Case No. 13-14053

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,
Plaintiff/Appellant

v.

TRANSPORTATION SECURITY ADMINISTRATION,
UNITED STATES OF AMERICA,
ALEJANDRO CHAMIZO,
BROWARD COUNTY, and
BROWARD SHERIFF'S OFFICE
Defendants/Appellees

On Appeal From the United States District Court for the Southern District of Florida
Case No. 12-CV-20863 (Lenard/O'Sullivan)

REPLY BRIEF OF APPELLANT JONATHAN CORBETT

Jonathan Corbett, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
Phone: +1 (305) 600-0410
E-mail: jcorbett@professional-troublemaker.com

CERTIFICATE OF INTERESTED PARTIES

Appellant Jonathan Corbett certifies that the following is a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations known to him that have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

Judges & Magistrates

- U.S. District Judge Joan A. Lenard
- U.S. Magistrate Judge John J. O'Sullivan

Appellant

- Jonathan Corbett

Appellees

- United States of America, its agencies, and its employees, including:
    - U.S. Department of Homeland Security
        - Janet Napolitano
        - Transportation Security Administration
            - John Pistole
            - Alejandro Chamizo
    - U.S. Department of Justice
        - Laura G. Lothman

        - Sharon Swingle
        - Andrea W. McCarthy
        - Rupa Bhattacharyya
        - Stuart F. Delrey
        - Wilfredo Ferrer
- Broward County, its agencies, and its employees, including:
    - Broward County Aviation Department
        - Robert L. Teitler
    - Broward Sheriff's Office

Non-Employee Attorneys for Appellee

- Counsel for Broward Sheriff's Office
    - Robert D. Yates

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ARGUMENT

I. Chamizo Was Directly Responsible For the Searches – But That Issue Is Not Before the Court

The district court did not dismiss the charges against Chamizo because it found that he was not liable for the actions of his subordinates working in his presence; rather, Chamizo was granted qualified immunity. Dismissal Order I, pp. 14, 15. It is therefore unclear why Chamizo has raised the issue within his brief, as the matter is not before the Court. Brief of Federal Appellees, pp. 14 – 17. It should also be noted that Appellant requested leave to substitute the individual subordinates in the event that the district court determined that Chamizo was not liable for their conduct; this was denied as futile since they would be entitled to the same qualified immunity. *Id*., p. 15. Accordingly, this Court should decide only the question of qualified immunity before it and leave the question of liability, along with the possibility of substitution of parties, to be resolved by the district court should this Court reverse the grant of immunity.

If the Court would like to go beyond the issue of qualified immunity presented by Appellant and also consider the issue of liability at this time, Appellant respectfully requests that the Court order supplemental briefing on the issue to allow Appellant to distinguish the instant case, where an immediate supervisor physically in the presence of his subordinates directed unlawful conduct, to *Iqbal*, which attempted to place

liability on bureaucrats and politicians in Washington, D.C., for the actions of prison guards whom they had never even met. *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

II. In The Context of an Airport Checkpoint Search, Any Motive Other Than Aviation Security Is Unlawful

Chamizo argues that his motive for conducting the searches is entirely irrelevant. Brief of Federal Appellees, pp. 7, 11, 17. But, in the context of an aviation security checkpoint, any search that is not intended to find items that represent an aviation security risk is an unlawful search. *United States v. Aukai,* 497 F.3d 955 (9th Cir. 2007) (*en banc*); *United States v. Fofana,* 2009 U.S. Dist. LEXIS 45852, 09-CR-49 (S.D.O.H. 2009); *United States v. McCarty*, 672 F. Supp. 2d 1085 (D.H.I. 2009).

The confusion lies in something the district court hinted at, but appears not to have fully applied to the instant action: "the development of a **second**, subjective motive on the part of the individual searcher is irrelevant for purposes of Fourth Amendment analysis." Dismissal Order I, p. 13 (*citing McCarty at 834-835*) (*emphasis added*). But Appellant isn't arguing that the retaliatory search was a second motive; rather, he has argued that beyond a certain point in the search, it was the *only* motive. Brief of Appellant, pp. 17, 18 ("at some point during the inspection, Chamizo became aware that the inspection would not turn up weapons or explosives, but continued it anyway for the purpose of "teaching Appellant a lesson.").

If Chamizo had a legitimate, lawful need to search Appellant for aviation security purposes, but decided, for example, to be extra thorough because he didn't appreciate Appellant's attitude, perhaps current Supreme Court precedent would bar a claim over that conduct. But in the instant case, Appellant's trouble with the TSA started when he refused a pat-down, which happened *after* Appellant's belongings had already been x-rayed and were cleared. That is, if Appellant had allowed the TSA screeners to touch his genitals as they had insisted on doing, his bags would never have been given another look. The lawful search was already satisfied, and the intense bag search that followed when Chamizo arrived happened while all TSA personnel involved already knew that nothing dangerous was in Appellant's bags.

This is further demonstrated by the way the intense bag search was conducted. Appellant provided the following account to the district court:

> 23. It was quite clear to me that the TSA screeners at FLL, including Mr. Chamizo, were well aware that they would not find weapons, explosives, or incendiaries in my belongings or on my person throughout the retaliatory portion of the search.
>
> 24. I make this observation based on the facts that: 1) my belongings had already been x-rayed and tested for explosive residue towards the beginning of the search, 2) my conversations with the screeners made clear that my actions were a protest of their policies, and 3) the conversation and demeanor of the screeners so indicated.
>
> 25. It was quite clear to me that the TSA screeners, including Mr. Chamizo, at a certain point

> continued their search only in hopes of finding some kind of contraband in order to "teach me a lesson" about disrespecting their authority.
>
> 26. I make this observation based on the facts that: 1) the places they were looking (inside of the "fifth pocket" of jeans, for example), were obviously too small to hide any sort of weapon, explosive, or incendiaries, but would have been large enough to conceal small quantities of drugs, 2) searching through my credit cards seemed to have no purpose other than to try and find a stolen credit card, 3) whether or not I have a warrant out for my arrest is not something that is typically verified by TSA screeners, 4) the conversation and demeanor of the screeners conveyed a "we'll get you!" vibe.

Decl. in Opp. to Deft. Chamizo's Mot. to Dismiss (Dist. Ct. D.E. 46-2), pp. 3, 4 (*footnotes omitted*).

At the motion to dismiss stage of the proceedings, Appellant need not yet have proven that the intense bag search served no purpose; he merely must have pled "plausible" facts to support the conclusion that, should the facts be true, Appellee has broken the law. Appellant has clearly so pled.

Appellee re-iterates its justification for the thorough search of Appellant's books in particular as a search for mysterious "sheet explosives." Brief of Federal Appellees, p. 16. Appellant disputed that sheet explosives can be disguised as pages in a book[1],

[1] The sheet explosive argument is entirely specious. If the TSA actually believed a terrorist could disguise a bomb as a book, they would search every book that every traveler brings through the checkpoint. The sheet explosive argument is but a pretext for otherwise unlawful search.

and so whether a reasonable screener may have been looking for sheet explosives is a question of fact that may not be resolved by a motion to dismiss. As noted above, Appellant has also alleged that his belongings were tested for explosives via an ETD swab before the book was touched, meaning there should have been no doubt that explosives were not present *before* the retaliatory search began[2].

Finally, Chamizo argues that a one hour checkpoint search is totally reasonable and normal, but he does so by comparing it to a *border search*. A border search is conducted under an entirely different authority and is significantly broader in scope than a TSA checkpoint search. The fact of the matter is that no court of which Appellant is aware has ever allowed the TSA to hold and search a traveler for a full hour.

III. If Chamizo Is Not The Correct Party, Leave to Amend Is Appropriate

Chamizo opposes Appellant's request to amend his complaint to name him in his official capacity for the purpose of obtaining declaratory relief, for the first time

[2] Appellee also notes that *Fofana* is not "clearly established law" for the purposes of qualified immunity. True – Appellant never said it was. It is, however, a clear explanation of the *real* reason why TSA screeners look through documents. They look not for sheet explosives; they look for evidence of general criminality, which is unlawful.

with the argument that Appellant would be unable to establish standing. Brief of Federal Appellees, pp. 18, 19. Again, this issue is not properly before the Court, and should be decided in the first instance by the district court if and when this Court orders the district court to re-consider Appellant's motion for leave to amend.

Chamizo's argument that Appellant's request is "belated" can be easily refuted by a simple review of the district court docket.

IV. USA's FTCA Arguments Are Without Merit

The government argues for the first time that TSA screeners – whose job title is "Transportation Security **Officer**," who wear badges, and who (apparently) are entitled to seize travelers during a search – are not "officers" of the United States. Brief of Federal Appellees, p. 21. Raising this issue for the first time on appeal is inappropriate, and even if it were, is clearly not based in law. Federal Appellees offer no case law to support that "officer" has special meaning within the context of the statute beyond what is explicit in the statute: individuals who are empowered to "execute searches, to seize evidence, or to make arrests for violations of Federal law."

The government wishes to have the Court disregard that TSA screeners conduct searches by saying that "Nor do TSA screeners execute searches *pursuant to search warrants*." Brief of Federal Appellees, p. 21 (*emphasis added*). But this "pursuant to

search warrants" requirement is invented by Appellees, not by Congress, and is a tacit admission that TSA screeners *do* execute searches – just without warrants.

V. TSA's Privacy Act Arguments Are Without Merit

Neither the district court nor Appellee TSA understand that when it comes to a violation of privacy, the fact that one's privacy has been invaded is *in itself* "adverse," under both a plain English meaning as well as the meaning of 5 USC § 552a(g)(1)(D). No one would dispute that the victim of a peeping tom was "adversely affected," and when the government collects and stores private information to which it is not entitled, the subject of that information is adversely affected. Appellant's rights were violated by the TSA, and Congress established statutory damages to avoid precisely the predicament that the TSA is attempting to create: that quantifying how much someone has been damaged by an invasion of privacy is difficult.

A statutory amount resolves that problem, and a natural reading of the statute shows that it was clearly the intent of Congress to compensate those who have their privacy violated without placing the burden on the victim to quantify the unquantifiable. This is evidenced by the fact that, under § 552a(g)(4)(A), a person is entitled to the greater of the amount they can actually show *or* the statutory amount. The TSA's reading, and district court's interpretation, of the statute would render the statutory amount meaningless.

Finally, the government argues that in order to obtain relief in the form of an order to amend records, Appellant must have applied to the agency before filing suit. Brief of Federal Appellees, p. 25. TSA cites no statute that says any such thing, nor case law at all, to support this argument.

VI. When One Knowingly Says Something That Is Not True, One Is Lying

No one, including Appellant, disputes that TSA and Broward County were entitled to discuss whether records held by the county constitute SSI before releasing those records to the public, despite the fact that Broward County persists in asserting that Appellant's claim is "based on the County conferring or consulting with the TSA." Brief of Broward County, p. 10; *similarly* Brief of Federal Appellees, p. 27. But Appellant filed his action not because a discussion was held, but because the outcome of the discussion was that Broward County was to say that records did not exist when they, in fact, did. This is unlawful, and the basis of Appellant's Fla. public records claim.

Appellees take offense at Appellant's characterization of this as "lying," *see Id.*, but what else does one call it when a party intentionally makes a claim that is untrue? Broward County admits that "the County responded to the public records request by informing Corbett that the subject CCTV recording did not exist." Brief of Broward

County, p. 6. The County also admits that the recording did, in fact, exist. Id. ("The TSA obtained the subject CCTV recording...").

Broward County lied to the Appellant, regardless of whether, at the time, it thought it was obligated to lie. But, Appellees have put forth no showing of law that would have led them, or anyone else, to the conclusion that lying was acceptable[3]. It cannot be found in the Fla. Public Records Act, nor in the federal Freedom of Information Act, nor in any of the SSI statutes or regulations. It cannot be found in the Federal Reporter, nor any other body of case law. The SSI designation protects the contents of records, not their existence, and as Appellant has vigorously argued in this Court and the one below, even if the SSI laws are interpreted to allow the government to hide the existence of records, it must do so through a Glomar denial.

Appellees would prefer if there were no legal consequences for intentionally (and without lawful authority) lying in a public records request. Allowing the government to lie, and then, if caught, receive no punishment other than to do what they were supposed to do in the first place, would disincentivize telling the truth and following the law, and would devistate the effectiveness of both state and federal public

[3] Broward County would like to blame their contractual agreements with TSA for its lying. Brief of Broward County, p. 5. But, 1) there is no showing that the OTA demanded lying, and 2) no contract between the TSA and Broward County can abrogate Appellant's rights under the state's public records law.

records laws. For this reason, a civil conspiracy charge is a wholly reasonable means of holding the government accountable in this circumstance.

It also should be underscored that not only was the excuse that "we couldn't disclose because the *existence* of the records was SSI" entirely unfounded as a matter of law, the TSA later admitted that the records themselves were not actually SSI in the first place. Brief of Federal Appellees, pp. 9, 10 ("TSA provided documents and video footage to plaintiff… and had blurred the faces of the individuals on video footage"). That is, once Appellant filed the lawsuit, TSA released the videos to him with blurring of the faces for *privacy* reasons, not SSI-related reasons. Nothing about the video was lawfully SSI – not its existence, not its content, nothing.

Finally, the federal Appellees raise the issue of sovereign immunity. Brief of Federal Appellees, p. 27. But this issue is, again, not before the Court at the moment, and should be properly argued in the district court in the first instance. And, even if the federal government were granted immunity, Broward County would not be.

VII. Broward Sheriff's Office Pounds the Table

"If you have the facts on your side, pound the facts. If you have the law on your side, pound the law. If you have neither on your side, pound the table."

Appellee Broward Sheriff's Office ("BSO") was charged with a single count of violating the Florida constitution resulting from seizing Appellant's identification card and running criminal records checks with neither reasonable suspicion nor consent. Plain. First Am. Compl., ¶¶ 146 - 151.

BSO would like to enjoy the qualified immunity that the TSA employees have thus far enjoyed. Brief of BSO, *passim* (mentioning qualified immunity a total of 13 times). But, BSO was never granted qualified immunity by the district court; instead, claims against it were dismissed because the district court opined that the Florida constitutional provision under which BSO was charged was not self-executing. Dismissal Order I, p. 31. BSO also never asked for qualified immunity. Deft. BSO's Mot. to Dismiss. The issue is plainly not before the Court.

Beyond the fact that the defense was improperly raised, BSO asserts that because the TSA was granted qualified immunity, it naturally flows that BSO employees are entitled to the same. Brief of BSO, p. 11 ("Corbett's request to amend his claim to drop BSO as a party and add the deputy who received his personal information from Chamizo would be futile because Chamizo was granted qualified immunity"). This is utter nonsense. The charge against the BSO is entirely different, and based on an entirely different set of actions, than the charge against the TSA. Two different officials who take two different actions have two completely separate arguments for qualified immunity.

Next, BSO characterizes Appellant's lawsuit as a challenge to TSA policy. Brief of BSO, pp. 12, 22. This is both entirely irrelevant to the charge levied against BSO and entirely untrue. The instant action results from TSA employees who *broke* TSA policy. TSA policy does not allow for screeners or managers to seize travelers, conduct retaliatory searches, threaten to send travelers to jail for refusing a search, *etc*. Appellee Chamizo took it on his own to do such things.

Appellant's challenge, as it relates to BSO, is that BSO unlawfully seized his identification and used that information to conduct a warrant check. As far as Appellant is aware, there is no TSA policy that forces BSO to do any such thing, as, obviously, TSA has no jurisdiction to force BSO to do anything. Just as Chamizo took it on his own to violate Appellant's rights, BSO took it on their own to do the same.

Continuing to the only relevant substance of BSO's brief, BSO argues that *Garcia v. Reyes*, 697 So.2d 549 (Fla. 1997), a case decided by an intermediate state appellate court from 17 years ago, should be controlling when Appellant has pointed out *Florida Hospital Waterman v. Buster*, 984 So.2d 478 (Fla. 2007), a case decided by the high court of Florida only 7 years ago. The two cases clearly conflict, and BSO's attempt at an explanation as to why *Garcia* applies and *Florida Hospital Waterman* does not fails miserably.

BSO's argument appears to be that Article I, Section 12 of the Florida constitution is not self-executing, and that the legislature's enactment of a limited

enabling statute is evidence of that. Brief of BSO, p. 15. However, the entire basis of the doctrine of self-executing constitutional provisions is that the legislature does not have the power to enable or disable those provisions. As Appellant has argued in his opposition to BSO's motion to dismiss, his motion for reconsideration, and his brief in this Court, a court must determine if a constitutional provision is self-executing using a balancing test. The district court failed to do so.

Finally, BSO attempts to impugn Appellant's motives, accusing him of "bad faith," "dilatory motive," having "an agenda," being on a "crusade," venue shopping, and being a "troublemaker." Brief of BSO, pp. 20, 21. BSO's feelings on these matters are largely to entirely irrelevant and are largely to entirely untrue or mischaracterized.

Appellant filed the instant action in his home venue, so BSO's accusation of venue shopping is absurd. Appellant first filed his claim within days of the expiration of the federal government's opportunity to respond to his FTCA notice, as such a wait was required by law[4], and has aggressively pursued this action since its commencement, so BSO's accusation of dilatory motive is similarly absurd[5].

[4] BSO seems to make a fleeting claim that Appellant was required to file his initial lawsuit within 60 days of the date of the incident. Brief of BSO, pp. 23, 24. It is entirely unclear as to what law would bar Appellant from commencing an action 61 days after the incident.

[5] BSO's claim of delay is further absurd because the largest delay in this case was due to BSO's attempted avoidance of process. Briefly, BSO refused to accept service of the complaint from a licensed process server, who was unwilling to simply leave the papers with the BSO against their will because BSO controls the licensing for process

As to whether or not Appellant has "an agenda," is on a "crusade," or is a "troublemaker," Appellant considers himself to be a civil rights advocate that seeks to hold abusive government agencies accountable for their actions. Appellant does indeed "cause trouble" for government agencies that do not respect the rights of their citizens – in the form of lawsuits, protests, and, most importantly, educating the public as to what their government is doing (or not doing). Appellant is proud of his work, but a discussion of his work will not help the Court determine whether the relevant section of the Florida constitution is self-executing, or whether the district court abused its discretion by failing to grant leave to amend. Those are the issue at hand.

Should the Court determine that Article I, Section 12 is not self-executing and that Appellant may not recover damages under that statute, leave to amend is appropriate because Appellant may recover under the federal Civil Rights Act. All of BSO's arguments to the contrary are entirely lacking in evidence to support its claims.

servers in Broward County and they feared revocation. Appellant had to use a non-professional to serve BSO against their will. Their behavior was unbecoming of a government agency anywhere in America, and is the true example of dilatory motive and bad faith.

VIII. The TSA Has Made No Showing That Release of the Video and/or Names Will Lead to Harassment of Government Employees

The TSA argues vigorously that if they are forced to reveal the names of their employees, those employees will be left "vulnerable" and subject to "harassment." Brief of Federal Defendants, p. 32. But the TSA has given neither this Court nor the one below it anything but mere conjecture to support that conclusion.

If conjecture is evidence these days, here is some opposing conjecture:

1. Appellee has the name of the TSA employee who was most responsible for violating his rights: Appellee Alejandro Chamizo. Chamizo's name is now a matter of public record, and has been published by Appellant on the Internet for over 2 years now. Has Chamizo been harassed? If not, is there any reason to think that the other, subordinate employees would be harassed?
2. If releasing checkpoint video without blurring the faces of its employees will lead to the identification and harassment of those employees, why does the TSA have its own YouTube channel[6] where it has, on multiple occasions when it suits their interest, posted checkpoint video that displays the faces of its employees? The TSA should not be able to "have it both ways" and

[6] http://www.youtube.com/user/TSAHQpublicaffairs/videos

publish video when it exonerates their behavior but hide behind privacy pretexts when it shows them violating the rights of travelers.

IX. Appellant's Public Records Claims Are Not Moot Because Documents Clearly Exist That Were Not Produced

TSA argues that it has already completed a sufficient search for documents and submitted a declaration to that effect. Brief of Federal Appellees, p. 29. But the declaration does not explain why records are missing. The TSA admitted to having conversations, and in some instances has provided partial communications, omitting the "other half" of the communications. There is, thus, reason to believe that more documents are present, and the TSA should be ordered to explain their absence specifically rather than allowed to walk away with a vague "yeah, we checked, nothing else exists."

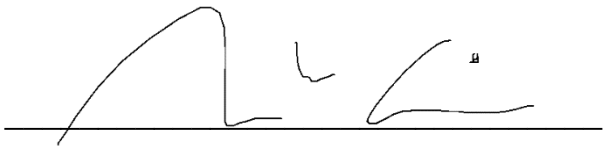
Broward County would also like to be off the hook for these missing documents, at least some of which they may be a party to. Brief of Broward County, p. 11. Broward County should also be ordered to explain missing communications with specificity, and the Fla. Public Records Act claim against it is not moot until they do.

CONCLUSION

For the above reasons, the judgment of the district court should be **reversed** and **remanded**.

Dated: Miami, Florida
January 13th, 2014

Respectfully submitted,



Jonathan Corbett
Appellant, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
E-mail: jon@professional-troublemaker.com

CERTIFICATE OF COMPLIANCE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that that this brief complies with Fed. R. App. P. 32(a) because it contains approximately 5,000 words using a proportionally-spaced, 14-point font.

Dated: Miami, Florida
January 13th, 2014

Respectfully submitted,

Jonathan Corbett
Appellant, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
E-mail: jon@professional-troublemaker.com

CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that I have served this **Reply Brief of Appellant Jonathan Corbett** on January 13th, 2014, on:

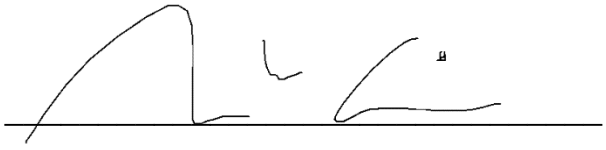
Appellees United States of America, Transportation Security Administration, and Alejandro Chamizo to Sharon Swingle, via electronic mail at the following address: Sharon.Swingle@usdoj.gov.

Appellee Broward County to Robert Teitler via electronic mail at the following address: RTEITLER@broward.org

Appellee Broward Sheriff's Office to Robert Yates via electronic mail at the following address: RDYPA@hotmail.com

Dated: Miami, Florida
January 13th, 2014

Respectfully submitted,



Jonathan Corbett
Appellant, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
E-mail: jon@professional-troublemaker.com