Nos. 11-2230 & 11-2276

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AARON TOBEY

Plaintiff - Appellee,

vs.

TERRI JONES, *et al.*

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Hon. Henry E. Hudson, Presiding)

BRIEF FOR APPELLEE

KNICELY & ASSOCIATES, P.C.
James J. Knicely
Robert Luther III
487 McLaws Circle, Suite 2
Williamsburg, Virginia 23185
Telephone: (757) 253-0026
Facsimile: (757) 253-5825

ARNOLD & PORTER LLP
Anand Agneshwar
Alan C. Veronick
399 Park Avenue
New York, New York 10022-4690
Telephone: (212) 715-1000
Facsimile: (212) 715-1399

Attorneys for Appellee

Of Counsel:
John W. Whitehead
Douglas R. McKusick
The Rutherford Institute
1440 Sachem Place
Charlottesville, Virginia 22906

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to Fed. R. Civ. P. 26.1 and Local Rule 26.1, Appellee Aaron Tobey makes the following disclosure:

1. Appellee is NOT a publicly held corporation or publicly held entity.

2. Appellee does NOT have any parent corporations.

3. Appellee does NOT have stock that is owned by a publicly held corporation or other publicly held entity.

4. There is NOT a publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.

5. Appellee is NOT a trade association.

6. This case does NOT arise out of a bankruptcy proceeding.

These disclosures were made and served on Appellants on March 2, 2012.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE.....1

STATEMENT OF JURISDICTION.....4

COUNTER-STATEMENT OF THE ISSUE 4

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 9

STANDARD OF REVIEW 10

ARGUMENT 13

I. MR. TOBEY'S SECOND AMENDED COMPLAINT PROPERLY ALLEGES A DELIBERATE AND ACTIONABLE VIOLATION OF HIS FIRST AMENDMENT RIGHTS 13

A. Mr. Tobey More Than Adequately Alleges that Appellants Took Retaliatory Action Against His Exercise of Protected First Amendment Rights.....15

B. Mr. Tobey's Peaceful and Cooperative Conduct Did Not Justify His Arrest 20

1. Mr. Tobey's Conduct Was in No Way "Disruptive" 22

2. Even if Mr. Tobey's Conduct Could be Characterized as "Bizarre," it Would Still be Protected by the First Amendment 27

II. MR. TOBEY ALLEGES A CLEARLY ESTABLISHED FIRST AMENDMENT VIOLATION. 29

CONCLUSION 35

REQUEST FOR ORAL ARGUMENT 37

CERTIFICATE OF COMPLIANCE 38

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. Wicomico County, Md.,
999 F.2d 780 (4th Cir. 1993) 13

Anderson v. Sara Lee Corp.,
508 F.3d 181 (4th Cir. 2007) 11

Ashcroft v. Iqbal,
556 U.S. 662, 129 S. Ct. 1937 (2009).....20

Bailey v. Kennedy,
349 F.3d 731 (4th Cir. 2003) 3

Baird v. Palmer,
114 F.3d 39 (4th Cir. 1997) 3

BenShalom v. Secretary of Army,
489 F. Supp. 964 (E.D. Wis. 1980) 29

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007).....11

Board of Airport Comm'rs v Jews for Jesus,
482 U.S. 569 (1987).....26, 30

Burgess v. Lowery,
201 F.3d 942 (7th Cir.2000) 30

Center for Bio-Ethical Reform, Inc. v. Napolitano,
648 F.3d 365 (6th Cir. 2011) 19

Cohen v. California,
403 U.S. 15 (1971).....26, 27, 28, 31, 32

Curley v. Klem,
298 F.3d 271 (3d Cir. 2002) 11

DiMeglio v. Haines,
45 F.3d 790 (4th Cir. 1995) 11, 21

Doe v. S.C. Dep't. of Social Servs.,
597 F.3d 163 (4th Cir. 2010) 10

Edwards v. City of Goldsboro,
178 F.3d 231 (4th Cir. 1999) 12

Florida v. Royer,
460 U.S. 491 (1983).....24

Forsyth County v. Nationalist Movement,
505 U.S. 123 (1992).....32

Fortney v. Mullins,
2011 WL 1885402 (N.D.W.Va. April 6, 2011).....12

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001).....33

Grant v. City of Pittsburgh,
98 F.3d 116 (3d Cir. 1996) 12

Harlow v. Fitzgerald,
457 U.S. 800 (1982).....10

Hartman v. Moore,
547 U.S. 250 (2006).....18, 24

Henry v. United States,
361 U.S. 98 (1959).....24

Hope v. Pelzer,
536 U.S. 730 (2002).....30

Int'l Society for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992).....31

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993).....32

Lee v. Int'l Soc. for Krishna Consciousness, Inc.,
505 U.S. 830 (1992).....26, 31

Melgar v. Green,
593F.3d 348 (4th Cir. 2010) 10, 30

Moss v. U.S. Secret Service,
572 F.3d 962 (9th Cir. 2009) 19

Mt. Healthy City Bd. of Ed. v. Doyle,
429 U.S. 274 (1977).....18

Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.,
991 F.2d 154 (4th Cir. 1993) 31

Pearson v. Callahan,
129 S. Ct. 808 (2009).....10

Perry v. Sindermann,
408 U.S. 593 (1972).....13, 17

Pickering v. Board of Educ.,
391 U.S. 563, 574 (1968).....13

Pritchett v. Alford,
973 F.2d 307 (4th Cir. 1992) 30

Rendon v. TSA,
424 F.3d 475 (6th Cir. 2005) 23

Republican Party of NC v. Martin,
980 F.2d 943 (4th Cir. 1992) 11

Revene v. Charles County Commissioners,
882 F.2d 870 (4th Cir. 1989) 11

Rosenberger v. Rector & Visitors,
515 U.S. 819 (1995).....33

Saucier v. Katz,
533 U.S. 194 (2001).....10

Scinto v. Preston,
170 Fed. Appx. 834 (4th Cir. 2006).....11

Snyder v. Phelps,
131 S. Ct. 1207 (2011).....27, 28

Spence v. Washington,
418 U.S. 405 (1974).....26, 28

Swagler v. Neighoff,
398 Fed. Appx. 872 (4th Cir. 2010).....20

Swagler v. Neighoff,
2009 WL 1575326 (D. Md. June 2, 2009), *rev'd on other grounds*,
398 Fed. Appx. 872 (4th Cir. 2010).....11

Swagler v. Sheridan,
2011 WL 2746649 (D. Md. July 12, 2011). 32

Suarez Corp. Indus. v. McGraw,
202 F.3d 676 (4th Cir. 2000) 14, 17, 33

Texas v. Johnson,
491 U.S. 397 (1989).....27

The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.,
597 F.3d 570 (4th Cir. 2010) 31

Trulock v. Freeh,
275 F.3d 391 (4th Cir. 2001) 17, 33

United States v. Alvarez,
617 F.3d 1198 (9th Cir. 2010) 28

United States v. Aukai,
497 F.3d 955 (9th Cir. 2007) 25, 26

United States v. Marcavage,
609 F.3d 264 (3rd Cir. 2010).....32

Venkatraman v. REI Sys., Inc.
417 F.3d 418 (4th Cir. 2005) 12

STATUTES AND OTHER MATERIALS **PAGE(S)**

42 U.S.C. § 1983.....2

Fed. R. Civ. Pro. 12(b)(6) 11

Fed. R. App. Pro. 29.....38

Fed. R. App. Pro. 32.....38

49 C.F.R. 1540.109 23

TSA Management Directive No. 100.4 5,7-8

INTRODUCTION

The District Court properly held — twice — that Appellee Aaron Tobey has stated an actionable First Amendment claim. Appellants violated Tobey's First Amendment rights by causing him to be arrested based on "the message conveyed by [his] silent, nonviolent expression of objection to the TSA's screening policies." JA 161 at ¶105. Although the Transportation Security Administration ("TSA") must take reasonable steps to ensure airport security, its employees were not entitled to effect Mr. Tobey's arrest or subject him to special treatment because of the content of his protest. This Court should affirm the District Court's rulings so that a jury can decide whether Mr. Tobey's properly-pleaded claim has merit.

STATEMENT OF THE CASE

On March 10, 2011, Mr. Tobey sued Appellants Jones and Smith[1] and police officers of the Richmond International Airport ("RIC")[2] for depriving

[1] Appellant Terri Jones is a supervisory TSA security officer responsible for supervising screeners and overseeing passenger and baggage security operations at Richmond International Airport. Appellant Rebecca Smith is a TSA security officer responsible for passenger and baggage screening at RIC.

[2] Mr. Tobey's suit named not only the Appellants, but also the Secretary of the Department of Homeland Security and the head of the TSA, the Metropolitan Capital Airport Commission, its Security Director, all in their official capacities, and Chief of Police, individually and in his official capacity, and three RIC police officers. The District Court granted motions to dismiss the official capacity claims against Airport Commission, the Secretary of the Department of Homeland Security, the head of the TSA, the Airport Security Director and the Chief of

(footnote continued on next page)

Appellee of his (i) Fourth Amendment Rights under 42 U.S.C. § 1983 and *Bivens* (Count 1); (ii) First and Fourteenth Amendment Rights under 42 U.S.C. § 1983 and *Bivens* (Count 2); and (iii) Fifth and Fourteenth Amendment Equal Protection Rights under 42 U.S.C. § 1983 and *Bivens* (Count 3). JA 4. On May 27, 2011 Appellee filed his First Amended Complaint. JA 5.

On June 27, 2011, Appellants Jones and Smith moved to dismiss. With respect to Mr. Tobey's First Amendment claims, they asserted they were entitled to qualified immunity because their actions resulted from Mr. Tobey's "failure to follow [Appellant] Smith's direction to proceed through the [Advanced Imaging Technology scanning unit], and not because of the message [Tobey] had written on his chest." JA 77-78.

On August 30, 2011, the Honorable Henry E. Hudson denied Appellants' motion as to Mr. Tobey's First Amendment claim (Count 2). The Court found Appellants' claim that they arrested Mr. Tobey solely because of his conduct to be "based upon factual conclusions not reasonably inferred from the face of [Mr. Tobey's] Complaint, and which the Court cannot entertain at this procedural stage." JA 78. The District Court explained that "because [Tobey's] unrebutted

---

(footnote continued from previous page)

Police. In addition to the TSA agents in this appeal, the other defendants remaining in the case are the former and current Chiefs of the RIC Police, Quintin Trice and Jeffrey Kandler, and two RIC police officers, Sgt. Anthony Mason and Corporal Calvin Vann.

claim facially states a cause of action [under the First Amendment], the question of qualified immunity must await further discovery." *Id.*[3]

Based on ensuing discovery, Mr. Tobey filed a Second Amended Complaint on October 7, 2012, adding Appellant Doe, the TSA manager of the screening checkpoint on Concourse "B" at RIC, asserting additional facts, and making identical claims against her. JA 8. Appellant Doe moved to dismiss, and on November 15, 2011 the District Court made the same rulings as to Appellant Doe that it had earlier made as to Appellants Jones and Smith. JA 182.

On October 31, 2011, Appellants Smith and Jones appealed the August 30 Order. JA 178. On November 28, 2011, Appellant Doe appealed the November 15 Order. JA 185. This Court consolidated the appeals for briefing and argument. JA 190.

[3] In the same August 30, 2011 ruling, Judge Hudson granted Appellants' motion to dismiss Mr. Tobey's Fourth Amendment claim (Count 1), finding that given the "heightened security interest at airport security checkpoints" it was "reasonable for [Appellants] to seek assistance from the [local] police." JA 76. Judge Hudson also dismissed Mr. Tobey's Fourteenth Amendment claim against appellants (Count 3). *Id*. Mr. Tobey disagrees with these rulings but cannot appeal them until final judgment is entered in the case. *Baird v. Palmer*, 114 F.3d 39, 42-43 (4th Cir. 1997) (plaintiff's appeal of order granting qualified immunity not permitted when other claims remain pending before the District Court); *accord Bailey v. Kennedy*, 349 F.3d 731, 734 (4th Cir. 2003).

STATEMENT OF JURISDICTION

Mr. Tobey concurs with Appellants' Statement of Jurisdiction. *See* Government Brief ("Gov. Br.") at 3.

COUNTER-STATEMENT OF THE ISSUE

1. Whether the District Court correctly held that Mr. Tobey adequately pleaded a First Amendment violation by alleging that Appellants caused him to be treated differently and arrested based on the message conveyed by his silent and peaceful expression of protest to the use of enhanced airport screening technology at RIC.

STATEMENT OF THE FACTS

TSA is responsible for maintaining the security of commercial air travel in the United States. JA 145 at ¶13. TSA employees screen and search airline passengers at airports, randomly selecting certain passengers for enhanced secondary screening. JA 145-146 at ¶¶14-15. Under its then-current enhanced secondary screening policy, TSA offered passengers the choice of submitting to either (a) an Advanced Imaging Technology ("AIT") scan, which produces a highly detailed picture of the passenger's unclothed body using x-ray or millimeter wave technology; or (b) a full-body pat-down search, which involves TSA agents using the front of their hands to feel the passenger's body. JA 146 at ¶16.

TSA screening has specific and limited purposes which include "to find explosives, incendiaries, weapons or other items and screening to ensure that an individual[']s identity is appropriately verified and checked against government watch lists." *Id.* at ¶17 (citing TSA Management Directive No. 100.4).[4]

On December 30, 2010, Mr. Tobey, then an architecture student at the University of Cincinnati, sought to fly from RIC to attend his grandfather's funeral in Wisconsin. JA 148 at ¶25. In order to protest against what he perceived to be intrusive and unconstitutional AIT screening, Mr. Tobey had transcribed the text of the Fourth Amendment onto his chest: "AMENDMENT 4: THE RIGHT OF THE PEOPLE TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED." *Id.* at ¶26.

Mr. Tobey waited until there was a short line at the TSA security screening checkpoint. *Id.* at ¶27. He then entered the screening process by handing his boarding pass and identification to the pre-screening agent. *Id.* at ¶28. Mr. Tobey

[4] TSA's screening activities are conducted pursuant to TSA Management Directive No. 100.4. JA 146 at ¶17. The screening is part of the broader stated purpose: "to prevent, protect against or respond to acts of terrorism and to protect persons, facilities and critical infrastructure as part of a layered security system in all modes of transportation." *Id.* Under TSA Management Directive No. 100.4, all administrative and special needs searches conducted by TSA personnel are specifically limited "to established procedures to ensure that searches will be confined in good faith to their intended purpose," which include the objectives of enhancing "the security of persons and critical infrastructure," eliminating "the threat item(s) that are the target of the search," as well as tailoring searches "to protect personal privacy." *Id.* ¶19.

proceeded to the conveyor belt area and placed his belt, shoes, sweatshirt, and other carry-on materials on the conveyor belt. *Id.* at ¶29. Appellant Smith diverted Mr. Tobey from the magnetometer (a metal detector used by TSA as the primary screening apparatus) toward the AIT scanning unit. JA 143-144 at ¶9, JA 148 at ¶30.

Before entering the AIT scanning unit, Mr. Tobey also removed his t-shirt and sweatpants and placed them on the conveyor belt, leaving him in running shorts and socks and revealing the text of the Fourth Amendment that he had previously written on his chest. JA 148-149 at ¶31. Appellant Smith advised Mr. Tobey that the removal of his clothing was not necessary. JA 149 at ¶32. Mr. Tobey responded that he was expressing his view that TSA's enhanced screening procedures were unconstitutional. *Id.*

Appellant Smith then radioed for assistance. As ordered by her supervisor Appellant Jones, Smith told Mr. Tobey to remain in front of the AIT scanning unit (which he did). Appellants Jones and Doe then asked the RIC police for assistance. JA 143-144 at ¶9, 149 at ¶33.[5]

---

[5] TSA and the RIC Commission have entered into agreements under which the Commission made its law enforcement officers available to TSA to enforce the TSA's and the Commission's regulations, policies, practices, customs, and protocols at RIC. JA 143 at ¶7, JA 147 at ¶¶20, 23. The agreements include a Memorandum of Agreement requiring TSA "[t]o provide guidance as to the process and procedures necessary to implement the Playbook Concept," and

(footnote continued on next page)

RIC police officers Vann and Mason arrived and, without warning or questioning Mr. Tobey, immediately arrested and handcuffed him. JA 149 at ¶ 34-35. The arrest was "without probable cause because of the message conveyed by [Mr. Tobey's] silent, nonviolent expression of objection to the TSA's screening policies." JA 161-162 at ¶105. At no time prior to or after his arrest did Mr. Tobey refuse to undergo an enhanced screening or pat-down search. JA 154 at ¶65. At no time did he refuse to respond to additional questioning within the airport screening area. Mr. Tobey "remained quiet, composed, polite, cooperative and complied with the requests of agents and officers" at all times during the screening process. *Id.*

Appellants Smith, Jones and Doe did not advise RIC police officers of the extent of the screening of Mr. Tobey or provide exculpatory information that Mr. Tobey had neither engaged in criminal conduct nor done anything else that would require his arrest, imprisonment, or prosecution under Management Directive

---

(footnote continued from previous page)

establishing a process by which TSA and the Commission "will act *collaboratively* for the purpose of combining layers of security and coordinating the assets of TSA, law enforcement, and other security partners at the airport to improve the overall airport security posture." JA 147 at ¶21 (emphasis added). Under the Memorandum of Agreement, the Commission has responsibility "to actively participate in the *collaborative* coordination of *security countermeasures*" and "to assign airport resources, when available and appropriate, to execute *agreed upon Plays*." *Id.* ¶22 (emphasis added).

100.4 or any other law. JA 150 at ¶37. Those individuals likewise did not seek assistance from any Federal Air Marshall or TSA law enforcement officer for appropriate follow-up.

Officer Vann escorted Mr. Tobey to a side area, adjusted his handcuffs with his arms behind his back, and informed him that he was under arrest for creating a public disturbance. JA 149 at ¶35. Appellant Doe searched Mr. Tobey's belongings at the security checkpoint, removing an unidentified item from those belongings. *Id.* Officer Mason then collected Mr. Tobey's belongings with assistance from Appellants Smith and Doe. JA 150 at ¶36.

Officer Vann took Mr. Tobey to the RIC police station where Vann and other officers questioned and challenged Mr. Tobey about his Fourth Amendment views. JA 150-152 at ¶¶40-44, 50-53.[6] Mr. Tobey spent 90 minutes with his arms cuffed behind his back, wearing only running shorts and socks in the cold airport police station. JA 152 at ¶54. The officers eventually charged Mr. Tobey with disorderly conduct in a public place in violation of Virginia Code 18.2-415. After

[6] The officers told Tobey that his conduct would have repercussions, threatened that they would make sure he would have a permanent criminal record, and for no discernible legitimate reason reported the incident by phone to the University of Cincinnati police. JA 150-152 ¶¶41-43, 50. One of the officers told Tobey that by purchasing a ticket and commencing a screening procedure, he had surrendered his Fourth Amendment rights. JA 151 at ¶44. They told him they were taking him to the Henrico County jail, and removed and discarded certain of his personal belongings which were declared to be "contraband." JA 151-152 ¶¶48, 51-53.

telling him he would be sent to jail, they later informed him that he would be released after he spoke with an Air Marshal from the Federal Air Marshal's Joint Terrorism Task Force. JA 153 at ¶55.

An Air Marshal arrived, and after questioning Mr. Tobey, Tobey was released. JA 153-154 at ¶¶56, 63. The Commonwealth Attorney for Henrico County, Virginia dropped the charge against Mr. Tobey, admitting there was no evidence to sustain it. JA 156 at ¶75.

SUMMARY OF THE ARGUMENT

The allegations in Mr. Tobey's Second Amended Complaint lead to only one conclusion — Appellants sought to suppress Mr. Tobey's expression and make an example of him because of the message he was conveying at the checkpoint, and not because of his behavior. Accordingly, the District Court correctly found that Mr. Tobey adequately pled a First Amendment violation.

Appellants' argument that Tobey was arrested because his behavior was out of the ordinary and "bizarre" is built on the faulty premise that Mr. Tobey threatened Appellants, interfered with their screening duties, or otherwise failed to comply with TSA regulations or agent directives. Nothing of the sort happened here. Nor can the Second Amended Complaint be read to infer any such conduct.

Mr. Tobey engaged in a silent, entirely passive, and non-violent protest, always obeying the directions of the TSA officers. Non-disruptive expressive

protest is at the core of protected First Amendment speech, whether it be construed as different, unusual or bizarre, and that is what the Second Amended Complaint alleged.

STANDARD OF REVIEW

This Court reviews the District Court's denial of a qualified immunity-based motion to dismiss *de novo*. *See, e.g.*, *Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010).

The qualified immunity defense 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 v. Fitzgerald*, 457 U.S. 800, 818 (1982); *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). This is a highly fact-specific determination that requires an inquiry into issues inherently fact-specific. *See, e.g.*, *Saucier*, 533 U.S. at 202. 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).[7]

Motions to dismiss (based on qualified immunity or otherwise) "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); s*ee also 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).

Accordingly, a Rule 12(b)(6) motion to dismiss "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). As a result, 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." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570; *see also Anderson v. Sara Lee Corp.*, 508 F.3d 181, 189 (4th Cir. 2007) (upholding, post-*Twombly*, as sufficiently stated, a

[7] *See also Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002) (noting that a decision on qualified immunity is premature when there are unresolved disputes of material fact relevant to the immunity analysis); *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").

fraud claim even under the heightened pleading requirements where the complaint did not detail how the defendant allegedly deceived the plaintiff). Moreover, the allegations set forth in the Complaint must be taken as true and all reasonable factual inferences must be construed in the plaintiff's favor. *See, e.g., Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *see also Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005) ("In 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.").

In qualified immunity cases, courts recognize that colorable claims are entitled to discovery and, therefore, often reserve determinations on the sufficiency of a plaintiff's claims 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").

ARGUMENT

I. MR. TOBEY'S SECOND AMENDED COMPLAINT PROPERLY ALLEGES A DELIBERATE AND ACTIONABLE VIOLATION OF HIS FIRST AMENDMENT RIGHTS

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." This fundamental right encompasses not only the affirmative right to speak, but also the right to be free from retaliation by public officials for speaking. *See, e.g.*, *ACLU v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir. 1993) (noting that "[r]etaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights"); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (stating that retaliatory acts are "a potent means of inhibiting speech").

By engaging in retaliatory acts, public officials place indirect restraints on speech "allow[ing] the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (alterations in original) (citation omitted). In order to state a retaliation claim, a plaintiff must allege 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." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685-86 (4th Cir. 2000). Mr. Tobey's Second Amended Complaint plainly alleges each of these elements.

Mr. Tobey alleges that he engaged in a peaceful, lawful protest of perceived intrusive screening procedures at RIC. It is significant that his conduct was not disruptive, did not implicate any of the security issues TSA screening is designed to address, and could have been resolved without any need for law enforcement intervention. JA 154 at ¶65. When Mr. Tobey displayed the text of the Fourth Amendment on his chest, however, Appellants arrested him "because of the message conveyed by [Mr. Tobey's] silent, nonviolent expression of objection to the TSA's screening policies." JA 161 at ¶105. After his detention by TSA, and arrest in collaboration with RIC police officers, the RIC officers handcuffed, questioned and bullied Mr. Tobey about his protest, and then charged him with a patently unsustainable crime.[8] JA 150-152 at ¶¶40-44, 50-53.

[8] The pertinent portion of the Virginia disorderly conduct statute (Virginia Code § 18.2-415) requires conduct "having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed." Moreover, the statute is specifically exempts from its reach "the utterance or *display of any words*."

A. Mr. Tobey More Than Adequately Alleges that Appellants Took Retaliatory Action Against His Exercise of Protected First Amendment Rights

Appellants concede that Mr. Tobey's Second Amended Complaint asserts a valid First Amendment claim if it alleges that Appellants "took retaliatory action against [Tobey] because of an objection to the viewpoint expressed by Tobey's body-writing." *See* Gov. Br. at 18-19. They argue, however, that Mr. Tobey's Complaint makes this allegation in too conclusory a fashion. *Id.*, at 17-22. Appellants are wrong.

The Second Amended Complaint asserts directly that Appellants "seized [Mr. Tobey], or in collaboration with others caused his seizure, without probable cause *because of the message conveyed* by [his] silent, nonviolent expression of objection to the TSA's screening policies . . ." JA 161 at ¶105 (emphasis added).[9]

[9] Appellants argue that Mr. Tobey's allegation that they arrested him "because of the message" he conveyed is ambiguous and could mean either that Appellants disliked the content of his protest message or that they were "motivated by his bizarre behavior." *See* Gov't Br. at 15. This is simply incorrect. The full allegation from Mr. Tobey's Second Amended Complaint is that Appellants caused his arrest "*without probable cause because of the message* conveyed by Plaintiff's silent, nonviolent expression of objection to TSA's screening policies . . . and thereby engaged in content and/or viewpoint discrimination **. . .**" JA 161 at ¶105 (emphasis added). Arresting Mr. Tobey based on purportedly bizarre behavior would not constitute "content and/or viewpoint discrimination." Appellants repeatedly argue that since the allegation of causation appears not in the factual section of the Complaint, but as part of additionally stated allegations in the Second Claim, that this somehow disqualifies it as an allegation of fact. *See* Gov. Br. 9, 11, 15, 33, 36, 38. This position ignores the fact that all prior allegations are

(footnote continued on next page)

Indeed, the Second Amended Complaint explains why retaliation against Mr. Tobey's protest message is the *only* reasonable explanation for Appellants' actions. At all times, Mr. Tobey acted peacefully and in compliance with all TSA rules, procedures and directions. He never refused any TSA request or instruction. He never refused to participate in the enhanced screening process. He remained quiet, composed, polite, cooperative and complied with the requests of agents and officers" at all times during the screening process. JA 154 at ¶65. The only action he took was simply to remove his t-shirt and sweatpants to reveal the text of the Fourth Amendment on his chest. JA 148-49, 156 at ¶¶31 and 79.

Yet, immediately after Mr. Tobey engaged in his expressive protest, Appellants immediately engaged RIC police officers to arrest him. JA 149 at ¶33. The police did so in a highly unconventional manner, moving in without warning and without questioning, immediately handcuffing him, pushing him through the magnetometer, holding him until his belongings were retrieved, and then taking him in handcuffs to the airport police station. JA 149-150 at ¶¶34-36. At the station, RIC police held Mr. Tobey in handcuffs for an extended period of time,

---

(footnote continued from previous page)

alleged in the Second Claim, as well as new allegations specific to that Claim. The Appellants offer no support for their contention that facts must be pled in a particular section of a complaint. The argument simply elevates form over substance and should be rejected. Moreover, Mr. Tobey's pleading is entitled to be read in the light most favorable to him, and not, as Appellants suggest, in the light most favorable to them.

photographed him, searched his belongings multiple times, questioned, bullied and debated with him about his protest, threatened him with jail, and notified his university. After being charged with disorderly conduct, Mr. Tobey was released. JA 150-153 at ¶¶40-44, 50-55. Ultimately, prosecutors chose not to pursue those charges, determining that they were unsupported by the evidence. JA 156 at ¶75.

The main events of Mr. Tobey's protest and arrest took place against an airport background that included "pictorial and graphic displays . . . of bare-chested persons, persons in bathing suits, and persons dressed in running shorts and other athletic apparel." JA 154-155 at ¶70. The only difference between these images and Mr. Tobey's appearance was that his bare chest contained a message with a contemporaneous, fully understandable, protest message. Notwithstanding these similar displays, Appellants unlawfully and summarily detained and arrested Mr. Tobey. JA 161-162 at ¶105.

These allegations easily support the conclusion that Appellants "took retaliatory action against [Tobey] because of an objection to the viewpoint expressed by Tobey's body-writing." *See* Gov. Br. at 18-19. Under settled law, these allegations state an actionable claim for violating Mr. Tobey's First Amendment Rights. *See, e.g.*, *Perry*, 408 U.S. at 597; *Suarez*, 202 F.3d at 685-86; *Trulock v. Freeh*, 275 F.3d 391, 405-06 (4th Cir. 2001). Just as in *Trulock*, the context of the stop, the timing of the search and the immediate seizure and arrest,

"raise[d] an inference of retaliatory motive." 275 F.3d at 405-06 (noting that "[a]ll of these factors, when viewed together and accepted as true, raise a reasonable inference that the interrogation and search were retaliatory").

Moreover, Mr. Tobey's express allegation that the arrest lacked probable cause further reinforces the validity of his retaliation claim. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Supreme Court confirmed that "[d]emonstrating that there was *no probable cause* for the underlying criminal charge will tend *to reinforce the retaliation evidence* and *show that retaliation was the but-for basis for instigating the prosecution*. . . .". *Id*. at 261 (emphasis added).[10]

The cases Appellants rely upon in arguing that Mr. Tobey's allegations are too "conclusory" all involved the bald assertion of secret conspiracies by high

[10] Because the "*absence* of probable cause will have *high probative value*," the *Hartman* Court ruled that the lack of probable cause must be pled in such cases (which Mr. Tobey has clearly done with regard to his unlawful arrest, detention and prosecution. JA 148-150 at ¶¶27-37; 161-162 at ¶105). The *Hartman* Court explained that "[s]ome official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but *when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution*." *Id.* (emphasis added); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283–284 (1977) (adverse action against government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms"). Here, in accord with this standard, as alleged in the Second Amended Complaint, Appellants took retaliatory action against Mr. Tobey, causing him to be detained and arrested *"without probable cause because of the message"* he was conveying in exercising his First Amendment rights.

government officials, with no context explaining why such conspiracies were plausible. *See* Gov. Br. at 21-22. Thus, in *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 377 (6th Cir. 2011), *pet. for cert. filed* (Dec. 28, 2011), the Sixth Circuit affirmed the dismissal of plaintiff's First Amendment claim where the plaintiff made "conclusory allegations of nefarious intent by officials at the highest levels of the federal government" to stifle plaintiffs speech by, for example, alleging that the government officials had labeled them as 'rightwing extremists,' inhibiting their speech activities." *Id.*[11]

Likewise, in *Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009), the Ninth Circuit dismissed as conclusory a First Amendment claim asserting that plaintiff's allegations that the Secret Service moved protesters "in conformity with an officially authorized *sub rosa* Secret Service policy of suppressing speech critical of the President." In so finding, the Court noted that "[t]he allegation of systematic viewpoint discrimination at the highest levels of the Secret Service, without any factual content to bolster it, is just the sort of conclusory allegation

[11] In *Center for Bio-Ethical Reform*, the Court found that the complaint lacked the "when, where, or what and by whom such a description was made. . . ." It also found that the complaint lacked "factual context that would render [the allegations] plausible. . . , including vague and undated assertions of law enforcement activities directed at them. . . . [and] silence about the location, manner, duration, extent or timing of the alleged governmental harassment, surveillance and scrutiny." *Id.* at 373-74.

that the *Iqbal* Court deemed inadequate."[12]

In contrast, the specificity of the allegations of fact in the context of this case, taken as a whole, has "facial plausibility" in that it "allows the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). *See supra* pages 15 through 18. Accordingly, the District Court was reasonable and correct in finding "*because [Appellee's] unrebutted claim facially states a cause of action, the question of qualified immunity must await further discovery.*" JA 78 (emphasis added), citing *Swagler v. Neighoff*, 398 F. App'x 872, 877-78 (4th Cir. Oct. 18, 2010) (*per curiam*) (affirming the district court's denial of qualified immunity in advance of discovery because issues of troopers' "subjective motivation" for action was "highly fact-dependent"). Appellant's offer no valid reason to upset the District Court's ruling.

B. Mr. Tobey's Peaceful and Cooperative Conduct Did Not Justify His Arrest

Appellants argue that it is "appropriate and lawful for screeners to consider a person's speech and behavior to determine if they present a higher risk to security,

[12] In *Moss*, the Court found that the alleged activity of the Secret Service agents in moving the appellant protesters was consistent with the perimeter established for other protesters, thereby negating any plausible claim of discrimination. *Id.* at 971. The Court also found that there was no allegation linking the agents to the actions of the local police which resulted in further acts of discrimination. *Id.*

and make further inquiries if that behavior is disruptive or 'bizarre' . . ." *See* Gov. Br. at 23-29. As explained above, however, Mr. Tobey's Second Amended Complaint alleges that Appellants arrested him *because* of the message of his protest, not because he was being disruptive, and not because of any bizarre conduct independent of the display of the Fourth Amendment on his chest.[13]

As this Court has noted:

> 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, viewing the facts in the most favorable light to Mr. Tobey, the Court should not consider whether Appellants' conduct would have been reasonable if it were truly motivated by concern for disruptive or bizarre behavior. Even if the Court were to do so, they are insufficient, at this stage of the proceeding, to justify dismissal of Mr. Tobey's First Amendment claim.

[13] As for the suggestion that Mr. Tobey's display of the Fourth Amendment on his chest was bizarre, it should be noted, as mentioned earlier, that the airport terminal contained several life-sized placards showing "bare-chested persons, persons in bathing suits, and persons dressed in running shorts and other athletic apparel" like Mr. Tobey's. JA 154-155 at ¶70.

1. Mr. Tobey's Conduct Was in No Way "Disruptive"

Appellants argue that Mr. Tobey was being "disruptive." This is contradicted by the plain allegations of the Second Amended Complaint. Far from acting in a disruptive manner, the Complaint alleges that he "remained quiet, composed, polite, cooperative and complied with the requests of agents and officers" during the entire screening process. JA 154 at ¶65. Moreover, Mr. Tobey never refused to undergo an enhanced screening or pat-down search, *id.* at ¶65, nor did he observe any disruption of other airline passengers as a result of his peaceful protest, *id.* at ¶66, nor did he disobey a TSA directive. JA 154 at ¶65.

Indeed, the Appellants' attempt to suggest that Mr. Tobey disrobed when directed not to do so by a TSA agent is simply not true. *See* Gov. Br. at 7. The Second Amended Complaint states unequivocally that it was only ***after*** he had already removed his T-shirt and sweatpants that the TSA agent ***then*** advised him that there was no need to do so.[14] Appellant Smith next advised Tobey to remain where he was, which he did until his arrest. JA 149 at ¶33.

[14] Appellants quote the District Court for the proposition that "[Mr. Tobey] began stripping off his clothes inside the security screening area and continued to do so even after Smith advised that removal of clothing was unnecessary." This is simply not correct. *See* Gov. Br. at 10. The pertinent allegations of the Second Amended Complaint clearly state a sequence of events where Tobey had removed his clothing and placed it on the conveyor ***before*** Appellant Smith said anything to him. Appellant Smith spoke to Tobey ***after*** he removed his shirt and sweatpants and was standing, not before or during the time he disrobed. *See* JA 148-149 at ¶¶31-32.

Mr. Tobey's actions here are a far cry from the plaintiff's actions in *Rendon v. TSA*, 424 F.3d 475 (6th Cir. 2005), a case involving 49 C.F.R. 1540.109, a TSA regulation making it unlawful to interfere with screening personnel, as applied to an airline passenger who was subjected to a civil penalty for becoming loud and belligerent after he set off the metal detector alarm. *See* Gov. Br. at 30-32. In *Rendon*, the 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. Here, Mr. Tobey was not disruptive, did not fail to comply with any TSA directive or request, and did not interfere with the TSA's screening duties.[15]

Appellants are also incorrect that the District Court's decision dismissing Mr. Tobey's Fourth Amendment claim somehow bears on the viability of his First Amendment claim. *See* Gov. Br. at 41. The District Court's Fourth Amendment ruling held that given the "heightened security interest at airport security

[15] Equally misplaced is Appellants' reliance on 49 C.F.R. 1540.109, the regulation at issue in *Rendon*, to justify their conduct. *See* Gov. Br. at 32-33. 49 C.F.R. 1540.109 provides that "[n]o person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter." *Id.* This regulation, however, does not apply to these facts because Mr. Tobey's conduct did not constitute interference, assault, threat or intimidating conduct against TSA officials. In the Second Amended Complaint, Mr. Tobey alleges the direct opposite, that he engaged in a silent, non-violent protest, always obeying the directions of the TSA officials. JA 148-149 at ¶31.

checkpoints" it was "reasonable for [Appellants] to seek assistance from the [local] police." JA 76. That ruling is not under consideration in this appeal, but assuming that it is correct on the facts and circumstances of this case, "seeking assistance" to monitor a situation is altogether different from detaining Mr. Tobey and causing his arrest, and it is especially different from taking action to effect the arrest of someone *"without probable cause because of the message"* he conveyed in the exercise of his First Amendment rights.

It is axiomatic that government officials must have probable cause to search or arrest an individual. *See, e.g., Henry v. United States*, 361 U.S. 98, 100 (1959); *see also Florida v. Royer*, 460 U.S. 491, 500 (1983) (noting that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion."). As the Supreme Court affirmed in *Hartman*, "the significance of probable cause *or the lack of it* looms large, being a potential feature of every case, *with obvious evidentiary value*." *Id*. at 265.[16]

[16] *Hartman* is directly on point: "Because showing an absence of *probable cause* will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." *Id*. at 266. The quotation set forth in the defendants' brief, however, substitutes the word "reasonableness" for the words "probable cause," suggesting that a finding that a request for police assistance was "reasonable" (as the lower court stated) is the same as a finding that probable cause existed for arrest and charging a person with criminal conduct (which is *not* what the lower court stated and remains as a central issue in this case).

In *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007), for example, 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 the plaintiff from opting out of further airport "pat-down" screening. After a TSA agent incurred repeated "hand wand alarms" on the passenger, and after referral to a TSA supervisor and further unsatisfactory "wanding," followed by tactile verification of an unidentified substance in the passenger's pocket, the TSA supervisor required the passenger to empty his pockets and discovered a package of methamphetamine, and *then* handed him over to state law enforcement officials. *Aukai*, 497 F.3d at 962.

Given these facts, the Ninth Circuit rejected the defendant's argument that the drug evidence constituted the fruit of an unlawful search. In particular, the Court 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. *Id.* (emphasis added).

Here, in stark contrast to what took place in *Rendon* and *Aukai*, Mr. Tobey was not even disruptive, nor had he violated any law or TSA regulation. Yet,

unlike *Aukai*, where the passenger was led through a deliberate and proportionately escalating process of inquiry, without summary seizure or arrest, so that TSA could resolve a security issue, here Mr. Tobey was summarily detained and arrested without any prior questioning or inquiry immediately following the Appellants contacts with police.

It is also settled law that expressive protest in public venues, including airport terminals, is almost *always* unusual and by definition different from the norm in the place where the protest takes place. *See, e.g., Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (ban on distribution of literature in the Port Authority airport terminals by religious group is invalid under the First Amendment); *Board of Airport Comm'rs v Jews for Jesus*, 482 U.S. 569 (1987) (peaceful First Amendment *conduct* must be permitted, even in an airport setting); *Spence v. Washington*, 418 U.S. 405, 410 (1974) (U. S. flag bearing a peace symbol displayed upside down on apparel worn by a student is protected speech); *Cohen v. California*, 403 U.S. 15 (1971) (apparel worn in courthouse containing profane expletive protesting the draft was protected speech). Appellants thus cannot justify their arrest of Mr. Tobey by asserting that his peaceful display of a message and cooperative conduct, by virtue of its being unusual, was somehow unduly disruptive. Indeed, if there was any disruption, it was, in fact, the Appellants' own overzealous conduct in reaction to Mr. Toney's

message.

2. Even if Mr. Tobey's Conduct Could be Characterized as "Bizarre," It Would Still be Protected by the First Amendment

Appellants' argument that they were justified is taking action against Mr. Tobey because he was exhibiting "bizarre" behavior is equally misplaced. *See* Gov. Br. at 23-29. Indeed, Appellants employ the term "bizarre" 19 times in their opening brief in the misguided view that whatever is "bizarre" is inherently illegal or a talisman justifying arrest and detention. But this view is simply not the law.

If the First Amendment were judged solely by the bizarre, the desecration of the flag would not be protected speech,[17] Cohen would have gone to jail for the profanity on his jacket,[18] and military funerals and other events would be spared from the "bizarre" protests of the Pastor Fred Phelps and the Westboro Baptist Church.[19] Fortunately for our democracy, the First Amendment protects expressive conduct that the less tolerant might consider "different" or "bizarre," particularly with reference to displays involving an individual's personal

[17] *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the act of flag burning was protected speech under the First Amendment).

[18] *Cohen*, 403 U.S. at 15.

[19] *Snyder v. Phelps*, 562 U. S. ____, 131 S. Ct. 1207 (2011).

appearance.[20] *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 410 (1974) (noting that "[a] flag bearing a peace symbol and displayed upside down [on apparel worn] by a student today might be interpreted as nothing more than ***bizarre behavior***, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it") (emphasis added); *see also United States v. Alvarez*, 617 F.3d 1198, 1201 (9th Cir. 2010), *cert. granted* 132 S. Ct. 457 (2011) (concluding that Alvarez's "***bizarre lies***" were protected speech under the First Amendment) (emphasis added). Contrary to Appellants' position, the talisman for intervention by law enforcement in free expression is when one's actions "no matter how ***bizarre*** or potentially dangerous, *actually manifests itself in*

[20] Appellants contend that "removing one's shirt and pants in the security screening area at Richmond Airport is highly unusual and obviously inappropriate" and that Mr. Tobey's "further disrobing" beyond his shirt "was obviously not required to convey this written message." *See* Gov. Br. at 24. This argument misses the point of Mr. Tobey's protest. The removal of one's belt, and shoes and other articles of clothing in a public venue is unusual (and may be distasteful for many). Mr. Tobey's removal of his shirt and sweatpants is no more inappropriate than the larger than life placards showing bare-chested men and women in swim suits on display in the terminal for all to see on the way to the checkpoint. Moreover, the TSA agent peering into the AIT scanning screen sees far more than Mr. Tobey in his running shorts and the agent doing a pat-down feels even more, which was exactly the point of Mr. Tobey's protest ***as alleged in his complaint*** — linking the written constitutional message with his demonstrative, symbolic speech in removing his clothing. JA 156 at ¶79. The bottom line is that all of this was overt speech designed to convey a message during a period of very evident public dissatisfaction with the over intrusiveness of AIT screening, and was certainly not inappropriate in light of the great tradition of individual protest in this country. *See, e.g.*, *Spence*, 418 U.S. at 410; *Cohen*, 403 U.S. at 15; and *Snyder*, 131 S. Ct. at 1207.

the form of unlawful conduct, that the government may intercede." *BenShalom v. Secretary of Army*, 489 F. Supp. 964, 976 (E.D. Wis. 1980) (emphasis added).

Here, Appellants cannot justify their conduct by characterizing Mr. Tobey's conduct as "bizarre." Expressive protests are protected by the First Amendment even if they may be characterized by some as "bizarre." It is only when the conduct becomes intrusive or illegal that government officials may lawfully intervene. The Second Amended Complaint makes no allegation of illegal or disruptive conduct; nor can any such conduct be inferred, whether or not the complaint is read in the light most favorable to Mr. Tobey. There was simply no probable cause to arrest Mr. Tobey and certainly individual notions of what is or what is not "bizarre" do not justify indiscriminate interference with his constitutional rights.[21]

II. MR. TOBEY ALLEGES A CLEARLY ESTABLISHED FIRST AMENDMENT VIOLATION

Appellants are equally mistaken in their argument that Mr. Tobey's Second Amended Complaint fails to allege that the First Amendment claim involved sufficiently settled law to overcome their qualified immunity defense. *See* Gov.

[21] Appellants offer page after page of policy reasons (*see* Gov. Br. 25-32) as to why the exercise of First Amendment rights at screening checkpoints should not be permitted, to the effect of sanitizing security checkpoints from application of the Bill of Rights, apparently aimed at soliciting a rule that gives security forces free reign to do what they please. That is not the law.

Br. at 47-54.

In order to demonstrate that a right is clearly established for purposes of the qualified immunity analysis, Mr. Tobey does not need a previous decision addressing the precise facts at issue. *See, e.g., Melgar*, 593 F.3d at 358; *see also Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992) (finding that a violation occurred does not require that "the very act in question [have been] held unlawful" previously); *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"). 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). Thus, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 739-40. That is exactly the situation presented here.

First, the law is clear that individuals possess First Amendment rights at airports located in the United States. *See, 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"). Accordingly, in *Jews for Jesus*, the Supreme Court noted that "[m]uch non-disruptive speech — such as the wearing of a T-shirt or button that 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*, 403 U.S. 15).[22]

As Appellants themselves recognize, the Supreme Court, in a case involving First Amendment rights in an airport, made clear that "an effort to suppress the speaker's activity due to disagreement with the speaker's view" is impermissible. Gov. Br. at 53 (citing *Int'l Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)).

Second, Courts have routinely upheld First Amendment rights where messages were delivered in a sensitive forum in a controversial manner. In the seminal case of *Cohen v. California*, 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

[22] *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).

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 (and is no more disruptive) under the First Amendment than the many more mundane messages on magazines, clothing, and billboard advertisements at airport terminals. *Id.* at 18 (recognizing that it would be improper to punish Cohen for his viewpoint on the inutility or immorality of the draft his jacket reflected). Likewise, it has long been recognized that a "[l]istener's reaction to speech is *not* a content-neutral basis for regulation" of speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (emphasis added); *see also*, *United States v. Marcavage*, 609 F.3d 264 (3rd Cir. 2010) ("[W]here the government regulates speech based on its perception that the speech will spark fear among or disturb its audience, such regulation is by definition based on the speech's content."); *accord*, *Swagler v. Sheridan*, 2011 WL 2746649 (D. Md. July 12, 2011).

Accordingly, claims of content and viewpoint discrimination have long formed 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."); *see also 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); *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").[23]

Finally, as Appellants concede, a person cannot be retaliated against by government officials for the content or viewpoint of his speech. *See* Gov. Br. at 18-19. As this Court has said, "[i]t is well established that a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right." *Suarez v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). Likewise, retaliatory governmental action aimed at individuals who engage in First Amendment protest of government policies is unconstitutional. *See, e.g., Trulock*,

[23] The Second Amended Complaint alleged that there were a variety of political and commercial speech activity in the RIC terminal on the day Mr. Tobey was arrested and that Mr. Tobey's expression was treated differently from other speech in the terminal. Specifically, Mr. Tobey asserted that 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." JA 154-155 at ¶70. While these displays involving commercial, political and protest messages were permitted, action was taken only against Mr. Tobey.

275 F.3d at 406 ("we hold that it was clearly established at the time of the search that the First Amendment prohibits an officer from retaliating against an individual for speaking critically of the government.").

Here, Mr. Tobey alleged claims of content and viewpoint discrimination in violation of the First Amendment. As the foregoing demonstrates, the law underpinning Mr. Tobey's First Amendment claims is well established. Accordingly, Appellant's qualified immunity claim fails.

CONCLUSION

The District Court concluded, based on Mr. Tobey's allegations in the Second Amended Complaint and the binding law of this Circuit, that he stated a claim under the First Amendment and, therefore, the question of whether Appellants are entitled to qualified immunity must await further discovery. Appellant has offered no arguments that these findings were erroneous. Accordingly, the District Court's orders denying Appellants' motions to dismiss Mr. Tobey's First Amendment claims should be affirmed.

Dated: March 2, 2012.

Respectfully submitted,

AARON TOBEY

By: /s/ James J. Knicely
James J. Knicely
Robert Luther III
KNICELY & ASSOCIATES, P.C.
487 McLaws Circle, Suite 2
Williamsburg, Virginia 23185

Anand Agneshwar
Alan C. Veronick
ARNOLD & PORTER, LLP
399 Park Avenue
New York, New York 10022-4690

Of Counsel:

John W. Whitehead
Douglas R. McKusick
The Rutherford Institute
1440 Sachem Place
Charlottesville, Virginia 22906

Attorneys for Appellee Aaron Tobey

REQUEST FOR ORAL ARGUMENT

Counsel for Appellee requests oral argument and believes it would assist the Court in resolving the issues presented on appeal.

CERTIFICATE OF COMPLIANCE
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 6,362 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportional typeface with 14 characters per inch in Times New Roman.

/s/ James J. Knicely
James J. Knicely
Counsel for Appellee Aaron Tobey

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on March 2, 2012, the foregoing Brief for Appellee was electronically filed with the Clerk of the United States Court of Appeals for the Fourth Circuit Court using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that the foregoing was filed with the Court pursuant to Federal Rule of Appellate Procedure 25 and Local Rule 25 by filing on this day the original and eight (8) true and correct copies of the foregoing with the aforesaid Clerk at the following address:

United States Court of Appeals
Office of the Clerk
1100 East Main Street
Richmond, Virginia 23219

/s/ James J. Knicely
James J. Knicely