt and stood in athletic running shorts, revealing the text of the Fourth Amendment that he had written on his chest to TSA screening agents and other persons present while he awaited enhanced screening. *Id.* at ¶ 31. Defendant Smith then informed Plaintiff that removal of clothing was not necessary, but Plaintiff responded that he wished to do so to express his view that enhanced screening procedures were not constitutional. *Id.* at ¶ 32.

Thereafter, Defendant Smith radioed for assistance and was ordered by Defendant Jones, a supervisory TSA officer responsible for the management, direction and supervision of TSA passenger and baggage screening at the RIC, to direct Plaintiff to stay where he was in front of the AIT unit, whereupon, Defendants Jones and Defendant Jane Doe, the manager of TSA security checkpoint "B" at the RIC, sought intervention by the RIC Police with Plaintiff. *Id.* at ¶¶ 9, 33. In this regard, Defendant Doe approached Commission Defendant police officers Calvin Vann and Anthony Mason to request that they take action against him. *Id.* at ¶ 33. Shortly thereafter, Defendants Vann and Mason arrived at the area where Plaintiff had been ordered detained by Defendant Smith and approached Plaintiff from behind his field of vision. *Id.* at ¶ 34. Without warning and without questioning the Plaintiff, Defendant Vann, at the urging and direction of Defendant Mason, immediately seized and handcuffed Plaintiff from

behind and forced him through the AIT unit, escorting him to a side area where the handcuffs were adjusted with Plaintiff's arms behind his back and he was informed that he was being placed under arrest for allegedly "creating a public disturbance." *Id.* at ¶ 35. Shortly thereafter, Defendant Doe searched Plaintiff's belongings at the security checkpoint, removing an unidentified item from those belongings. *Id.* Defendant Mason then collected Plaintiff's belongings with assistance from Defendants Smith and Doe. *Id.* at ¶ 36.

At no point in time did Defendants Smith, Jones or Doe intervene and/or communicate with the Commission Defendant officers to explain the extent of the screening conducted with regard to Plaintiff, and/or to explain the limited purposes and/or permissible limits of the TSA screening procedure, and/or to provide exculpatory information to them that Plaintiff had not engaged in any criminal conduct or in any conduct that would require his arrest and/or imprisonment and/or prosecution under TSA Management Directive No. 100.4 or any other law. *Id.* at ¶ 37. Moreover, Defendants Smith, Jones or Doe never sought assistance from any Federal Air Marshall or TSA law enforcement officer for appropriate follow-up, if any, including conducting a screening interview of Plaintiff based upon the screening that had occurred to the time of Plaintiff's arrest by the Defendants Vann and Mason. *Id.* at ¶ 38. Rather, Defendant Vann took Plaintiff in handcuffs to the airport police station located under the center of the main RIC concourse, *id.* at ¶ 38, and Plaintiff was subsequently charged with disorderly conduct in a public place in violation of Va. Code § 18.2-415. *Id.* at ¶ 56. The Commonwealth Attorney for Henrico County, Virginia subsequently dropped the charge, admitting there was no evidence to sustain it. *Id.* at ¶ 75.

STANDARD OF REVIEW

A motion to dismiss "should not be granted unless it appears beyond doubt that the plaintiff *can prove no set of facts* to support h[is] allegations." *Revene v. Charles County*

Commissioners, 882 F.2d 870, 872 (4th Cir. 1989) (emphasis added) (internal citations omitted). As the United States Supreme Court explained in *Scheuer v. Rhodes*, 416 U.S. 232 (1974),

> [w]hen a federal court reviews the sufficiency of a [§ 1983] complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Id. at 236, *abrogated on other grounds by*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 584 (2007) (affirming decision not to expand pleading requirements beyond the limits of the Federal Rules); *Scinto v. Preston*, 170 Fed. Appx. 834, 836 (4th Cir. 2006) (stating that "where the face of the pleadings tends to show that recovery would be very remote and unlikely, a complaint cannot be dismissed unless there is *no set of facts* in support of the claim which would entitle the plaintiff to relief") (emphasis added) (quoting *Scheuer*); *Revene*, 882 F.2d at 872 (quoting *Scheuer* for the proposition quoted above).

A motion to dismiss under Rule 12(b)(6) "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of NC v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). Rule 12(b)(6) does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Thus, as this Court recognized in the August 30 Order, the "Court must assume Plaintiff's well-pleaded factual allegations to be true and determine whether those allegations 'plausibly give rise to an entitlement to relief.'" August 30 Order at 9; *see also Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005) ("[i]n considering a motion to dismiss, we accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff."); *McCall v. City of Portsmouth*, No. 2:07cv339, 2007 WL 3025359, *3 (E.D. Va.

Oct. 12, 2007) (noting that the complaint's allegations are taken as true and all reasonable factual inferences should be construed in the plaintiff's favor).

ARGUMENT

I. THE DOCTRINE OF QUALIFIED IMMUNITY DOES NOT BAR PLAINTIFF'S FIRST AMENDMENT CLAIM AGAINST DEFENDANT DOE.

"The doctrine of qualified immunity is a judge-made rule designed to strike the classic balance between freedom and security." *Henry v. Purnell*, 619 F.3d 323, 345 (4th Cir. 2010) (Gregory, J. dissenting). The actions of the Federal and Commission defendants in the present case typify an imbalanced preoccupation with security to the virtual exclusion of basic constitutional protections.

While federal actors are generally shielded from liability when performing discretionary functions, this qualified immunity is not available if the Complaint alleges that the officer's conduct violated an individual's constitutional rights and those rights were "clearly established" at the time of the alleged violation. *See, e.g.*, *Harlow*, 457 U.S. at 818; *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Pearson v. Callahan*, 129 S.Ct. 808 (2009); *Doe v. S.C. Dep't. of Social Servs.*, 597 F.3d 163 (4th Cir. 2010). The rule "is intended to 'balance [] two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* "If the law is clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19.

Under the first prong of the *Harlow* test, to survive a motion to dismiss, the plaintiff must simply demonstrate that the complaint alleges facts sufficient to support a constitutional claim. *Id.* Under the second prong, the contours of the right must be sufficiently clear that a reasonable

official would understand what he or she is doing violates that right, but there need not be any previous decision addressing the precise facts at issue. *See Melgar v. Green*, 593F.3d 348, 358 (4th Cir. 2010); *see also Burgess v. Lowery*, 201 F.3d 942, 944-45 (7th Cir.2000) (noting that "the absence of a decision by the Supreme Court or this court cannot be conclusive on the issue [of] whether a right is clearly established"). Indeed, the Supreme Court has recognized that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," expressly rejecting "a requirement that previous cases be 'fundamentally similar.'" *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citation omitted).

A. Plaintiff's Second Amended Complaint Alleges a Clearly Established First Amendment Violation Against Defendant Doe.

In her Motion to Dismiss, Defendant Doe argues that Plaintiff's "Second Amended Complaint does not give rise to a plausible inference that [she] took any action as a result of the message Plaintiff had written on his chest." Def. Motion at 2. Instead, Defendant Doe contends that the allegations in the Second Amended Complaint "are 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." *Id.* at 8. Defendant Doe's self-serving reading of the allegations contained in the Second Amended Complaint should not be credited.

Plaintiff clearly alleges that Defendant Doe, acting in concert with Defendants Smith and Jones and Commission officers Vann and Mason, violated Plaintiff's First Amendment rights because of the message conveyed by Plaintiff's silent, nonviolent expression as to the constitutionality of TSA's enhanced body imaging/pat-down policies. Second Am. Compl. at ¶¶ 104-109. In particular, Plaintiff alleges that Defendant Doe, the manager of TSA security checkpoint "B" at the RIC during the December 20, 2010 incident, sought intervention by the RIC Police with Plaintiff. *Id.* at ¶¶ 9, 33. In this regard, Defendant Doe approached Commission

Defendant police officers Vann and Mason "***to inform them of the incident involving Plaintiff and request that they take action against him***." *Id.* at ¶ 33 (emphasis added). Shortly thereafter, Defendants Vann and Mason arrived at the area where Plaintiff had been ordered detained by Defendant Smith and approached Plaintiff from behind his field of vision. *Id.* at ¶ 34. Without warning and without questioning the Plaintiff, Defendant Vann immediately seized and handcuffed Plaintiff from behind and forced him through the AIT unit, escorting him to a side area where the handcuffs were adjusted with Plaintiff's arms behind his back and he was informed that he was being placed under arrest. *Id.* at ¶ 35. Shortly thereafter, Defendant Doe searched Plaintiff's belongings at the security checkpoint, removing an unidentified item from those belongings. *Id.* Moreover, Plaintiff alleges that "Defendant[] . . . Doe . . . seized Plaintiff, or in collaboration with others caused his seizure, 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 on an equal basis with other citizens, to petition the government for the redress of grievance, and to engage freely in political expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution." *Id.* at ¶ 105. Plaintiff further alleges that the conduct of Defendant Doe resulted in Plaintiff's subsequent arrest, made without probable cause. *Id.*

Given the foregoing well-pleaded allegations set forth in the Second Amended Complaint, the issue before the Court, like the issue before it on the Motion to Dismiss brought by Defendants Smith and Jones, is "whether the TSOs in fact radioed for assistance because of the message Plaintiff sought to convey. . ." as opposed to Plaintiff's behavior. August 30 Order at 34. As this Court noted, the Fourth Circuit has found that:

> In instances where there is a material dispute over what the defendant did, and under the plaintiff's version of the events the defendant would have, but under the defendant's version he would not have, violated clearly established law, it may be that the qualified immunity question cannot be resolved without discovery.

DiMeglio v. Haines, 45 F.3d 790, 795 (4th Cir. 1995). Accordingly, as this Court recognized in the August 30 Order, "because Plaintiff's unrebutted claim facially states a cause of action, the question of qualified immunity must await further discovery." August 30 Order at 34, citing *Swagler v. Neighoff*, 398 F. App'x 872, 877-78 (4th Cir. Oct. 18, 2010) (per curiam) (affirming district court's denial of qualified immunity in advance of discovery because issues of troopers' "subjective motivation" for action was "highly fact-dependent"). The same reasoning applies here.

Defendant Doe argues that "Plaintiff cannot point to any clearly established law that would guide the TSA agents when facing a protest carried out during security screening." Def. Motion at 15. She contends that because the airport is a non-public forum, it can exclude speakers "so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Id.* There are two answers to this argument. First, the law is clear that individuals possess First Amendment rights at U.S. airports, s*ee, e.g.*, *Board of Airport Comm'rs v Jews for Jesus*, 482 U.S. 569 (1987) (the Supreme Court found facially invalid a regulation adopted by the Board of Airport Commissioners for Los Angeles Airport that stated the airport was "not open for First Amendment activities by any individual").[3] There, the Court noted that "[m]uch non-disruptive speech — such as the wearing of a T-shirt or button that

[3] *See also Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (holding that the ban on distribution of literature in the Port Authority airport terminals is invalid under the First Amendment); *The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 577-78 (4th Cir. 2010) (a ban on news-racks at the Raleigh-Durham Airport violated the First Amendment); *Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993) (finding a ban on newspaper racks at Greenville-Spartanburg Airport violated the First Amendment).

contains a political message — may not be 'airport-related,' but it is still protected speech even in a nonpublic forum." *Id*. at 576 (citing *Cohen v. California*, 403 U.S. 15 (1971)). Moreover, in the longstanding *Cohen* case, the Supreme Court reversed a disturbing the peace conviction against a defendant who wore a jacket displaying the words "F*ck the Draft" *inside a courthouse*, observing that "[t]his case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance." As *Cohen* makes clear, the First Amendment permits controversial messages to be delivered in sensitive places — in that instance a public courthouse — and such speech suffers no less protection under the First Amendment than the many more mundane messages on magazines, clothing, and advertisements at airport terminals. *Id.* at 18 (recognizing that it would be improper to punish Cohen for his speech on the inutility or immorality of the draft his jacket reflected). Accordingly, claims of viewpoint discrimination that occur simply by allowing the presentation of one message, while removing another, whether intentional or not, frequently form the basis of First Amendment violations. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). Indeed, related claims of content and viewpoint discrimination have long formed the basis of First Amendment violations. *See, e.g., Rosenberger v. Rector & Visitors*, 515 U.S. 819, 828-829 (1995) (noting that the government may not regulate speech on the basis of either substantive content or viewpoint); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (Milford's exclusion of the Good News Club is indistinguishable from the exclusions in [*Rosenberger and Lamb's Chapel*] and constitutes viewpoint discrimination). Finally, although viewpoint discrimination may occur simply by reason of standardless

selectivity of the government in excluding one viewpoint and allowing another viewpoint in the same forum, it has long been axiomatic that governmental actors also violate the First Amendment if they engage in an intentional "effort to suppress expression merely because [the] public official[] oppose[s] the speaker's view." *News & Observer*, 597 F.3d at 577-78.[4]

In accord with these standards, Plaintiff's Second Amended Complaint alleges that there was a variety of political and commercial speech activity in the RIC terminal on the day he was detained and arrested; that his expression was treated differently from other speech in the terminal; and that he was treated differently from other air travelers subject to the same screening process — that is, passengers exercising their First Amendment rights — in an unreasonable and discriminatory manner. Specifically, Plaintiff asserts that in the same terminal where he was arrested, there was "speech on clothing, and commercial speech, including without limitation numerous large advertisements and other pictorial and graphic displays and publications in and around the RIC terminal, concourse and screening areas, of bare-chested persons, persons in bathing suits, and persons dressed in running shorts and other athletic apparel." Second Amend. Compl. at ¶ 70. The only distinguishable fact from these messages and images in the terminal, and Plaintiff's appearance was that Plaintiff's bare chest contained a message with a viewpoint

[4] Defendant Doe contends that *Iqbal v. Ashcroft*, 129 S. Ct. 1937, 1948-49 (2009), requires Plaintiff to offer "proof of discriminatory intent" in his complaint and that he must "plead and prove that defendant acted with discriminatory purpose." Def. Motion at 8. However, as the cases previously cited indicate, Defendant Doe fails to recognize that Plaintiff's viewpoint discrimination claim does not require a showing of "intent," but simply the selective exclusion of a viewpoint in the same forum. Moreover, even with regard to the separate intentional discrimination claim, that claim rests in part on documentary and testimonial evidence that has otherwise been kept confidential between and among the defendants and undisclosed to Plaintiff as of the filing of the motion to dismiss. *Iqbal* is simply inapposite for the argument Defendant Doe seeks to advance and, if accepted, would eliminate most, if not all, civil rights cases involving intentional discrimination claims based on Defendant Doe's rationale. "Proof" in the context of intentional discrimination is what is necessary for trial or summary judgment, not for a motion to dismiss.

that presented a contemporaneous protest message challenging the practice he was directed to submit to, and for that alone, Plaintiff was unlawfully and summarily detained and arrested, whereas viewpoints involving commercial and political messages, protest and images of persons displayed with other messages were permitted.

Relying on 49 C.F.R. § 1540.109 and the Sixth Circuit's decision in *Rendon v. TSA*, 424 F.3d 475 (6th Cir. 2005), Defendant Doe claims she was justified in her actions because Plaintiff engaged in distracting behavior that prevented the TSA officers from performing their required functions. Def. Motion at 17-20. This argument, however, misses the mark both factually and legally.

First, Defendant Doe justifies her actions on 49 C.F.R. 1540.109's proscription that "[n]o person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter." This regulation, however, does not apply to these facts because the Complaint cannot be reasonably read to suggest that Plaintiff engaged in any interference, assault, threat or intimidating conduct against TSA officials.

Second, *Rendon* cannot be read to justify the conduct here. In that case, an airline passenger, frustrated with an extended wait in the screening line, "actively engag[ed] the screener with loud and belligerent conduct," harassing the screener to the point where the screener was forced to shut down his line and call his supervisor to deal with the passenger. *Id.* at 479. Plaintiff here was not disruptive, did not fail to comply with any TSA directive or request, did not interfere with their performance of screening duties — unless of course, the message on his chest was deemed objectionable, in which case Defendants Doe, Smith and Jones impermissibly retaliated against him for the lawful exercise of his constitutional right to Free Speech.

Notably missing from Defendant Doe's motion is its citation and reliance on the principal case relied upon by Defendants Smith and Jones in their prior motion to dismiss, namely, *U.S. v. Aukai*, 497 F.3d 955 (9th Cir. 2007). Although *Aukai* relates to the Fourth Amendment claim, it does in fact provide well established guidance that constitutional limits apply to official conduct at screening checkpoints, even when unusual incidents occur. In *Aukai*, an airline passenger set off alarms at both the walk-through magnetometer *and* during a separate hand wand "search." Seeing two indicators of a potential security concern, the TSA prevented Plaintiff from opting out of further airport "pat-down" screening, and after (a) a TSA agent then conducted *repeated further* "hand wand alarms" on the passenger, and (b) after referral to a TSA supervisor and further unsatisfactory "wanding," and (c) after a TSA agent made a *tactile verification* of an unidentified substance in the passenger's pocket, and (d) after the TSA supervisor required the passenger to empty his pockets and discovered a package of methamphetamine, TSA *then* handed the subject over to state law enforcement officials. *Aukai*, 497 F.3d at 962. The Ninth Circuit recognized that under the Fourth Amendment, the "scope of such searches is not limitless [and] is constitutionally reasonable [if] it "is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [][and] that it is confined in good faith to that purpose," and in these circumstances, there was no need for the passenger's consent to do a pat down search. The disparity of the treatment afforded to Plaintiff by the Federal and Commission Defendants compared to the *Aukai* case (and the reasonable inferences that the Second Amended Complaint presents) is only too obvious. The Second Amended Complaint makes clear that no one, neither Defendant Doe, nor anyone else from TSA, questioned Plaintiff or investigated what he was doing except to observe that he had

removed his shirt and pants and had the text of the Fourth Amendment written on his chest. For this, he was summarily arrested, detained, and charged with a crime.

As noted above, the Second Amended Complaint alleges that Defendants Doe, Smith and Jones took action against Plaintiff based upon his display of the Fourth Amendment on his chest in protest of the TSA's enhanced screening policies. It alleges that, in agreeing to security protocols and procedures that gave unrestrained discretion to TSA agents to exercise standardless discretion in censoring speech and otherwise exceed the limitations imposed by such procedures, Department of Homeland Security officials were deliberately indifferent in their duties to train, supervise and oversee the personnel acting under their authority, including Defendants Doe, Smith and Jones, to avoid improper discrimination by TSA officials in regards to the content and/or viewpoint(s) of speech at RIC. Second Am. Compl. at ¶ 106. Accordingly, for the reasons set forth above, Plaintiff has alleged content and viewpoint based First and Fourth Amendment claims which are well recognized.

B. Defendant Doe's Motion Should Be Denied Because It Is Premature to Decide the Qualified Immunity Question.

Significantly, a decision on qualified immunity is premature when there are unresolved disputes of material fact relevant to the immunity analysis. *See, e.g., Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002); *see also Swagler v. Neighoff*, 2009 WL 1575326 (D.Md. June 2, 2009), *rev'd on other grounds*, 398 Fed.Appx. 872 (4th Cir. 2010) ("it would be premature to rule upon the issue of qualified immunity at this juncture due to the undeveloped nature of the record"). Here, Plaintiffs have yet to depose Defendants Doe, Smith and Jones, or to receive a response to a subpoena issued to the Department of Homeland Security. Accordingly, Plaintiff has thus not yet had the opportunity to inquire into the circumstances surrounding and considerations governing the conduct of Defendant Doe or the other TSA Defendants. As such, any

determination on the issue of qualified immunity should be withheld until at least the summary judgment stage. *See, e.g., Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir. 1996) (suggesting that qualified immunity questions are best resolved at the summary judgment stage); *see also Fortney v. Mullins*, 2011 WL 1885402, * 7 (N.D.W.Va. April 6, 2011) (noting that the a decision on qualified immunity would be "premature" where "[n]o discovery has as yet been conducted . . . [and] [n]o scheduling order has yet been entered").

CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. No. 38), Plaintiff respectfully requests that this Court deny Defendant Doe's Motion to Dismiss the claims in the Second Amended Complaint brought against her.

Plaintiff respectfully requests that in the event the Court grants Defendant Doe's motion to dismiss, that it certify in its order under 28 U.S.C. § 1292 that there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, as to permit the immediate appeal of the ruling and its consolidation with the current interlocutory appeal of Defendants' Smith and Jones thereby advancing the interests of justice and judicial economy.

Dated: November 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, the foregoing Plaintiff's Opposition And Memorandum Of Law In Opposition To Defendant Doe's Motion To Dismiss was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to:

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