Hector O. Villagra (Bar No. 177586)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
2140 W. Chapman Avenue, Suite 209
Orange, CA 92868
Telephone:(714) 450-3962
Facsimile:(714) 450-3969
Email: hvillagra@aclu-sc.org

(Additional Counsel Listed On Following Page)

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JAMEELAH MEDINA,

Plaintiff,

v.

COUNTY OF SAN BERNARDINO, a political subdivision; GARY PENROD, in his individual and official capacities; and DOES 1 through 10, in their individual and official capacities,

Defendants.

CASE NO. EDCV07-1600 VAP (OPx)

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Date: February 25, 2008
Time: 10:00 a.m.
Courtroom: 2

Complaint Filed: December 5, 2007

Ranjana Natarajan (State Bar No. 230149)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, CA 90026
Telephone:(213) 977-9500
Facsimile:(213) 250-3919
E-Mail: RNatarajan@aclu-sc.org

Lenora M. Lapidus (Admitted *Pro Hac Vice*)
Ariela M. Migdal (Admitted *Pro Hac Vice*)
AMERICAN CIVIL LIBERITES UNION FOUNDATION
WOMEN'S RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
Telephone:(212) 519-7861
Facsimile:(212) 549-2580
E-Mail: LLapidus@aclu.org
E-Mail: AMigdal@aclu.org

Daniel Mach (Admitted *Pro Hac Vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
PROGRAM ON FREEDOM
OF RELIGION AND BELIEF
915 15th Street, NW
Washington, DC 20005
Telephone:(202) 548-6604
Facsimile:(202) 546-0738
E-Mail: DMach@dcaclu.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

OTHER STATE CASES

FEDERAL RULES

STATE STATUTES

MISCELLANEOUS

INTRODUCTION

The Court should deny Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Motion"), because Plaintiff has alleged facts sufficient to state a claim for a violation of California's Tom Bane Act. Specifically, Plaintiff's allegations satisfy the Act's requirement of "threats, intimidation, or coercion." CAL. CIV. CODE § 52.1 (West, Westlaw through 2007 Sess.). Case law and secondary legal sources make clear that the threat of additional detention or confinement by the police suffered by Plaintiff is sufficient, even in the absence of a threat of physical violence. Moreover, the support cited by Defendants for the proposition that a threat of physical violence is required is inapposite and incorrect. For these reasons, the Court should deny the Motion to Dismiss.

BACKGROUND

Plaintiff Jameelah Medina is a practicing Muslim who, in accordance with her religious beliefs and as a part of the exercise of her religion, wears a headscarf when she is in public and when she is in the presence of men who are not members of her immediate family. First Amended Complaint ("FAC") ¶¶ 4, 12-14. For Ms. Medina, to have her hair and neck uncovered in the presence of men who are not her immediate family members is a serious breach of faith and religious practice, and a deeply humiliating and violating experience that substantially burdens her religious practice. *Id.* ¶ 14.

On December 7, 2005, Ms. Medina was arrested for having an invalid Metrolink ticket. *Id.* ¶ 16-17. The arresting officer took her to San Bernardino County's West Valley Detention Center. *Id.* ¶¶ 20-23. There, a female officer told Ms. Medina to take off her jewelry and other personal items, and then she told Ms. Medina to remove her headscarf. *Id.* ¶ 23. Ms. Medina responded that she could not take it off and that she wore it for religious reasons, and the female officer then again told her to remove it, after which Ms. Medina repeated her response. *Id.*

Subsequently, the female officer told Ms. Medina that she did not care what worked "outside" and that Ms. Medina must take off the headscarf "in here." The officer told Ms. Medina that "in here" she must do as she was told. *Id.* ¶ 24. The officer threatened that she could make sure that Ms. Medina was not processed or fingerprinted and that, as a result, Ms. Medina would not be eligible for bail and would not be released from jail that same day. *Id.* In response to this threat, Ms. Medina allowed the officer to remove her headscarf in the presence of the male arresting officer. *Id.* ¶ 25. During the incident, Ms. Medina felt violated, exposed, and humiliated, because she was coerced into removing her headscarf in the presence of a man, in violation of her religious beliefs and practices. *Id.*

Later in the day, while still in custody at the jail, the same female officer saw that Ms. Medina had received her headscarf back and had put it on her head. The officer told Ms. Medina to take off the scarf again, and Ms. Medina complied with the officer's demand. *Id.* ¶ 29. Ms. Medina then attempted to cover herself by putting her thermal undershirt over her head, but the officer told her that she was not allowed to put anything on her head. *Id.* ¶ 30. At least two or three male officers saw Ms. Medina that day without her headscarf. *Id.* ¶ 32. She was not able to put her headscarf back on until she was released on bond that evening. *Id.* ¶ 33.

Ms. Medina alleges that, by their actions described above, including threatening her with additional jail time if she refused to remove her headscarf, Defendants unlawfully interfered with Ms. Medina's rights to exercise her religion freely, in violation of California's Tom Bane Act. *Id.* ¶ 60. Ms. Medina alleges that, as a result of the defendants' threats, coercion, or intimidation, she was harmed in that she was coerced into being exposed in violation of her religious beliefs, and that she was also harmed in that she suffered emotional distress as a result of Defendants' actions. *Id.* ¶ 61.

Defendants have moved to dismiss on the ground of failure to state a claim under the Tom Bane Act. Plaintiff opposes this motion.

ARGUMENT

The Court Should Deny Defendants' Motion Because Plaintiff Has Stated A Claim Under The Tom Bane Act.

A. Legal Standard For Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12(b)(6).

In reviewing a motion to dismiss, the Court should "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007) (citing *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)). Dismissal for failure to state a claim "is proper only when there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Siaperas v. Montana State Compensation Ins. Fund*, 480 F.3d 1001, 1003 (9th Cir. 2007) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). The Court is "required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990)). "'It is axiomatic that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."'" *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, at 598 (1969))).

B. Plaintiff Has Stated A Claim Under The Tom Bane Act, Because The Act's Coercion Requirement Is Satisfied By The Threat Of Additional Jail Time.

California's Tom Bane Act, Cal. Civil Code § 52.1, provides a cause of action to an individual when a person "interferes by threats, intimidation, or

coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment" of the individual's constitutional or statutory rights. CAL. CIV. CODE § 52.1(a). Under the statute's plain language, the interference may be by threats, intimidation, or coercion; violence or threat of physical violence is not required. Case law and secondary sources interpreting the statute confirm that the "[u]se of law enforcement authority to effectuate . . . detention" suffices to constitute a threat, intimidation, or coercion for purposes of the statute. *Cole v. Doe 1 thru 2 Officers of City of Emeryville Police Dept.*, 387 F. Supp. 2d 1084, 1102-04 (N.D. Cal. 2005); Judge Harold E. Kahn & Robert D. Links, *California Civil Practice Civil Rights Litigation* § 3:19 (updated 2007), *available at* Westlaw, CCPCIVILRGHTS § 3:19 (hereinafter "Kahn & Links") (discussing the *Cole* case and the threat and coercion requirement).

In the *Cole* decision, which a leading treatise characterized as "[t]he only published Bane Act case that has discussed the meaning of 'threats,' 'intimidation,' and 'coercion,'" Kahn & Links § 3:19, the court agreed that the plaintiff could proceed to trial on a Tom Bane Act claim where he alleged that police officers had stopped him without probable cause and searched his trunk without his consent in violation of his Fourth Amendment rights, *see Cole*, 387 F. Supp. 2d at 1103. The court held that "[u]se of law enforcement authority to effectuate" the stop, detention, and search satisfies the requirement of threat, intimidation, or coercion. *Id.* (citing *Venegas v. County of Los Angeles*, 87 P.3d 1 (Cal. 2004) (permitting a cause of action under § 52.1 for unreasonable search and seizure in the absence of any claim that the police used excessive force); *Jones v. Kmart Corp.*, 949 P.2d 941 (Cal. 1998) (noting that § 52.1 requires "a form of coercion")).

The *Cole* court relied upon an unpublished California appellate opinion holding that the act of a police officer barring a plaintiff from entering a meeting, even without using force, constitutes coercion under § 52.1, and noting that § 52.1 does not by its terms require violence or threat of violence. *See id.* (discussing

Whitworth v. City of Sonoma, No. A103342, 2004 WL 2106606 (Cal. Ct. App. Sept. 22, 2004) (unpublished)). *Cole* also discussed the *Whitworth* court's statement that the Tom Bane Act "was modeled on the Massachusetts Civil Rights Act of 1979, which has been construed to cover '"an implicit threat of physical ejection or arrest."'" *Id.* (quoting *Whitworth*, 2004 WL 2106606, at *7 (quoting *Bally v. Northeastern Univ.*, 532 N.E.2d 49, 53 (Mass. 1989))). Both the *Cole* court and the *Whitworth* court found persuasive Massachusetts precedent holding, in the context of its "'virtually identical counterpart to the Bane Act,'" *id.* (quoting *Whitworth*, at *7), that "'"coercion may take various forms,"'" *id.* (quoting *Whitworth*, at *7 (quoting *Buster v. George W. Moore, Inc.*, 783 N.E.2d 399, 401 (Mass. 2003))), that it is "not limited . . . to actual or attempted physical force," *id.*, and, importantly, that the commands of uniformed officers constitute "'"sufficient intimidation or coercion to satisfy the statute,"'" *id.* (quoting *Whitworth*, at 7 (quoting *Batchelder v. Allied Stores Corp.*, 473 N.E.2d 1128, 1131 (Mass. 1985))), "'"simply because *the natural effect of the* [officer's] *action was to coerce* [the plaintiff] in the exercise of his rights"'" *id.* (quoting *Whitworth*, at *7 (quoting *Redgrave v. Boston Symphony Orchestra*, 502 N.E.2d 1375, 1379 (Mass. 1987) (discussing the *Batchelder* case, in which a uniformed security guard ordered the plaintiff to cease distributing handbills on private property))).[1]

In the instant case, Plaintiff has alleged facts sufficient to state a claim under the Tom Bane Act. Ms. Medina alleges that, while she was under arrest in the West Valley Detention Center, a female police officer instructed her to take off various personal items, including her headscarf. FAC ¶ 23. Ms. Medina informed the officer that she could not remove the headscarf and that she wore it for religious

[1] At least one subsequent federal decision to address the issue has followed the *Cole* court's analysis and held that even non-violent police action can constitute coercion for purposes of the Tom Bane Act. *See Reinhardt v. Santa Clara County*, No. C05-05143, 2006 WL 3147691, at *9 (N.D. Cal. Nov. 1, 2006) (unpublished) (holding that "the City is mistaken in its contention that non-violent police action does not constitute coercion") (citing *Cole*, 387 F. Supp. 2d at 1103).

reasons. *Id.* In response, the officer repeated her command to take off the headscarf, and Ms. Medina repeated her response. *Id.* The female officer subsequently told Ms. Medina that she did not care what worked "outside" and that Ms. Medina must take off the headscarf "in here," meaning in the jail. *Id.* ¶ 24. The officer told Ms. Medina that she must do as she was told in jail, and the officer threatened that she could make sure that Ms. Medina was not processed or fingerprinted and that, as a result, Ms. Medina would not be eligible for bail and would not be released the same day. *Id.* In response to these threats, Ms. Medina allowed the officer to take the headscarf off of her head. *Id.* ¶ 25.

These facts present a clearer coercion scenario than either *Cole* or *Whitworth*. While *Cole* found coercion where officers stopped the plaintiff and coerced him to consent to the search of his car, the plaintiff there was not in a jail, but in a public place. Here, Ms. Medina was under arrest in the West Valley Detention Center under the near-total control of the officers who administer the jail. She was also acutely aware – particularly after the female officer pointed it out – that the jail's staff could continue to detain her if she did not comply with their demands. It also goes without saying that the coercion undergone by Ms. Medina was more powerful than that experienced in *Whitworth*, where an officer barred the plaintiff from entering a meeting, or in *Batchelder*, where the private security guard ordered the plaintiff to cease distributing handbills. The environment of a jail, in which many aspects of one's life are controlled by the police and jail staff, is very coercive. *See, e.g.*, *Russell v. Richards*, 384 F.3d 444, 448 n.2 (7th Cir. 2004) (describing the "coercive character of the jail environment"). And in this case, the officer threatened Ms. Medina explicitly with further jail time if she did not comply.

C. Defendants' Argument That The Tom Bane Act Requires Violence Or A Threat Of Physical Violence Is Meritless.

Defendants' argument that Plaintiff must prove that Defendants used

violence or threatened her with physical violence is simply wrong, and is based upon a statement of the Act's requirement that is recognized by courts and legal authorities as outdated and incorrect. By its terms, the statute does not require interference by physically violent acts or by threat of violent acts; on the contrary, the statute does not mention violence, much less physical violence.

The sole source of authority cited by defendants for the contrary proposition is *Austin v. Escondido Union School District*, 57 Cal. Rptr. 3d 454 (Cal. App. 2007). Deft's Mot. to Dismiss at 5-6. *Austin*, however, did not address the question whether violence or a threat of violence is required under the Act, much less whether police commands to an individual who is in police custody satisfy the requirement of "threats, intimidation, or coercion." Rather, *Austin* concerned an action by two autistic preschoolers against a school district alleging that a preschool instructor had engaged in abusive conduct against them, including pinching, holding their hands painfully, stepping on their fingers, and other forms of physical abuse. *Id.* at 867. The court found that the plaintiffs had not made out a Tom Bane Act claim, because the preschool teacher had neither caused the children not to attend school nor attempted to achieve that result, so he had not caused (or attempted to cause) a loss of their right to an education. *Id.* at 883. The decision did not address the issue before the Court here, and it is therefore inapposite.

In listing the elements of a Tom Bane Act claim at the outset of its discussion of the Act, the *Austin* court quoted the Judicial Council of California Civil Jury Instruction No. 3025, the first element of which is that the "defendant interfered or attempted to interfere with a constitutional or statutory right 'by threatening or committing violent acts.'" *See* 149 Cal. App. 4th at 882 (quoting Judicial Council of California Civil Jury Instruction N. 3025). The "Sources and Authority" for this jury instruction explain that the first element is based on the statement in *Cabesuela v. Browning-Ferris Industries of California, Inc.*, 80 Cal. Rptr. 2d 60 (Cal. App. 1998) ("It is clear that to state a cause of action under § 52.1 there must first be

violence or intimidation by threat of violence."). The California Civil Practice treatise of Judge Harold E. Kahn and Robert D. Links explains in its "Practice Note" to the section on the Tom Bane Act jury instruction:

> "The first element of 3025 is probably erroneous . . . . As to the first element, see § 3:19 supra for an explanation why violence or a threat of violence is not always required for a Bane Act claim. *Cabesuela*, *supra*, relied on by the Judicial Council for the first element, is no longer good law since the 2000 amendment to the Bane Act clarified that the Bane Act does not incorporate the proof requirements of the Ralph Act. [See § 3:19]."

Kahn & Links, *supra*, § 3:26. Section 3:19 of the treatise discusses *Cole* and *Whitworth* and explains that use of law enforcement authority to stop or detain can constitute a threat, intimidation, or coercion, even in the absence of use of force or violence. *Id.* § 3:19. The practice note explains that *Cabesuela*'s requirement of violence is probably "incorrect" and that *Cabesuela* had relied upon *Boccato v. City of Hermosa Beach*, 35 Cal. Rptr. 2d 282 (Cal. App. 1994) in importing the requirement from another California statute, the Ralph Act, CAL. CIV. CODE § 51.7. *Id.* (discussing *Cabesuela*, 80 Cal. Rptr. 2d at 65). Because *Boccato* was subsequently legislatively overruled by the 2000 amendment to the Tom Bane Act, the treatise concludes that importation of Ralph Act requirements into the Tom Bane Act is contrary to the Bane Act's current form. *See id.* (citing CAL. CIV. CODE § 52.1(g) (Tom Bane Act is independent from the Ralph Act).

In short, Defendants' suggestion that violence or a threat of physical violence is always required for a Tom Bane Act violation is based on an outdated premise – that the Tom Bane Act incorporates such a requirement from the Ralph Act – which the Legislature subsequently overruled by amending the Tom Bane Act to state that it is independent of the Ralph Act. A leading treatise and several court cases have recognized that the exercise of law enforcement authority, particularly in the context of detention, suffices to satisfy the Tom Bane Act's requirement of "threat, intimidation, or coercion." The single case cited by Defendants for support does not address this requirement one way or the other; it merely quotes the jury

instruction that is recognized to be out-of-date and erroneous as to its suggestion that violence is required. The Court should follow the *Cole*, *Reinhardt*, and *Whitworth* courts and the Kahn and Links treatise and find that Plaintiff, who alleges threats, intimidation, and coercion by the police while she was under arrest in jail, has stated a claim under the Tom Bane Act.[2]

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny or strike Defendants' Motion to Dismiss Plaintiff's Fourth Claim for Relief.

Dated: February 11, 2008

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
Hector O. Villagra
Ranjana Nataranjan

ACLU WOMEN'S RIGHTS PROJECT
Lenora M. Lapidus
Ariela M. Migdal

ACLU PROGRAM ON FREEDOM OF RELIGION AND BELIEF
Daniel Mach

By: /s/
Hector O. Villagra
Attorneys for Plaintiff JAMEELAH MEDINA

[2] In addition, Defendants' Motion fails to comply with Local Rule 7-3, which requires Defendants' counsel to meet and confer with Plaintiff's counsel regarding the substance of a proposed motion "at least five (5) days prior to the last day for filing the motion." According to Federal Rule of Civil Procedure 6, "intermediate Saturdays, Sundays, and legal holidays" are excluded when computing the five days. Defendants were served on January 16, 2008. Excluding February 2 and February 3, the last day for meeting and conferring with Plaintiff's counsel was January 29, 2008. Plaintiff's counsel offered to meet with Defendants' counsel to discuss the case on Monday, January 28, 2008 and on Tuesday, January 29, 2008, but Defendants' counsel was not available to meet on those days, and did not meet with Plaintiff's counsel until January 31, 2008.