No. 11-4292

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NICHOLAS GEORGE,
Plaintiff-Appellee,

v.

JOHN DOES 1-5,
Defendants-Appellants,

and

WILLIAM REHIEL, Philadelphia Police Officer, in his individual capacity; EDWARD RICHARDS, Philadelphia Police Officer, in his individual capacity; UNITED STATES OF AMERICA,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR DEFENDANTS-APPELLANTS

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STATEMENT OF JURISDICTION

The plaintiff invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343(a)(3), and 1346(b). The individual federal defendants moved to dismiss the claims against them, which were brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), as barred by qualified immunity. Joint Appendix (JA) 76; Memorandum In Support Of The Individual Federal

Defendants' Motion to Dismiss Plaintiff's Constitutional Claims, Dkt. 26, at 5-25. The district court denied the individual defendants' motion to dismiss in an order dated September 30, 2011, and entered into the docket on October 3, 2011. JA 78. The individual federal defendants filed a timely notice of appeal from that order on November 28, 2011. JA 92-93.

The individual federal defendants also moved in the district court for clarification of the court's order, which did not provide any rationale for the denial of qualified immunity. *See* JA 79. The district court ruled on the motion for clarification in an order dated Oct. 28, 2011. JA 81-89. In relevant part, the order makes clear that the district court rejected the individual federal defendants' qualified immunity arguments, on the rationale that the amended complaint states valid claims against each individual federal defendant under the Fourth and First Amendments and that "[t]he defense of qualified immunity in this case may be clarified by discovery." JA 84-87. In an abundance of caution, the individual defendants filed a timely notice of appeal from that order on December 16, 2011, JA 94-95, which this Court treated as an amended notice of appeal.

A district court order denying a motion to dismiss on qualified immunity grounds is immediately appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *See Ashcroft v. Iqbal*, 556 U.S. 662, 672-675 (2009); *Keystone Redevelopment Partners, LLC v. Decker*, 631 F.3d 89, 95 (3d

Cir. 2011); *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 69 (3d Cir. 2011). As numerous courts have held, immediate interlocutory appeal is permitted whenever the functional effect of the district court's ruling is to deny individual federal defendants the benefit of qualified immunity. *See, e.g., X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 64, 66-67 (2d Cir. 1999) (holding that the court of appeals had jurisdiction to review the district court's order that consideration of qualified immunity was "premature in advance of discovery"); *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004) (holding that district court's refusal to address merits of defendant's motion asserting qualified immunity is immediately appealable); *Valiente v. Rivera*, 966 F.2d 21, 23 (1st Cir. 1992) (holding that district court's refusal to permit defendants to move for summary judgment on qualified immunity grounds is immediately appealable).

This Court has jurisdiction to review the district court's orders under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

The plaintiff is a 21-year-old man who presented himself for security screening at the Philadelphia airport with (1) handwritten Arabic-English notecards that included the words "bomb," "explosion," "terrorist," "to attack," "kidnapping," and "to wound"; and (2) a U.S. passport showing recent travel to

countries with significant links to terrorism and terrorist activity, including an extended stay in Jordan and trips to Sudan, Malaysia, Egypt, and Indonesia. The plaintiff was selected for additional screening and questioning by Transportation Security Administration (TSA) officials; Philadelphia police officers then hand-cuffed and detained him for several hours. The Philadelphia police sought assistance from the federal Joint Terrorism Task Force (JTTF), and two JTTF officials searched the plaintiff's belongings and questioned him for approximately thirty minutes before he was released and permitted to fly to his destination. The questions presented on appeal are:

1. Whether the individual federal defendants are entitled to qualified immunity on the plaintiff's claims that their conduct in questioning him and searching his baggage violated the Fourth Amendment.

2. Whether the individual federal defendants are entitled to qualified immunity on the plaintiff's claim that their conduct was unlawful retaliation for protected speech in violation of the First Amendment.

STATEMENT OF THE CASE

The plaintiff brought claims against the individual federal defendants under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), alleging that they violated his rights under the First and Fourth Amendments. The individual federal defendants moved to dismiss the claims on the ground of qualified immunity, which the district court denied. The district court's order denying the motion to dismiss on qualified immunity grounds is subject to immediate appeal. *See Iqbal*, 556 U.S. at 672-675.

STATEMENT OF FACTS

A. Factual Background.[1]

This claims at issue in this appeal challenge the plaintiff's alleged treatment by three Transportation Security Administration (TSA) screening officials, John Does 1-2 and Jane Doe 3, and two officials with the FBI's Joint Terrorist Task Force (JTTF), John Does 4-5, at the Philadelphia Airport in August 2009. *See generally* JA 32-52.[2]

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[1] The description of the factual background of this case is derived from the allegations in the plaintiff's amended complaint. Those allegations are assumed to be true solely for the purposes of this appeal; the individual federal defendants do not concede that the amended complaint accurately describes the underlying events in question.

[2] Pursuant to a stipulated protective order entered in district court, Dkt. 14, the (continued...)

The plaintiff is a U.S. citizen who was a student at Pomona College at the time of the events giving rise to this suit. JA 32-33. He went to the Philadelphia Airport on August 29, 2009, to fly to Phoenix and on to California. JA 36. He had recently spent a semester studying abroad in Jordan, and had also traveled to Sudan, Malaysia, Egypt, and Indonesia. JA 33.

When the plaintiff arrived at the airport security screening checkpoint, he presented his boarding pass and passport, which reflected his recent foreign travel. JA 36. The plaintiff was asked what was inside his carry-on bag, and he told a TSA screening official that his bag contained two stereo speakers. JA 36. The plaintiff was asked to remove the speakers from the bag to be screened separately by the x-ray screening device. JA 36-37. After the plaintiff walked through the metal detector, he was directed by a TSA official to enter a glass-enclosed area for additional screening. JA 37.

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[2](...continued)
three TSA screeners named as individual defendants were named as John Does 1-2 and Jane Doe 3, and were identified under seal. The two individual defendants alleged in the complaint to be "detectives of the Philadelphia Police Department," JA 35, were identified in preliminary discovery in the case as JTTF officials. *See* Memorandum In Support Of The Individual Federal Defendants' Motion to Dismiss Plaintiff's Constitutional Claims, Dkt. 26, at 1 n.1. Those two individual federal defendants have been designated as John Does 4-5 pursuant to the stipulated protective order. The official caption for this appeal denominates the individual federal defendants as "John Does 1-5."

When the plaintiff entered the glass-enclosed screening area, he was asked by another TSA official — John Doe 1 — to empty his pockets. JA 37. The plaintiff's pockets contained approximately 80 handwritten notecards with Arabic and English words. JA 37-38; JA 56-75 (copy of notecards). Many of the cards contained words that were violent and threatening in nature, including "bomb," "terrorist," "explosion," "an attack," "battle," "to kill," "to target," "to kidnap," and "to wound." JA 58, 62, 66, 70, 72, 74. After seeing the notecards, the TSA screener took the plaintiff to another screening area, where that screener and a second TSA screener — John Doe 2 — swabbed the plaintiff's cell phone for explosives and searched his carry-on items. JA 38-39. One of the men allegedly telephoned a supervisor, Jane Doe 3, who arrived within thirty minutes. JA 39-40.

The TSA supervisor allegedly questioned the plaintiff for approximately fifteen minutes in a manner that the plaintiff found "hostile and aggressive." JA 40. The TSA supervisor asked the plaintiff about the Arabic-English notecards. JA 41. The TSA supervisor also allegedly asked the plaintiff his views about 9/11, and commented on his possession of a book entitled "Rogue Nation: American Unilateralism and the Failure of Good Intentions," that criticized U.S. foreign policy in the Middle East. JA 40-41.

The plaintiff alleges that "[t]he TSA Supervisor * * * was in mid-sentence when a police officer arrived." JA 42. The officer, who was from the Philadelphia

Police Department, instructed the plaintiff to put his hands behind his back and handcuffed him. JA 42. The officer then led the plaintiff through the terminal to the airport police station, while telling the plaintiff that he was being taken "for extra screening." JA 42-43. In response to the plaintiff's questions, the police officer told him that he was not being arrested but was being detained. JA 43. The plaintiff was placed in a cell for approximately four hours. JA 33, 47.

The plaintiff alleges that Philadelphia police officers called the FBI's Joint Terrorism Task Force (JTTF). JA 45. Two officers from JTTF subsequently arrived at the police station. JA 45. The officers searched the plaintiff's carry-on items and inspected the inside of the plaintiff's stereo speakers. JA 45. The officers then questioned the plaintiff about his background; his foreign travel; whether he had joined a terrorist group or met anyone during his travels "who was 'overtly against the U.S. government'"; and his political and religious beliefs. JA 46-47. After approximately thirty minutes of questioning, the officers explained to the plaintiff that "[t]he police call us to evaluate whether there is a real threat," and that he was "not a real threat" and was free to leave. JA 47.

The following day, the plaintiff returned to the airport, boarded a flight, and reached his destination without incident. JA 49.

B. District Court Proceedings.

The plaintiff filed this suit in the Eastern District of Pennsylvania. He asserted constitutional claims against three TSA employees in their individual capacities: the two TSA screeners who searched his belongings (John Does 1-2), and the TSA supervisor who searched and questioned him (Jane Doe 3). The plaintiff also asserted constitutional claims against the two federal JTTF officers who questioned him before his release by the Philadelphia Police Department (John Does 4-5). He alleged that he had been subjected to an unreasonable search and seizure in violation of the Fourth Amendment and that that he had been interrogated and detained in alleged retaliation for his possession of notecards and a book, in violation of the First Amendment. JA 50.

The plaintiff also alleged claims against the United States under the Federal Tort Claims Act, JA 51-52, and against two Philadelphia police officers, defendants Rehiel and Richards, JA 50. Those claims are not at issue in this appeal.

The individual federal defendants moved to dismiss the *Bivens* claims, arguing that the plaintiff's allegations do not establish a violation of the First or Fourth Amendment and that, in any event, any such rights were not clearly established as necessary to overcome the defense of qualified immunity.

Memorandum In Support Of The Individual Federal Defendants' Motion to Dismiss Plaintiff's Constitutional Claims, Dkt. 26, at 5-25. The United States filed a separate motion to dismiss the Federal Tort Claims Act claims. JA 54-55.

On September 30, 2011, the district court denied both motions to dismiss. JA 78. The order stated that the motions were being denied "because the amended complaint alleges claims for relief that are "plausible on [their] face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))."

The individual federal defendants appealed the denial of their motion to dismiss on qualified immunity grounds. JA 92.[3] In addition, the individual federal defendants moved for clarification in the district court, asking the district court to confirm that the court had intended to reject their qualified immunity defense. JA 79.

On October 28, 2011, the district court ruled on the motion for clarification in an order that provided additional reasoning for its earlier order denying the

[3] This Court issued an order on December 6, 2011, directing the parties to brief the question whether the district court's order was immediately appealable. Following briefing by the parties, who agreed that the order denying qualified immunity is among the class of collateral orders subject to immediate appeal under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the Court ordered that the appeal would not be dismissed, and referred the jurisdictional question to the merits panel assigned to this case.

individual federal defendants' motion to dismiss. JA 81-89. The district court stated that the amended complaint "contains sufficient factual allegations of specific conduct on the part of each defendant that, if true, constitute violations of the plaintiff's First and Fourth Amendment rights." JA 81.

The district court acknowledged that no warrant or individualized suspicion of wrongdoing is required under the Fourth Amendment for airport security screening searches. JA 83-84. The court suggested, however, that an airport search must be "minimally designed to protect plaintiff's personal privacy and individual liberty rights," and that the TSA screeners' authority to search and question the plaintiff was "exhausted after the first 10-15 minutes, once plaintiff was found to possess nothing that would endanger airline safety." JA 84. Any further scrutiny, the district court reasoned, constituted an "investigatory detention and arrest" for which "reasonable suspicion of criminal activity or probable cause of a specific crime" was required. JA 84-85. "If the facts alleged are true," the court stated, "the [Philadelphia Police Department] handcuffed and locked [the plaintiff] in a cell at the direction of the TSA and JTTF," without probable cause to support an arrest. JA 85. The district court also stated that the plaintiff's allegations established "that each individual defendant participated in subjecting plaintiff to an intrusion upon his personal freedom for more than five hours." JA 85.

The district court also held that the amended complaint "plausibly sets forth a First Amendment violation," declaring that "the entirety of plaintiff's airport experience may fairly be attributable to his possession of materials protected by the First Amendment." JA 85-86. The court relied on the plaintiff's allegations that the TSA screeners inspected and questioned him about the Arabic-English notecards, and that one TSA screener and the TSA supervisor inspected the book that the plaintiff he was carrying. JA 86. The district court concluded that the plaintiff had adequately alleged "that each defendant violated plaintiff's rights to read, study, and possess protected materials by arresting and detaining him for his exercise of those rights." JA 86.

The district court did not separately analyze whether the Fourth or First Amendment rights alleged to have been violated were so clearly established that no reasonable officer in the defendants' position could have believed that his conduct was lawful. Instead, the court opined that "[t]he defense of qualified immunity in this case may be clarified by discovery." JA 87.

SUMMARY OF ARGUMENT

The district court erred in denying the individual federal defendants' motion to dismiss on the ground of qualified immunity. The plaintiff's allegations fail to state a violation of a constitutional right and even more plainly fail to state a violation of a clearly established right.

The plaintiff asserts that TSA employees violated his First and Fourth Amendment rights when they searched his baggage and questioned him at an airport security screening site during an encounter that lasted approximately 45 minutes. The plaintiff was carrying handwritten Arabic-English notecards with many violent and threatening words. His passport indicated that that he had recently traveled to and stayed in countries with significant ties to terrorism and terrorist activity. No judicial precedent remotely suggests that TSA screeners must cease immediately a search of a passenger, when a search of his baggage does not find any firearms or explosives but there are other indications that the passenger might pose a threat. On the contrary, the courts have uniformly recognized that officials at airport screening checkpoints must be granted considerable latitude in protecting against risks to aviation security.

The plaintiff is on no firmer ground in engrafting a First Amendment claim onto his assertion that his examination was an unconstitutional search or seizure.

His First Amendment retaliation claim is based on allegations that he was subjected to additional screening by officials because of his possession of Arabic-English notecards and a book that was critical of U.S. foreign policy. The plaintiff's right to carry such materials is uncontroverted. It should be equally clear, however, that the First Amendment does not prohibit screening officials from considering an individual's possession of suspicious written materials along with other factors in determining whether to engage in further questioning. Here, the plaintiff's possession of the threatening notecards and his recent travel to countries with significant links to terrorism supported the screeners' decision to question and search him further. The plaintiff's allegation of retaliatory animus is wholly conclusory, and, under *Iqbal*, such assertions are not sufficient to state a claim in light of the obvious alternative explanation for the defendants' actions. Furthermore, the plaintiff's First Amendment claim would fail in any event because he has not shown that the individual federal defendants lacked adequate grounds under the Fourth Amendment to question him further and to search his property.

Plaintiffs allegations regarding the two JTTF agents underscore the absence of any anchor in fact or precedent for his constitutional claims. The agents responded to a request for assistance from the Philadelphia police. They searched the plaintiff's bags, questioned him for approximately 30 minutes, and advised the

police that he did not pose a risk to aviation security. That conduct violated neither the Fourth nor the First Amendment. The district court appeared to believe that the individual JTTF agents (and the TSA employees) could be deemed individually liable for the conduct of the Philadelphia police in handcuffing and detaining the plaintiff. *Iqbal* makes clear that this type of vicarious liability is impermissible under *Bivens*. The plaintiff has, in any event, offered no allegations that support a plausible inference that the police operated as agents of the individual TSA employees or JTTF employees.

Finally, even if the plaintiff had stated a constitutional claim against any individual defendant, his allegations cannot be construed to state a violation of any clearly established right. The "'contours of the right must be sufficiently clear,'" and "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Kopec v. Tate* 361 F.3d 772, 784 (3d Cir.), *cert. denied*, 543 U.S. 956 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The district court did not identify any decision invalidating a similar airport search on either Fourth or First Amendment grounds, and there are none. The lack of any clearly established precedent requires application of qualified immunity to shield the defendants from suit.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's ruling on a motion to dismiss on the basis of qualified immunity. *See McLaughlin v. Watson*, 271 F.3d 566, 570 (3d Cir. 2001), *cert. denied*, 535 U.S. 989 (2002).

ARGUMENT

THE PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL FEDERAL DEFENDANTS ARE BARRED BY QUALIFIED IMMUNITY

A. In Order To Defeat The Individual Defendants' Qualified Immunity, The Plaintiff Must Allege Facts Establishing That Each Defendant's Conduct Violated The Plaintiff's Clearly Established Constitutional Rights.

Qualified immunity shields government officials from personal liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is intended "to mitigate the social costs of exposing government officials to personal liability," *Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998), by giving officials "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011). Properly applied, the doctrine protects "all but the plainly incompetent or those who

knowingly violate the law." *Ibid.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The determination whether a right alleged to have been violated is so clearly established that any reasonable officer would have known of it "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quotation marks and citation omitted). In order for the official to lose the protections of qualified immunity, "existing precedent must have placed the statutory or constitutional question *beyond debate*." *Al-Kidd*, 131 S. Ct. at 2083 (emphasis added); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (government official is entitled to qualified immunity unless the unlawfulness of his conduct is "apparent" under pre-existing law).

The Supreme Court has repeatedly "stressed the importance of resolving [qualified] immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). District courts should move "expeditiously to weed out suits * * * without requiring a defendant who rightly claims qualified immunity to engage in expensive and time-consuming preparation to defend the suit on its merits." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Qualified immunity is not merely a defense, but also "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

Accordingly, "any claim of qualified immunity must be resolved at the earliest possible stage of litigation." *Miller v. Clinton County*, 544 F.3d 542, 547 (3d Cir. 2008).

Because a government official may only be held personally liable under *Bivens* "for his or her own misconduct," the plaintiff must allege that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Accordingly, in order to overcome a defense of qualified immunity, a plaintiff must allege facts showing that the conduct of each individual defendant (1) "violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Al-Kidd*, 131 S. Ct. at 2080. A court of appeals has discretion to decide which of the two prongs of the qualified immunity analysis should be decided first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). As we next show, the plaintiff has not satisfied either prong of the qualified immunity analysis, for either of his claims against any of the individual federal defendants.

B. The Plaintiff's Allegations Do Not Establish That Any Individual Federal Defendant Violated His Clearly Established Rights Under The Fourth Amendment.

1. The Plaintiff's Factual Allegations Do Not Establish A Fourth Amendment Violation.

a. TSA Screening Officials (John Does 1-2 and Jane Doe 3).

The plaintiff alleges that the two TSA screening officials — John Does 1 and 2 — inspected his Arabic-English notecards, searched his carry-on bag, swabbed his cell phone for explosives, and contacted a supervisor for assistance. Amended Complaint ¶¶ 23, 27-30. The TSA supervisor — Jane Doe 3 — then questioned the plaintiff for a brief additional period before a local Philadelphia police officer arrived and handcuffed the plaintiff and escorted him to the police station. The plaintiff alleges that it took 30 minutes in total to conduct the initial search and wait for the TSA supervisor to arrive, and that the TSA supervisor then questioned him for approximately 15 minutes. Amended Complaint ¶¶ 30, 40.

It is not controverted that airport security screening of a passenger and his baggage is an administrative search for which no individualized suspicion is required under the Fourth Amendment. *United States v. Hartwell*, 436 F.3d 174, 177-181 (3d Cir.), *cert. denied*, 549 U.S. 945 (2006). As this Court explained, "'[i]t is hard to overestimate the need to search air travelers for weapons and

explosives before they are allowed to board the aircraft," given that "the potential damage and destruction from air terrorism is horrifically enormous." *Id.* at 178-79 (quoting *United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005)).

Accordingly, the plaintiff has conceded that the two TSA screening officials who searched the plaintiff's person and baggage "began properly" and that they acted lawfully in "conduct[ing] a thorough search of his carry-on items for weapons and explosives." Plaintiff's Memorandum in Opposition to the United States' Motion to Dismiss 2-3, Dkt. 33. The plaintiff argued, however — and the district court agreed — that once this search failed to discover any explosives or other hazardous weapons, the screeners were required to release the plaintiff immediately and that they violated constitutional standards by consulting their supervisor. JA 84. The district court reasoned that the screeners' authority to search and question the plaintiff was "exhausted after the first 10-15 minutes, once plaintiff was found to possess nothing that would endanger airline safety." JA 84. At that point, the district court declared, further examination constituted an "investigatory detention and arrest" for which "reasonable suspicion of criminal activity or probable cause of a specific crime" was required. JA 84-85.

The court's ruling is without support in precedent or common sense. Courts have consistently upheld airport screening searches that involved an escalating level of scrutiny, where suspicions that a passenger posed a security risk

could not be ruled out at the initial level of screening. In *Hartwell*, for example, the individual set off an alarm when he passed through an x-ray scanner, and was then searched with a hand-held x-ray wand. 436 F.3d at 175-176. When that search revealed a solid object in the individual's pocket, the individual was escorted to a separate room for questioning. When the individual refused to empty his pockets, the screening officer reached into his pockets and pulled out drugs. *Id.* at 176. The Court held that the initial screening was proper as an administrative search and that the screening officer was permitted to escalate the search "after a lower level of screening disclosed a reason to conduct a more probing search." *Id.* at 180.

Similarly, in *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007), the Ninth Circuit sitting en banc upheld an airport security search in which an individual was referred for additional screening because he failed to present photo identification. *Id.* at 957. The individual was searched using a hand-held x-ray wand, and an item in his pocket triggered an alarm. *Ibid.* The individual repeatedly refused to produce the item, and sought to leave the airport. *Id.* at 957-958. A supervisor directed the individual to empty his pocket, then physically touched the individual's pocket to confirm that it contained a small item — a glass pipe used to smoke methamphetamine. *Id.* at 958. The en banc court of appeals held that the search satisfied the Fourth Amendment because the procedures used

to perform the search were "minimally intrusive" and the length of the search (approximately 18 minutes) was reasonable. *Id.* at 963; *see also, e.g., United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

As in those cases, the conduct of the airport screeners here was wholly consistent with the Fourth Amendment. The plaintiff was selected for additional searching and questioning after TSA officials discovered that he was carrying handwritten Arabic-English notecards containing words such as "bomb," "terrorist," "explosion," "an attack," "battle," "to kill," "to target," "to kidnap," and "to wound." The TSA screening officials also had possession of the plaintiff's passport, which showed that he had recently returned from a lengthy stay in Jordan and shorter trips to Sudan, Malaysia, Indonesia, and Egypt, countries with significant links to terrorism and terrorist activities. Jordan, where the plaintiff had stayed for several months, has experienced significant problems with domestic terrorism, including terrorist cells led by former Guantanamo detainees. *See* U.S. Department of State, Country Reports on Terrorism 2010, at 22-23, available at http://www.state.gov/documents/organization/170479.pdf. Jordanian nationals have also carried out terrorist activities in other countries, including attacks against U.S. government employees and terrorist activities as leaders or members of al Qaeda. *See ibid.* Sudan has been formally designated as a state sponsor of terrorism by the Department of State since 1993, a designation that indicates that

the government has repeatedly provided support for acts of international terrorism. *See* http://www.state.gov/j/ct/c14151.htm. Usama bin Laden operated al Qaeda out of Sudan in the 1990s, *see* The 9/11 Commission Report 57-63, and terrorist groups continue to operate there and to carry out terrorist attacks including the murder of two U.S. Embassy staff members. *See* U.S. Department of State, Country Reports on Terrorism 2009, at 193-194, available at http://www.state.gov/documents/organization/141114.pdf. Other countries to which the plaintiff had traveled also have ties to terrorist activities and groups. For example, terrorists who were involved in the December 25, 2009 attempted bombing of a Detroit-bound airliner were arrested in Malaysia in early 2010. *See* B. Henderson, "Terror Suspects 'Linked' to Detroit Bomber Arrested," The Telegraph (Jan. 28, 2010), available at http://www.telegraph.co.uk/news/worldnews/asia/malaysia/7092494/Terror-suspects-linked-to-Detroit-bomber-arrested.html; *see also* Country Reports on Terrorism 209, 213 (describing Malaysia's efforts to combat terrorism within the country). The terrorist organization Jemaah Islamiyah is reported to have carried out multiple terrorist attacks in Malaysia and Indonesia, and to have provided armed training and other extremist instruction in that region. *See* http://www.dfat.gov.au/publications/terrorism/chapter5.html. Egypt has also

experienced attacks by terrorist groups and has worked to quell domestic terrorist operations. *See* Country Reports on Terrorism 2009, at 118-119.

Airport screeners transgressed no constitutional limit by carefully searching the plaintiff's baggage and consulting with a supervisor. The district court was wholly mistaken to believe that their inquiries were required to cease immediately after no guns or explosives were found in the plaintiff's baggage. The actions taken by the TSA screeners corresponded to the level of concern raised by the plaintiff's possession of handwritten Arabic-English notecards containing words such as "bomb," "terrorist," and "explosion," and his recent travel to countries linked to terrorism. This information could lead reasonable screeners to fear that the plaintiff might intend to engage in terrorist activity against an aircraft, potentially working with other passengers or insiders to commit wrongful acts. *See Hartwell*, 436 F.3d at 180 (noting that airport security searches "may become more invasive when "a lower level of screening disclosed a reason to conduct a more probing search."

Indeed, courts have repeatedly upheld escalating searches of an airline passenger after initial screening raised suspicions, even where the passenger did not pose an immediate threat to aircraft security. *See, e.g., United States v. Herzbrun*, 723 F.2d 773, 777 (11th Cir. 1984) (upholding search of baggage of passenger who has left screening area and attempted to board a taxi); *United States*

v. Legato, 480 F.2d 408, 410 (5th Cir.) (upholding search of baggage after individual left airport terminal and crossed street to parking lot), *cert. denied*, 414 U.S. 979 (1973); *see also People v. Farlow*, 52 Cal. App.3d 414 (Cal. Ct. App. 1975) (rejecting Fourth Amendment challenge to airport screening in which screening agent consulted supervisor after removing a cigarette box from an individual's pocket and found a small plastic balloon).

Like the actions of the initial screeners, the response of the TSA supervisor was entirely reasonable and did not violate constitutional limits. Her questioning lasted approximately 15 minutes, took place at the same screening site, and did not involve any physical invasion. The Fourth Amendment does not prohibit a supervisory-level official from engaging in brief additional questioning of a suspicious passenger, where the initial level of screening cannot rule out the possibility that he could be a threat to aircraft security and the safety of the passengers and crew.

The plaintiff does not advance his argument by alleging that he did not feel free to leave while he was being questioned. JA 41. This Court has rejected the argument that a passenger has a Fourth Amendment right to leave an airport security checkpoint while screening is ongoing, explaining that such a rule would "encourage airline terrorism by providing a secure exit where detection was threatened." *Hartwell*, 436 F.3d at 181 n.12 (internal quotation marks and citation

omitted). As the en banc Ninth Circuit reasoned in *Aukai*, allowing the subject of screening to leave mid-search "would afford terrorists multiple opportunities to attempt to penetrate airport security by 'electing not to fly' on the cusp of detection until a vulnerable portal is found." 497 F.3d at 961-962; *see also Skipwith*, 482 F.2d at 1276-1277, 1282; *Herzbrun*, 723 F.2d at 775-778.

The district court also erred in suggesting that the TSA screening officials could be could be held individually liable under the Fourth Amendment because the plaintiff was handcuffed and detained by the Philadelphia police. JA 85 ("[T]he amended complaint adequately alleges that each individual defendant participated in subjecting plaintiff to an intrusion upon his personal freedom for more than five hours."). The TSA screening officials did not arrest the plaintiff and, in fact, lack authority to make an arrest. *See* TSA Management Directive 1100.88-1 4(A) at 2, available at http://www.tsa.gov/assets/pdf/foia/TSA_MD_1100_88_1_FINAL_070511.pdf (omitting security screeners from categories of TSA employees authorized to make arrests). "[V]icarious liability is inapplicable" under *Bivens*. *Iqbal*, 556 U.S. at 676. Accordingly, individual federal defendants may not be held liable for the conduct of the Philadelphia police.

In any event, even if the plaintiff's legal theory were not barred as a matter of law, his allegations do not support the inference that the Philadelphia police

acted as the agents of the individual TSA employees when they handcuffed and detained the plaintiff. *See Iqbal*, 556 U.S. at 678 (plaintiff's well-pleaded factual allegations must show that claim to relief is "plausible," not merely possible). The plaintiff alleges that the TSA Supervisor "was in mid-sentence when a police officer arrived" and that the police officer immediately handcuffed and led him away. JA 42. The plaintiff does not allege that any of the individual federal defendants made any statement to the police officer, much less allege facts that would establish that local police acted under the federal officials' direction in handcuffing and detaining the plaintiff. The clear implication of the plaintiff's allegations is that the Philadelphia police made the decision to detain the plaintiff, in order to seek assistance from additional officials with anti-terrorism experience to question the plaintiff further. *See* JA 43 (alleging that police officer told the plaintiff he was not being arrested), 44 (alleging that the plaintiff was not given *Miranda* warnings), 45 (alleging that, while the plaintiff was detained, Philadelphia police officers "called various federal and state agencies * * * in order to arrange for [the plaintiff] to be interrogated"). The TSA screening officials had neither legal nor functional control over that decision.

b. JTTF Agents (John Does 4-5).

The plaintiff's factual allegations against the two agents with the FBI's Joint Terrorist Task Force (JTTF) underscore the absence of any doctrinal anchor for his claims. The plaintiff alleges that the two JTTF agents arrived at the police station, searched the plaintiff's belongings and questioned him for approximately 30 minutes, and then indicated that he was free to leave. That questioning plainly did not constitute an unreasonable search or seizure, and the district court did not suggest otherwise.

Instead, the court theorized that the JTTF agents could be held liable for the plaintiff's detention for several hours by the Philadelphia police. *See* JA 85. But the plaintiff's factual allegations do not support a plausible inference that the individual federal defendants were involved in the plaintiff's detention — or even that they knew how long he was detained. The only factual allegations about the two JTTF agents are that they went to the Philadelphia police station at the request of local police in order to question the plaintiff; that they searched the plaintiff's property; and that they questioned him for a relatively brief period of time before indicating that he did not pose a security risk and was free to go. The district court did not and could not explain any way in which these allegations state a violation of the Fourth Amendment.

2. Any Fourth Amendment Rights That Were Violated By The Individual Federal Defendants' Conduct Were Not Clearly Established.

Qualified immunity applies unless existing precedent shows that the unlawfulness of a defendant's conduct is "beyond debate." *Al-Kidd*, 131 S. Ct. at 2083. Even assuming that the plaintiff's factual allegations establish a violation of the Fourth Amendment by any of the individual defendants, the allegations plainly do not state a violation of a clearly established right.

The "controlling authority," or "robust consensus of cases of persuasive authority," *Al-Kidd*, 131 S. Ct. at 2084, in this area is the large body of decisions upholding airport searches against Fourth Amendment challenge. Neither the plaintiff nor the district court identified any cases with even remotely similar facts in which conduct like that challenged here has been held unlawful.

Instead, the district court adopted the type of reasoning repeatedly rejected by the Supreme Court, noting the general principle that an "investigatory detention and arrest are constitutional only if supported by reasonable suspicion of criminal activity or probable cause of a specific crime." JA 84-85 (citing *Terry v. Ohio*, 392 U.S. 1 (1968), and *Orsatti v. New Jersey State Police*, 71 F.3d 480 (3d Cir. 1995)). The Supreme Court has repeatedly admonished that, in determining whether an official has violated a "clearly established" constitutional right, a court

should not frame the right at issue at such a high level of generality. *See Al-Kidd*, 131 S. Ct. at 2084 (citing cases). The law is not "clearly established" unless "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). And while "[w]e do not require a case directly on point * * * existing precedent must have placed the statutory or constitutional question beyond debate." *Al-Kidd*, 131 S. Ct. at 2083.

Terry articulated general standards for a stop-and-frisk, and *Orsatti* set out general standards for an arrest (in the course of holding that the individual defendants were *entitled* to qualified immunity). These cases did not define the constitutional boundaries for TSA officials to search and question passengers at an airport security checkpoint in order to protect safety interests of the first magnitude, where the failure to identify a security risk could have catastrophic consequences. Here, reasonable officials in the position of the TSA screening officials would have no reason to believe that the Fourth Amendment prohibits a limited search and questioning for approximately 45 minutes of an individual carrying handwritten Arabic-English notecards containing many violent and threatening words, and who had recently traveled at length in countries with significant ties to terrorism. Similarly, there are no cases that would make clear

that JTTF agents could not lawfully respond to a request for assistance by the Philadelphia police and conduct a limited search and 30-minute questioning of such an individual.

The district court's suggestion that the case should not be dismissed because "[t]he defense of qualified immunity in this case may be clarified by discovery," JA 87, was also legal error. Qualified immunity is intended to "free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 556 U.S. at 685 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment). For this reason, its applicability should be "resolved at the earliest possible stage of litigation." *Miller*, 544 F.3d at 547. Permitting a litigant to proceed with insubstantial individual-capacity claims like those at issue here would discourage officials from vigorously carrying out their duties to safeguard our national security — precisely the type of harm that the qualified immunity doctrine is intended to prevent.

C. The Plaintiff's Allegations Do Not Establish That Any Individual Federal Defendant Violated His Clearly Established Rights Under The First Amendment.

1. The Plaintiff's Factual Allegations Do Not State A Valid Claim Under The First Amendment, Because They Do Not Show That The Plaintiff Was Searched, Questioned, Or Detained Because Of Officials' Retaliatory Motive.

The district court reasoned that "the entirety of plaintiff's airport experience may fairly be attributable to his possession of materials protected by the First Amendment," pointing to the allegations that the plaintiff was detained "solely because he passed through an airport screening checkpoint with a set of Arabic-English flashcards and a book critical of American foreign policy"; that TSA screeners inspected the flashcards and one of them inspected his book; and that the TSA supervisor asked the plaintiff about the flashcards and, "[a]fter noticing the book, * * * continued her hostile and aggressive questioning." JA 86.

The court failed to give effect to the Supreme Court's holding in *Iqbal* that a plaintiff must provide "sufficient factual matter" to allow a court to draw the reasonable inference that the defendant has acted unlawfully, and that a court is not required to accept as true "a legal conclusion couched as a factual allegation." 556 U.S. at 677-678. In *Iqbal* itself, the Court refused to accept the truth of the allegation that defendants Mueller and Ashcroft willfully agreed to submit him to harsh conditions of confinement "solely on account of [his] religion, race, and/or

national origin and for no legitimate penological interest." *Id.* at 680. As the Court noted, bare assertions that the petitioners "adopted a policy because of" its effects on an identifiable group were conclusory and not entitled to be assumed as true. *Id.* at 681 (internal quotation marks and citation omitted).

The plaintiff's allegations here similarly fail to establish that it was plausible, rather than simply possible, that the defendants acted out of retaliatory animus instead of a good-faith belief that the plaintiff might pose a threat to airline security. The well-pled factual allegations of the complaint show that the plaintiff, who was carrying a passport reflecting recent travel to countries with identifiable and recent links to terrorist groups or terrorist activity, was directed to secondary screening after going through an x-ray machine. JA 37. A TSA screener subsequently discovered that the plaintiff was carrying handwritten Arabic-English notecards containing a significant number of threatening words. JA 37. TSA officials' reasonable concern based on the information they had discovered that the plaintiff might pose a threat, and not any animus toward the content of expressive materials that he was carrying, is an "obvious alternative explanation" for their conduct. *Iqbal*, 556 U.S. at 682; *see also American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) ("[C]ourts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest

lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." (citation omitted)).

` The district court appeared to be of the view that the officers would have violated the First Amendment to the extent that their inquiries were prompted in part by written material in the plaintiff's possession. The court offered no authority for this position. An airplane passenger may read whatever he pleases, including political tracts and books describing how to make explosive devices. A TSA screening officer does not, however, violate the First Amendment by questioning a passenger further in circumstances where particular material in his possession suggests that he might pose a threat to aircraft security.

2. The Plaintiff's Allegations Also Fail To Establish A Valid First Amendment Claim Because They Do Not Show That The Individual Defendants Lacked Adequate Grounds Under The Fourth Amendment To Search, Question, And Detain Him.

The plaintiff's First Amendment claim would fail in any event, because his factual allegations do not establish that the individual defendants lacked adequate grounds to conduct a more extensive search and questioning of the plaintiff and to detain him briefly pending this search.

This Court held in *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782 (3d Cir. 2000), that a plaintiff claiming retaliatory arrest and prosecution in violation of the

First Amendment must establish that the defendant lacked probable cause to believe that the plaintiff had committed a criminal violation. *Id.* at 794-796. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Supreme Court endorsed that view for malicious prosecution claims, holding that a plaintiff must plead and prove the absence of probable cause to bring a valid *Bivens* claim for allegedly inducing criminal prosecution in retaliation for protected speech. As the Supreme Court explained in *Hartman*, a plaintiff who alleges that federal officials took retaliatory actions against him because of his First Amendment expressive activities must show that retaliatory motive was the "but-for cause" of the official's action, since official action colored by a "bad motive does not amount to a constitutional tort if that action would have been taken anyway." 547 U.S. at 256, 260. In a retaliatory prosecution case, evidence showing whether there was probable cause to bring a criminal charge is "highly valuable circumstantial evidence" that is likely to prove or disprove causation. *Id.* at 261.[4]

As we showed in discussing the plaintiff's Fourth Amendment claims, the TSA screeners had a more than reasonable basis for engaging in additional screening and questioning of the plaintiff. Similarly, the JTTF agents properly

[4] Although the Tenth Circuit in *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011), refused to require a plaintiff claiming retaliatory arrest to show the absence of probable cause as a condition of a valid claim, the Supreme Court has granted certiorari to review that holding. *See Reichle v. Howards*, 132 S. Ct. 815 (2011).

responded to the Philadelphia police request for assistance by searching the plaintiff's belongings and questioning him for approximately 30 minutes to determine whether he posed a threat. Because the plaintiff's allegations do not show that the individual federal defendants' conduct was unreasonable under the Fourth Amendment, his claim of retaliatory search and detention fails as a matter of law.

3. Any First Amendment Rights That Were Violated Were Not Clearly Established.

Even if the plaintiff's allegations could be construed to state a violation of the First Amendment, they cannot be construed to state a violation of any clearly established right. The district court cited no cases finding a First Amendment violation in circumstances remotely analogous to the circumstances here. Instead, the court relied on two cases having no direct bearing on the legal question presented here.

Eichenlaub v. Township of Indiana, 385 F.3d 274 (3d Cir. 2004), involved allegations that, in retaliation for the plaintiff's public criticism, a township and its officials took various actions relating to building permit applications. *Id.* at 277-278, 282. This Court held that the plaintiff could base a claim of unlawful retaliation on speech that, although it was made in a public forum, involved a question of private rather than public concern. *Id.* at 285. The Court did not reach

the question whether the retaliation claim was otherwise valid, *id.* at 285, and the facts have no relation to those alleged here.

In *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), the Supreme Court rejected a First Amendment challenge brought by U.S. citizens to the Attorney General's decision to refuse admission to the United States to a foreign national who the plaintiffs wished to hear speak in person and with whom they wished to speak and debate. *Id.* at 762-770. There was no First Amendment retaliation claim in the case, and the Supreme Court did not suggest that government officials are forbidden from considering an individual's possession of written materials in determining that he might pose a threat. Neither of these cases establishes that the individual federal defendants' conduct was clearly unlawful under the First Amendment.

4. *Reichle v. Howards*, Currently Pending Before The Supreme Court, Will Likely Provide Significant Guidance As To Whether Courts May Properly Imply A First Amendment *Bivens* Cause Of Action For An Allegedly Retaliatory Search And Detention.

The question whether to recognize a *Bivens* claim for a First Amendment retaliatory-arrest claim is currently pending before the Supreme Court in *Reichle v. Howards*, No. 11-262 (argued Mar. 21, 2012), in which the individual defendants and the United States as amicus curiae have urged the Court not to recognize a *Bivens* action for retaliatory arrest in violation of the First Amendment. The

Court's decision is likely to provide importance guidance for the disposition of this case. It is also likely to indicate the extent of the continuing vitality of this Court's decision in *Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1981), that a prisoner has a valid *Bivens* claim for money damages for alleged retaliation by prison officials for his exercise of First Amendment rights, a ruling that in the government's view was in error.

The Fourth Amendment provides objective standards for evaluating officials' authority to search, question, and detain individuals during airport security screening. And, as we have discussed, application of those standards demonstrates that the plaintiff's claims should be dismissed prior to discovery. By contrast, the retaliatory search and detention tort alleged by the plaintiff would lack any such objective anchor, and would impose liability based on a jury's after-the-fact assessment of an official's subjective motivation. The interests of public safety would be ill-served by recognizing a tort that could cause officers to shy away from questioning suspicious passengers or searching them further simply because the background context involves expressive activity. We will advise this Court of the Supreme Court's resolution in *Reichle v. Howards* and the extent to which it bears on consideration of the implication of a First Amendment *Bivens* cause of action in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand with instructions to dismiss with prejudice the claims against the individual federal defendants.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman. The brief complies with the word limits of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 8,271 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The text of the paper copy of this brief and the text of the "PDF" version of the brief filed electronically through ECF are identical. A virus check was performed on the electronic version of the brief, using Trend Micro OfficeScan Client (version 6.5) software, and no virus was detected.

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CERTIFICATE OF SERVICE

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