UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JONATHAN CORBETT

Plaintiff,

-against- 13 Civ. 602 (PGG)

THE CITY OF NEW YORK,

Defendant.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT CITY OF NEW YORK'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULE 12(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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Service Date: April 12, 2013

PRELIMINARY STATEMENT

Defendant City of New York ("City"), by its attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, hereby respectfully submits this reply memorandum of law in further support of its motion to dismiss dated February 27, 2013. In its original moving papers, Defendant City moved to dismiss the matter pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that the Court lacks subject matter jurisdiction under Article III of the U.S. Constitution because plaintiff lacks standing and the matter is not ripe for judicial review. Broadly and liberally construing plaintiff's opposition papers dated March 29, 2013, plaintiff opposes dismissal because he argues that it is impossible to use the scanners constitutionally, and that he will somehow suffer an injury if judicial review is not granted. For the reasons set forth herein, and in City defendant's February 27th motion papers, all of plaintiff's claims must be dismissed in their entirety for lack of subject matter jurisdiction.

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS ARE NOT RIPE FOR ADJUDICATION

Plaintiff's opposition fails to show that his claims are ripe for review. In fact, plaintiff has set forth no analysis to defeat City defendant's motion to dismiss for lack of ripeness.

A. Plaintiff Will Not Suffer A Direct And Immediate Hardship As A Result Of The Court Withholding Review

Plaintiff's claims are not ripe for review as plaintiff cannot show that he will suffer any direct and immediate adverse consequence as a result of this Court withholding review. In Marchi v. Board of Coop. Educ. Servs., a public school teacher was directed by his employer, the Board of Cooperative Educational Services ("BOCES"), to refrain from using

religious references in his interactions with students. 173 F.3d 469 (2d Cir. 1999). The teacher brought suit against BOCES and alleged, *inter alia*, that the directive was unconstitutional because it could apply to the teacher's off-campus interactions with students and thus had a chilling effect. Id. at 478. The Second Circuit held that the teacher's claim failed to present a controversy ripe for judicial review because there lacked a credible threat to the teacher's off-campus speech. Id. (noting that a court "would be forced to guess at how [the organization] might apply the directive and to pronounce on the validity of numerous possible applications of the directive, all highly fact-specific and, as of yet, hypothetical."). In the instant matter, plaintiff's alleged harm is similarly hypothetical as he cannot point to a credible threat to his constitutional rights. Rather, plaintiff's only allegation of harm is based on plaintiff's own conjecture that "it is impossible to utilize the Scanners for any practical purpose that would not run afoul of constitutional requirements." See ¶¶ 20-21 of Plaintiff's Complaint attached to the Declaration of Brian J. Farrar (hereinafter "Farrar Decl.") as Exhibit "A" (hereinafter "Exh. A"). However, as noted in the Wall Street Journal Article attached to plaintiff's complaint, the New York City Police Department ("NYPD") has yet to determine when, or if, the device will be deployed. Id. at Plaintiff's Exhibit A. Thus, plaintiff's threadbare claims regarding the scanners do not show a threat to plaintiff that is both direct and immediate.

B. Judicial Review Is Only Appropriate Where A Concrete Controversy Exists

The Supreme Court has found that the "[d]etermination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." Longshoremen v. Boyd, 347 U.S. 222, 223-224 (1954). In Texas v. United States, where Texas sought a preclearance declaration that §5 of the Voting Rights Acts of 1965 does not apply to the sanctions authorized by the Texas Education Code, the Supreme Court held that

the issue was not ripe for adjudication because the "operation of the statute is better grasped when viewed in light of a particular application." 523 U.S. 296, 301 (1998). Here, plaintiff appears to be requesting this Court to speculate as to how the NYP D will implement the scanners. See. P. 3, Plaintiff's "Memorandum In Opposition To Motion To Dismiss," dated March 29, 2013, hereinafter referred to as "Plaintiff's Opposition." However, it is not the role of this Court to speculate as to how the scanners will be used because "[s]uch an open-ended and indefinite challenge is not well suited to judicial decision." Marchi, 173 F.3d at 479. This Court should postpone consideration of the questions presented until a concrete controversy arises.

POINT II

PLAINTIFF'S CLAIMS SHOULD BE DISMISSED FOR LACK OF STANDING

A. Plaintiff's Alleged Threatened Injury Is Not Certainly Impending And Relies On A Highly Attenuated Chain Of Possibilities

Plaintiff's alleged threatened injury is not certainly impending as his alleged future injury is based solely on speculation regarding the City's use of the scanners. See Plaintiff's Opposition at P. 1. (where plaintiff alleges that the scanners can only be used in an unconstitutional manner and notes that it is a "virtual fantasy" to think that there is a constitutional means for implementation). In the instant matter, plaintiff's allegation that the implementation of the scanners will be unconstitutional is a legal conclusion and this Court need not accept such an allegation as a factual truth. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Papasan v. Allain, 478 U.S. 256, 286 (1986) ("on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'")). A review of the complaint reveals that the only relevant factual allegation alleged by plaintiff is that the "NYPD has obtained the technology" and is in the process of testing the scanners. See Exh. "A" at ¶ 8. This alone cannot confer standing as plaintiff cannot show that the NYPD's

ownership of the scanners creates a real and immediate threat of injury. See e.g. City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983) (finding that "it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse.").

Plaintiff's theory of standing relies on a highly attenuated chain of possibilities.. Plaintiff, in his opposition papers, argues that the instant matter is distinct from the speculative chain of attenuation found in Clapper v. Amnesty International. See Plaintiff's Opposition at P. 8. However, plaintiff fails to distinguish the instant matter from Clapper. See Clapper v. Amnesty Int'l. United States, 133 S. Ct. 1138, 1148 (Feb. 26, 2013), *rev'g*, 638 F.3d 118 (2d Cir. 2011).

First, plaintiff argues that one of the reasons the alleged injury in Clapper was found to be speculative was because "§1881a was limited to the small number [of individuals] that the government chose to bring in front of [the Foreign Intelligence Surveillance Court] . . . rather than the millions that can be targeted annually by the NYPD." See Plaintiff's Opposition at P. 8. Plaintiff misconstrues the Supreme Court's analysis in Clapper as the number of individuals potentially targeted by the government was not at issue. Rather, the Supreme Court's analysis revolved around speculative assumptions regarding "whether [respondents] communications with their foreign contacts would be acquired under §1881a." Clapper, 133 S. Ct. at 1148. The Court further explained the highly attenuated chain by noting that "respondents can only speculate as to whether the Government will seek to use §1881a-authorized surveillance (rather than other methods) to do so." Id. at 1149. In the instant matter, plaintiff's standing revolves around similarly speculative assumptions as plaintiff's threatened injury requires that

the NYPD implement the scanners and also decide to use the scanners over other alternate means.

Second, plaintiff alleges that "the plaintiffs in Clapper speculated on the future decisions of a court," and that in the instant matter it is not speculative to assume that the "NYPD will actually use a machine that it spent millions of dollars to develop." See Plaintiff's Opposition at P. 8-9. The chain of attenuation in Clapper required authorization from the Foreign Intelligence Surveillance Court prior to any action under §1881a and the Supreme Court explained that "respondents can only speculate as to whether that court will authorize such surveillance." 133 S. Ct. at 1150 (finding that "[the Court has] been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). Here, plaintiff is asking this Court to speculate as to the decisions of the City and the NYPD prior to any decision actually being made. Plaintiff cannot rely on a theory of standing that rests on such speculation.

Finally, plaintiff alleges that in Clapper, respondents' could only speculate that their communications would be intercepted by the Government because "communications interception is a highly uncertain process" but here "a Scanner has a certainty that it will work." See Plaintiff's Opposition at P. 9. Plaintiff's analysis regarding the certainty of a scanner is purely speculative. Additionally, plaintiff's analysis hinges on plaintiff being among those scanned. See Clapper, 133 S. Ct. at 1150 (finding that "even if the Government were to conduct surveillance of respondents' foreign contacts, respondents can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired."). However, as discussed *infra*, plaintiff cannot show that he will be among those injured.

B. Plaintiff Does Not Have A Personal Stake In The Matter And Cannot Show That He Will Be Among The Injured

In the instant matter, plaintiff cannot establish that he has "'a personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." Lyons, 461 U.S. at 101 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). Plaintiff, in an attempt to circumvent the 'personal stake' requirement, alleges that "anyone who wanders the streets of New York runs a significant, real and immediate risk" of being scanned and "any such individual has standing to bring suit." See Plaintiff's Opposition at P. 7. However, this analysis lacks any basis in law. In Lyons, where plaintiff lacked standing for injunctive relief barring police from indiscriminately using chokeholds, the Supreme Court explained that Lyons "is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." 461 U.S. at 111 (*citations omitted).* The Court further noted that "such undifferentiated claims should [] be taken seriously by local authorities" but that "a federal court . . . is not the proper forum to press such claims." Id. at 111-12.

Plaintiff attempts to distinguish the instant matter from Lyons by focusing on the likelihood that an individual in New York City would be scanned. See Plaintiff's Opposition at P. 7. ("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."). Plaintiff goes so far as to speculate the number of individuals that one scanner could scan in a year as well as the odds of being scanned while in New York City. See Plaintiff's Opposition at P. 7 at n. 4. However, all of the calculations made by plaintiff are purely speculative and based on multiple assumptions regarding the implementation and use of the scanners. In fact, plaintiff himself

admits that he is "*[a]ssuming* one Scanner scans one million random persons per year." Id. (*emphasis added).* It is clear that plaintiff does not face a real and immediate threat of future injury as plaintiff's imagined calculations do not establish that plaintiff will be among the injured.

C. Plaintiff Will Have Standing If, And When, The NYPD Implements The Scanners And Plaintiff Is Among The Scanned

Plaintiff alleges that this Court can craft a remedy to address plaintiff's threatened injury. See Plaintiff's Opposition at P. 9. However, plaintiff misconstrues the role of the federal courts. See Lewis v. Casey, 518 U.S. 343, 349 (1996) ("It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts . . . to shape the institutions of government in such fashion as to comply with the laws and the Constitution). Plaintiff suggests that this Court should "enjoin the NYPD from use of the Scanners" or require the "NYPD to submit to the Court a set of proposed guidelines for lawful use." See Plaintiff's Opposition at P. 9. However, the courts can only intervene and alter governmental procedures where actual or imminent harm exists. Lewis, 518 U.S. at 350 (explaining that if, for example, "a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared"). In the instant matter, it is not the role of this Court to preemptively determine which actions are and are not constitutional. Rather, "in exercising their equitable powers federal courts must recognize '[the] special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." Lyons, 461 U.S. at 112.

Plaintiff further alleges that the Court should engage in early review of this matter because the NYPD could scan individuals without them ever knowing. See Plaintiff's Opposition at P. 4-5. However, plaintiff provides no analysis as to how the NYPD's use of the scanners would be insulated from judicial review. See e.g. Clapper, 133 S. Ct at 1154 (finding that if the Government uses or discloses "information obtained or derived from a §1881a acquisition . . . the affected person may challenge the lawfulness of the acquisition."). Further, it appears that plaintiff is arguing that this Court should find that plaintiff has standing because otherwise the constitutionality of the Scanners could never be challenged. However,"[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." Id. (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 489 (1982) (*additional citations omitted*)). Moreover, such a "view would convert standing into a requirement that must be observed only when satisfied." Valley Forge Christian College, 454 U.S. at 489. If, in fact, plaintiff does suffer an actual injury as a result of the NYPD's use of the device at some future date, plaintiff will have an adequate remedy at law at that time.

Accordingly, plaintiff cannot satisfy the standing requirements for his alleged claims. Therefore, this Court lacks the necessary subject matter jurisdiction to adjudicate this matter.

CONCLUSION

WHEREFORE, for the reasons set forth above and in City defendant's February 27th motion papers, plaintiff's complaint should be dismissed in its entirety, together with such other and further relief as this Court may deem just and proper.

Dated: New York, New York
April 12, 2013

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Due and timely service is hereby admitted.

New York, N.Y. ....., *2013*.....

....., *Esq.*

Attorney for .....