UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Jonathan Corbett, Plaintiff v. City of New York Defendant	**13-CV-602 (PGG)** **MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

I. SUMMARY

On January 28th, 2013, Plaintiff filed a complaint against the City of New York for its plan to immediately begin testing terahertz imaging devices (hereafter, "Scanners") on citizens and visitors doing nothing more than walking on public sidewalks, for the alleged purpose of removing illegal guns[1] from the streets. Defendant attempted to have the Court dismiss this action based via letter to the presiding judge – a highly irregular form for such a motion – and the Court promptly ordered the filing of a proper motion (D.E. #6). Defendant filed a proper motion to dismiss under Fed. R. Civ. P. 12(b)(1), asserting lack of subject matter jurisdiction for want of standing and ripeness (D.E. ## 7 – 9). Because Plaintiff complains of a concrete and particularized, imminent injury that is redressable by a favorable decision, Plaintiff has satisfied Article III requirements and the Court has jurisdiction to hear his case.

[1] Since a Scanner cannot differentiate a legally concealed weapon from an "illegal gun," the City must rely on the fact that its laws prevent virtually all of its civilians from lawfully carrying a weapon, a situation that separately is almost certainly unconstitutional. *See McDonald v. Chicago*, 561 U.S. 3025 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

II. STANDARD OF REVIEW

It is axiomatic that if the Court lacks subject matter jurisdiction, it is mandatory that the case must be dismissed. See *Manway Constr. Co. Inc. v. Housing Auth. of City of Hartford*, 711 F.2d 501, 503 (2nd Cir. 1983). In order to determine whether a Plaintiff has standing, Plaintiff must show that he or she has plead a "concrete and particularized," "actual or imminent," injury that is "redress[able] by a favorable decision." See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561 (1992). In order to determine that Plaintiff's challenge is ripe, the Court must find the existence of a "'real, substantial controversy between parties' involving a 'dispute definite and concrete.'" See *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 478 (2nd Cir. 1999), *quoting Babbitt v. United Farmworkers National Union*, 442 U.S. 289, 298 (1979).

In deciding a Rule l2(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court must "accept as true all material factual allegations in the complaint." See *Atlanta Mutual Insurance Co. v. Balfour Maclaine Int'l, Ltd.*, 968 F.2d 196, 198 (2nd Cir. 1992), *citing Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In proceeding *pro se*, Plaintiff is entitled to have his submissions "be construed liberally and 'to raise the strongest arguments that they suggest.'" See *Bey v. Jamaica Realty*, 2012 U.S. Dist. LEXIS 65310 (E.D.N.Y., May 9, 2012), *quoting Triestman v. Federal Bureau of Prisons*, 470 F.3d 471, 474 (2nd Cir. 2006).

Finally, the Court also "may refer to evidence outside the pleadings." See *Makarova v. United States*, 201 F.3d 110, 113 (2nd Cir. 2000).

III. ARGUMENT

A. It Is Not Possible to Utilize Scanners Constitutionally

Much of Defendant's argument is, or relies on, a proposition that since the City hasn't created policies governing use of the Scanners, Plaintiff is merely speculating that they will be used illegally. *See* Deft.'s Mot. to Dismiss, pp. 6 – 8. However, Plaintiff's complaint alleges and explains that it is *impossible* to utilize the Scanners for any practical purpose that would not run afoul of constitutional requirements. *See* Complaint, ¶¶ 20, 21. Virtually the only scenario for which the NYPD could lawfully use the Scanner would require an officer on the streets to determine that he has reasonable suspicion that a gun carrying individual is present and then, instead of conducting a traditional stop-and-frisk, that officer would call for, and wait for, another officer to drive this truck-mounted Scanner to within 25 yards of the presumed armed-and-dangerous individual, all the while hoping that the individual did not notice the police truck approaching/pointing this device at him and making a decision to flee (or start shooting). *See* Id. at 20. This is sheer fantasy.

Even if this fantasy were indeed orchestrated, there would still exist two problems: 1) the Scanner would only be marginally useful since it is only able to alert the police as to whether the individual is carrying a gun on the side of his body closest to the Scanner (that is, a Scanner cannot detect objects on the far side of the individual's body), and more importantly, 2) the Scanner would also unconstitutionally scan any innocent bystander in the vicinity of the suspect. *See* Id. at 21. Quite simply, these Scanners are useful only to those who intend to scan people at random, not to those who have found a dangerous individual and wish to confirm their "reasonable suspicion" that he or she is armed.

Despite Plaintiff clearly articulating this in both his complaint (¶¶ 20, 21) and Motion for TRO/PI (p. 5), Defendant, while dismissing Plaintiff's assertion that the Scanners are only practical for mass scanning of random passers-by, tellingly offers no explanation as to what potential lawful use cases the City has in mind, detailing how the City could possibly work around the legal impracticality inherent in the use of these Scanners. Surely the City did not spend millions of dollars co-developing these Scanners with no idea as to how they intended to use them. Plaintiff's well-plead allegations in his complaint (including his allegations relating to limitations of the Scanners that would make lawful use impossible), at this stage, must be presumed to be true, and if Defendant wishes to persuade the Court that his allegations are "hypothetical," "conjectural," or otherwise not well-plead, its argument must come attached to a compelling explanation as to how lawful use is indeed possible.

B. Earlier Review is Justified for This Particular Search Tool Because of its Inherent Lack of Accountability

The importance of Defendant's unsupported argument that there are indeed lawful plans for these Scanners is diminished by the troubling fact that the Scanners come with no accountability because they can be used without the knowledge of the search victim. *See* Complaint, ¶ 18 ("It is not possible to "feel" a scan – an individual being searched by a Scanner would have no way to know that they were being scanned."). It follows that Defendant's contention that if actually scanned, Plaintiff would have a remedy at law, is false[2], since the

[2] It is also false because constitutional injuries often times (including in the circumstances relevant here) cannot be fully redressed by money. Plaintiff faces *irreparable* injury if the Court does not review the constitutionality of the Scanners before he is actually scanned. *See* Plaint. Mot. for TRO/PI, p. 7.

police could scan (and may indeed have already scanned) Plaintiff all day long and Plaintiff would never know it. *See* Deft.'s Mot. to Dismiss, p. 10 (compare to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), where future victims of the challenged chokehold practice would obviously be able to sue).

Because the NYPD is now in possession of a tool that can easily be used to violate the rights of the people without their knowledge or recourse, residents and visitors of New York alike *presently* have a rational fear that they will be – or indeed have been – scanned. This impending violation is something that cannot be avoided by the citizens, save for permanently leaving the City or locking themselves in their houses (compare the instant search which may happen, without notice, the moment one steps outside to subway searches, airport checkpoint searches, *etc*.).

C. The Threatened Injury is Real and Immediate, Not Conjectural or Hypothetical

Plaintiff has alleged that the NYPD is presently in the process of implementing the unlawful search at the heart of his complaint. *See* Complaint, ¶¶ 1 ("is *in the process of* rolling out"), 9 ("the NYPD had obtained the technology"), 19 ("The NYPD either has or immediately intends for the scanners to be 'mounted on a truck and deployed to sites identified as prone to gun violence.'"), *emphasis added*; *see also* Complaint, Exhibit A ("The NYPD is testing," "The NYPD received its machine last week").

Plaintiff's assertions are neither threadbare nor mere conjecture, but rather based on public and undisputed statements by the highest ranking official of the NYPD, Commissioner Raymond Kelly. Kelly's public statements made days before the filing of this lawsuit convey an

immediacy of implementation in stark contrast to his statements one year prior. See *Id.*, ¶ 8 ("was working with the NYPD to develop" body scanners in January 2012; compare with "in the process of rolling out," *etc*., language above from January 2013). It is clear, according to Kelly, that the NYPD has already moved past the one-day hopes of having a machine to violate the rights of the people to present-day possession of the technology and present-day "testing" of the technology. See Complaint, Exhibit A.

The Court need not wait until the defendant actually begins unlawful searches. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("actual *or imminent*," *emphasis added*). Rather, the Court has the duty to *prevent* this immediately impending constitutional injury from occurring when possible.

D. Plaintiff Has a Personal Stake in the Outcome of the Case

The instant case is distinguished from all other cases in which "attenuation" is claimed as a basis for removing standing by the ability of a single Scanner to personally affect "millions of people per year." See Complaint, ¶ 22. In the landmark case on citizen challenges to police policy, the plaintiff in *Lyons* failed to establish that he would, at some point in the future, be a victim of a particular police policy. In that case, the disputed police policy affected *less than 200 people per year*[3], and in at least some of those cases, application of the disputed policy was lawful. *Id.* at 116 (over 5+ year span, 975 reported cases) (Marshall, J., *dissenting*). A Scanner pointed at a crowd would violate that number of people in mere seconds, and due to lack of

[3] Assuming a 1980 city size of three million residents and 200 random incidents, one's odds of encountering a police chokehold in Los Angeles in 1980 would be 0.007%.

practicality and inability to avoid innocent bystanders as discussed *supra*, all or nearly all of those scanned would be scanned illegally.

In the end, *Lyons* was denied his injunction because the "odds" that he would encounter the disputed police practice in the future were insufficient to bring a case. *Id* at 108; *see also* *Friends of Earth v. Laidlaw*, 528 U.S. 167, 184 (1999) (confirming that *Lyons* turned on "likelihood" that plaintiff would encounter disputed police practice). In the instant case, with the deployment of just a single Scanner, the odds of anyone who finds themselves in New York encountering this odious police practice are several orders of magnitude greater than the odds rejected in *Lyons*. With the deployment of several Scanners in strategic locations, these odds approach three out of four[4]. As such, anyone who wanders the streets of New York[5] runs a significant, real, and immediate risk of being in the crosshairs of a Scanner, and thus any such individual has standing to bring suit.

The instant case can also be compared to the "chain of attenuation" analysis suggested by Defendant, as well as to such analyses in other cases. For example, Defendant claims that in order for Plaintiff to be injured, the following must occur: 1) the NYPD must decide to use the devices, 2) Plaintiff must be present in the City, 3) the NYPD must use the device on Plaintiff, and 4) the NYPD's use must have been unconstitutional. While true that these four points are all

[4] Assuming one Scanner scans one million random persons per year and that there are eight million persons in New York, one's odds of being scanned when the NYPD runs a single scanner for a year are 11.75%. If the NYPD were to deploy 10 Scanners, one's odds would be 71.35%.

[5] Defendant makes much ado about Plaintiff's Florida residency. *See* Deft. Mot. to Dismiss, pp. 7, 8. However, it is not residency that is relevant, but rather whether one finds him or herself within the area containing Scanners. Plaintiff maintains business and personal relationships within city limits that require his presence on a regular basis "for no less than several weeks per year for each of the previous 5 years." *See* Complaint, ¶ 4. Plaintiff's presence in the City is not a "some day intention," but rather a continuing occurrence. Indeed, Plaintiff filed this action in person with the clerk of this Court in downtown Manhattan.

required, most of these four points are not at all "speculative." Regarding Point 1, it is not mere speculation that the NYPD intends to use a machine that it spent millions of dollars to develop. Regarding Point 2, Plaintiff has alleged that he is regularly within the City, an allegation that must be assumed to be true for the purposes of this motion. Regarding Point 3, as discussed *supra*, Plaintiff (and indeed all those in New York) face a significant, real, and immediate risk of being scanned. Regarding Point 4, again, Plaintiff has alleged facts that, if taken as true (as they must), would certainly lead to the fact-based legal conclusion that lawful use is so impractical as to be fanciful.

Compare the not-so-speculative chain of attenuation in this case to *Clapper v. Amnesty* International, 568 U.S. ____ (2013). The chain in that case narrowly rejected by the U.S. Supreme Court in their 5-4 decision was:

> (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under §1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy §1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.

Each of the five parts of the chain in that case was highly speculative. Regarding Points 1, 2 and 5, the number of individuals subjected to §1881a was limited to the small number that the government chose to bring in front of FISC out of the population of the entire world, rather than millions that can be targeted annually by the NYPD out of the population of one city. Regarding Point 3, the plaintiffs in *Clapper* speculated on the future decisions of a court (compare

attempting to predict judicial outcomes to "speculating" that the NYPD will actually use a machine that it spent millions of dollars to develop). Regarding Point 4, a Scanner has a certainty that it will work, barring malfunction, while communications interception is a highly uncertain process (for example, if a party to a communication is using a communications device of which the government is unaware that the party possesses, the communication may go undetected). *This* is a speculative chain that attenuates a party's claim for standing, and judging by the 5-4 nature of the ruling, is barely over the line between "too speculative" and "real controversy."

E. The Court Can Indeed Fashion a Remedy to Redress Plaintiff's Injury

Defendant's assertion that the Court would be unable to help Plaintiff even if it ruled in his favor is absurd. Defendant's argument in support of this proposition is that even when the NYPD conducts searches which are largely lawful, it still ends up violating the people. *See* Deft.'s Mot. to Dismiss, pp. 9, 10. While Plaintiff fully agrees with the City that the NYPD frequently manages to use search tools that are not facially unlawful in a manner that in a given circumstance results in an unlawful search, that fact is entirely irrelevant to the instant matter, which regards a search tool that is facially unlawful due to there being no practical lawful use. Potential remedies that would partially or fully redress Plaintiff's injury include: enjoining the NYPD from use of the Scanners, requiring the NYPD to submit to the Court a set of proposed guidelines for lawful use of the Scanners (if the NYPD can indeed create such guidelines) before implementation, and/or requiring the NYPD to inform any individual searched using the Scanners (either before or after the search has been completed).

Plaintiff need not show that the Court is able to produce a remedy that will completely, fully, and instantly resolve all of his issues. "[P]laintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision ... [P]laintiffs must show only that a favorable decision is likely to redress [their injuries], not that a favorable decision will inevitably redress [their injuries]." *See* Ibrahim v. D.H.S., No. 10-15873 (9th Cir., Feb. 8, 2012), *citations omitted*. The sample remedies above would significantly reduce, if not completely eliminate, any future injuries to Plaintiff.

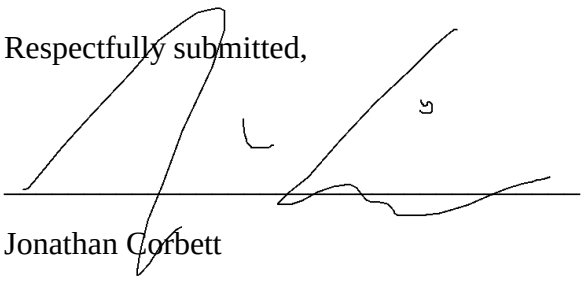
IV. CONCLUSION

Accordingly, Plaintiff has presented concrete facts that show Defendant's imminent actions will harm him. Defendant's unsupported assertion that "there is nothing to see here" is insufficient to dislodge Plaintiff's standing and the ripeness of this controversy. Defendant's motion should be **denied** and it should be **ordered** to answer the complaint.

Dated: New York, NY

March 29th, 2013

Respectfully submitted,



Jonathan Corbett

Plaintiff, *Pro Se*

382 NE 191st St #86952

Miami, FL 33179-3899

E-mail: jon@professional-troublemaker.com