IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Rhonda Mengert *Plaintiff* v. U.S. Transportation Security Administration *et al*. *Defendants*	Case No. 19-CV-304 (JED) (JFJ)

PLAINTIFF'S OPPOSITION TO MOTION
TO DISMISS BY INDIVIDUAL DEFENDANTS

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I. Introduction

The Court is already considering a fully-briefed motion to dismiss by the government defendants, D.E. ## 21 – 23, and thus Plaintiff will not be repetitive of the background of this case. The instant motion is a motion to dismiss by the individual defendants sued as Unknown Transportation Security Administration Agents 1 & 2, and identified by the government as Amanda Morroney and Whitney Brown[1]. D.E. #25.

The thrust of the individual defendants' argument is: 1) that a *Bivens* remedy is not available, and 2) that even if such a remedy were available, the individual defendants are entitled to qualified immunity.

For the foregoing reasons, the individual defendants' arguments are not only without merit, they are at times legally frivolous[2].

II. Standard of Review

Defendants' bring their motion under Rule 12(b)(6), which requires dismissal of complaints for which the factual allegations of the complaint do not add up to a claim for which the Court can grant relief. Fed. R. Civ. P. 12(b)(6). In this instance, the sufficiency of the facts is not at issue; rather, the questions raised by the individual defendants are purely matters of law:

[1] Plaintiff has no way to independently verify the identities of these individuals at this time, but proceeds on the assumption that the government has correctly identified them.

[2] Defendants were informally notified of this issue on December 12th, 2019, but did not reply. Advance service of a Rule 11 motion, as required by Rule 11's "safe harbor" provision, will be made upon the individual defendants tomorrow.

whether *Bivens* may provide a remedy on these facts, and whether the individual defendants are entitled to qualified immunity.

In order to address the individual defendants' contentions, first, the Court must determine if Plaintiff has presented a "new" *Bivens* context. The U.S. Supreme Court has spoken with particular clarity on this issue:

> "The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider."
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> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859, 1860 (2017).

If the answer to this first question is yes, the Court must next consider whether to extend *Bivens* to the new context. The U.S. Supreme Court has spoken with less clarity here: the Court must consider whether there are "special factors counselling hesitation" and whether "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective" *Carlson, v. Green*, 446 U.S. 14, 18, 19 (1980).

Third, assuming that the answers to these first two questions allow a *Bivens* remedy to be available to the plaintiff, the Court must then analyze whether the individual defendants are entitled

to qualified immunity. "Where qualified immunity is raised at the dismissal stage, the Court must accept all well-pleaded allegations as true and view them in a light most favorable to the plaintiff. To survive a motion to dismiss based on qualified immunity, the plaintiff must allege sufficient facts that show - when taken as true - the defendant plausibly violated [plaintiff's] constitutional rights, which were clearly established at the time of the violation." *Wade v. City of Tulsa*, Case No. 19-CV-120, at *5 (N.D. Okla., Aug. 9th, 2019) (Dowdell, C. J.), *citing* *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012) (*internal citations and quotations omitted*).

III. Argument

A. The Individual Defendants Have Presented Frivolous Arguments to The Court

Before delving into the core of the individual defendants' arguments, the Court should emphatically reject three assertions of law in their motion that are neither warranted by existing law nor identified as an attempt to extend, modify, or reverse existing law – in other words, are frivolous.

1. The Individual Defendants' Argument That Plaintiff Can Seek Review in the Courts of Appeals Is Contrary to Clearly Established Law

In their Motion to Dismiss, the individual defendants twice make the argument that Congress has provided an avenue for redress for Plaintiff in the Court of Appeals, *e.g.*:

> "Here, Plaintiff plainly has some procedure to defend and make good on [her] position outside the *Bivens* arena. Airline passengers may potentially seek injunctive relief from TSA screening procedures that they believe to be unconstitutional.

> Congress has provided for, and channeled, such relief through a petition for review in an appropriate federal court of appeals. 49 U.S.C. § 46110."

See Motion to Dismiss, pp. 15 (*citation and quotations omitted*); *see also* p. 21.

However, the attorneys for the individual defendants are well aware that § 46110 applies only to "orders" of the agency. *See* § 46110 (using the word "order" ten times within 5 paragraphs). The term "order" under § 46110 applies to final, written decisions of the agency complete with administrative record sufficient to enable judicial review. *Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993). A verbal command by a TSA screener never constitutes an "order" as defined by § 46110. *Id*. The rogue actions of TSA screeners *in violation of* agency policy cannot even arguably be challenged in the Court of Appeals.

Plaintiff has made perfectly clear that she is not suing to challenge an "order" of the agency. *See* First Amended Complaint, D.E. #12, ¶ 3 (individual defendants' actions "in direct opposition to written TSA procedures"), ¶ 58 ("…in clear violation of agency policy…"); Plaintiff's Opposition to Second Motion to Dismiss, D.E. #22, p. 29 ("Plaintiff has been quite clear that the two TSA screeners were sued not for following the SOP, but for violating it."). Frankly, if the individual defendants had followed the order of the TSA that dictates passenger screening procedures and prohibits strip searches, Plaintiff's injury would never have happened and we would not be here today.

Plaintiff's request in her first amended complaint that the Court order additional training for TSA screeners – relief requested against agency, not individual, defendants – does not justify the individual defendants' argument because: 1) it cannot be construed as a demand that the Court modify a TSA order, and 2) it is obviously not a remedy for Plaintiff's existing injuries. Plaintiff

wants TSA to train their employees *as to the already existing order* that they may not strip search passengers. There is no ambiguity here: the order should stay as-is, and should be disseminated far and wide to TSA screeners and managers everywhere. Furthermore, the training of TSA screeners cannot possibly constitute an avenue for "redress" of Plaintiff's *existing* injuries: it is no more than a request that the Court try to prevent a *future* injury. No amount of "training" the Court could possibly order would compensate Plaintiff for being humiliated and traumatized last May.

In short, if Plaintiff were to petition the Court of Appeals to adjudicate the actions of the individual defendants, the petition would be summarily dismissed with costs for lack of subject matter jurisdiction because § 46110 does not apply and jurisdiction is thus squarely in the district courts pursuant to general federal question jurisdiction conferred by 28 U.S.C. § 1331. "Section 46110 does not grant the court of appeals direct and exclusive jurisdiction over every possible dispute involving TSA. The district court's federal question jurisdiction is preempted by § 46110 as to those classes of claims reviewable under § 46110. The district court, therefore, may retain jurisdiction over claims challenging TSA's orders when § 46110 does not explicitly allow us to hear them." *Latif v. Holder*, 686 F.3d 1122, 1127, 1128 (9th Cir. 2012) (*internal citations and quotations omitted*)

Accordingly, it appears that the individual defendants have included their remarks about remedies in the Court of Appeals, as well as implying that said remedies indicate that Congress has provided a *Bivens* alternative for injuries such as those suffered by Plaintiff, for no purpose but to muddy the waters and attempt to confuse the Court. The Court should find these arguments on pages 15 and 21 of the Individual Defendants' Motion to Dismiss to be frivolous in violation of Fed. R. Civ. P. 11(b)(2).

2. The Individual Defendants' Argument That an Internal Complaint Process Is an "Alternative" "Remedy" for Personal Injury Damages Is Unsupported By Law

The individual defendants make the astounding argument that as a substitute for the Court's review and possible award of a wide range of remedies, including money damages, Plaintiff could have simply filed a complaint with the TSA's parent agency, Individual Defendants' Mot. to Dismiss, pp. 17, 18, or better yet, could have told a supervisor or police officer at the airport about her injury, *id*., p. 19.

A process to file a complaint unaccompanied by any right to a remedy is simply not an avenue for relief.

Consider a hypothetical: counsel for the FBI appears in federal court after being sued for false arrest and excessive force, and argues, "No, no, *Bivens* remedies are no longer necessary because we created a Web page where people can air their grievances. This is an adequate remedy; there is no need to give the plaintiff money." They would be laughed out of court.

When people are injured, they are entitled to be made whole for their injuries[3]. Just as additional training will not undo or compensate Plaintiff for the existing injuries she incurred at the hands of the individual defendants, the ability to file a complaint with their employer or a local police officer (who has no jurisdiction over TSA policy) does nothing to undo or compensate Plaintiff for the extraordinary emotional trauma she went through. This is doubly-so when the

[3] When an injury is non-monetary, it is obvious that sometimes the injury cannot be literally reversed, in which case our system of justice requires Plaintiff to be provided a monetary approximation of the extent of their injuries. No amount of money can undo the sexual assault suffered by Mrs. Mengert, but offering her a complaint form does not even begin to approximate compensation of any sort.

complaint process requires only vague "review and assess[ment]" by the agency, Individual Defendants' Mot. to Dismiss, p. 17, and not any kind of formal or remedial process whatsoever, and certainly no compensation to the complainant. To hold that violations of constitutional rights entitle the citizens to no more than the right to complain would be to throw our constitutional rights in the trash and light them on fire. The Court should not only emphatically reject the individual defendants' invitation to do so, but hold the argument to be frivolous.

3. The Individual Defendants' Request to Both Preclude FTCA Review and Cite It As a Means to Defeat **Bivens** *is Improperly Arguing Both Sides of the Issue*

The government thus far has dedicated a substantial amount of ink to arguing that state law and FTCA claims may not lie in this case. Gov't. Defendants' Mot. to Dismiss, D.E. #21, pp. 15 – 27; Mot. to Substitute, D.E. #8.

The same attorneys are now arguing that state law remedies and FTCA remedies are sufficient remedial paths such that *Bivens* remedies are unnecessary and should be precluded. Individual Defendants' Mot. to Dismiss, pp. 16, 17.

As a general matter, a litigant in federal court is entitled to offer "in the alternative" claims and defenses. In other words, the defendants could reasonably have argued, "Our position is that FTCA remedies are not available here, but if the Court decides otherwise, FTCA remedies preclude *Bivens* remedies." But that is not what the defendants are doing here. They have explicitly argued that the Court should *both* preclude state law and FTCA remedies *and* hold that FTCA remedies are available and thus there is no need for *Bivens* remedies:

> "Regardless of the outcome of this particular Plaintiff's efforts to utilize state tort law and the FTCA process, it is clear as a general matter that those means have the

> potential to provide meaningful monetary relief to travelers aggrieved by interactions with TSA screeners."
>
> Individual Defendants' Motion to Dismiss, p. 17, fn. 8.

Defendants simply cannot have it both ways, and there is no good faith basis for arguing otherwise[4]. The argument is frivolous.

B. *Plaintiff Has Presented a Claim Substantially Similar to* Bivens

The Court must decide if Plaintiff has alleged facts that extend *Bivens* to a new context, or if the facts alleged by Plaintiff ask for relief from injuries that are similar enough to those found in *Bivens* to justify awarding remedies in the same fashion as *Bivens*. Although the U.S. Supreme Court declined "to create an exhaustive list of differences that are meaningful enough to make a given context a new one," it provided a list of 7 examples of meaningful differences:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider

[4] As a point of observation, the individual defendants and the government defendants seem to have a conflict of interest here: it is in the interest of the individual defendants to argue that the FTCA applies to avoid personal liability, and of the agency's interest to argue that it does not to avoid a judgment against the United States of America. In any other context, one attorney or firm would not be allowed to represent both categories of defendants because of that conflict of interest. However, because "personal" liability here is really a legal fiction since the reality is that the government is paying the bill no matter which defendant is held liable, Courts allow a unified defense – notwithstanding issues such as this one where an attorney is tempted to argue both positions to satisfy both clients despite the positions being mutually-exclusive.

Ziglar at 1860.

Applying these examples to the instant case, we have far more similarities than differences. In both *Bivens* and this case, the individual defendants are low-ranking employees of the agency. *C.f. Ziglar*, refusing to extend *Bivens* where a prison warden and high-level executive branch staff were sued. In both *Bivens* and this case, the Fourth Amendment right to be free from unreasonable search and seizure were implicated. In both *Bivens* and this case, the complaint is of a one-time incident of misconduct directed solely at the plaintiff. In both *Bivens* and this case, the individual defendants had clear limitations to their authority (in *Bivens*, the warrant requirement before search a home, and in this case, boundaries on the administrative search doctrine coupled with unambiguous TSA policy prohibiting strip searches[5]). This case poses little risk of disruptive intrusion by the Judiciary into the functioning of other branches: holding a TSA employee accountable for blatant violation of TSA policy to the injury of the public poses no threat of undermining the functioning of the TSA.

Regarding "the presence of potential special factors that previous *Bivens* cases did not consider," the individual defendants raise four potential special factors later in their brief when discussing whether the Court should extend *Bivens*: a) Congressional inaction, b) a "national

[5] Since the inception of government-sponsored airport screening, courts have held that these administrative searches "do[] not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives" *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973). Given that TSA has decided that strip searches are never necessary to clear passengers, there should have been no question in the individual defendants' minds that their search of Plaintiff was prohibited and outside the judicial boundaries of a lawful administrative search.

security" context, c) the "creat[ion] of an unworkable category of constitutional litigation," and d) the "chilling effect" this would have on the TSA. These potential special factors will be discussed *infra*.

Notably, when discussing whether Plaintiff's case is a new *Bivens* context, the individual defendants' brief did not address any of these examples provided by the U.S. Supreme Court. Individual Defendants' Mot. to Dismiss, pp. 13, 14. Instead, they provide their own examples of why this context seems new to them.

First, they allege that we have a new context because TSA screeners are not law enforcement officers. Mot. to Dismiss, p. 13. But, other cases have allowed *Bivens* claims against non-law enforcement. *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853 (10th Cir. 2016) (*Bivens* remedy against non-law enforcement agriculture inspector who conducted an inspection by breaking onto property). Indeed, some have allowed *Bivens* claims against TSA screeners in particular. *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013) (allowing *Bivens* claim for man who wrote Fourth Amendment on his chest, arrested by TSA request); *Ibrahim v. Department of Homeland*, 538 F.3d 1250 (9th Cir. 2008) (allowing *Bivens* claim against TSA internal call center operator whose instructions resulted in arrest of plaintiff). Given that the question here is whether the government employee conducted an illegal search, it hardly seems relevant as to whether the defendant also has powers of arrest.

Second, they allege that the context is new because the incident happened at an airport rather than at a home like in *Bivens*. Individual Defendants' Mot. to Dismiss, pp. 13, 14. But, plenty of other cases have allowed *Bivens* claims for incidents that happened in cars, on the public sidewalk, or again, by TSA screeners at airports. *See McLeod v. Mickle*, 18-1272 (2nd Cir., Mar.

27, 2019) (*Summary Order*) (allowing *Bivens* claim for unlawful car stop); *Fiore v. Walden*, 657 F.3d 838 (9th Cir. 2011) (*Bivens* claim allowed for money illegally seized at airport gate) . It hardly seems relevant where the search happened.

Third, they allege that the context is new because Plaintiff did not also allege excessive force and home invasion. Individual Defendants' Mot. to Dismiss, pp. 14. This one borders on the silly: the vast majority of *Bivens* cases do not allege a trio of unlawful search, excessive force, and home invasion. Alleging one fewer tort does not change the context.

Instead of these trivial differences pointed out by the individual defendants, *Bivens* and the instant case should be compared to *Ziglar*, where the U.S. Supreme Court found that suing high-level government officials for harsh prison conditions was a new context to *Bivens*. With this perspective, it is easy to see why *Ziglar* was a new context while this case is not.

C. Even Were This a New Bivens *Context, There is No Reason Not to Extend* Bivens *to Cover It*

The individual defendants argue that four "special factors" plus the availability of alternative remedies should lead the Court to refuse to extend *Bivens* to this, *arguendo*, "new" context. These arguments are misguided.

Addressing the four factors, the individual defendants first allege that Congressional inaction on providing a court remedy for TSA abuse should counsel hesitation. But, this is not a special factor that was not considered in *Bivens*: the whole reason *Bivens* exists at all is because Congress has failed to create a remedy for constitutional violations in almost any context. Especially in modern days of partisan politics in Congress, annually leading to hundreds of bills

passed by one house not even being brought up for a vote in the other house, the fact that Congress has not passed a law cannot be taken to mean that Congress has decided there should be no such law. Bringing up that Congress rejected monetary compensation for those erroneously put on the no-fly list, Individual Defendants' Mot. to Dismiss, p. 22, is a statement grasping for relevance.

The second factor raised is that the TSA checkpoint is a "uniquely sensitive area" with "national security implications." Individual Defendants' Mot. to Dismiss, p. 23. *Ziglar* attempted to warn that "national-security concerns must not become a talisman used to ward off inconvenient claims," but the individual defendants appear to pay no heed to these words. *Ziglar* at 1862. But unlike *Ziglar*, Plaintiff does not challenge "major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security." *Ziglar* at 1861. Plaintiff, in fact, challenges no government policy at all. Plaintiff merely seeks redress of an injury caused by rogue government employees who decided to violate government policy. It can hardly be said that providing a remedy here would threaten national security.

Third, the individual defendants lament the possible "creat[ion] of an unworkable category of constitutional litigation" if lawsuits relating to TSA abuse are allowed. Individual Defendants' Mot. to Dismiss, p. 24. But they overlook that such lawsuits are currently allowed in every circuit of this country, either through *Bivens* or the FTCA (or both). There is no reason to think that a floodgate of litigation will open if the Court allows a remedy to Plaintiff here, but more bluntly, perhaps if the TSA wishes to avoid litigation, instead of begging courts to immunize it, it could stop strip searching grandmothers in the airport.

Fourth, the individual defendants complain of a "chilling effect" this would have on TSA screeners at the checkpoint. The same could, of course, be said of police officers, FBI agents, and others who actually encounter dangerous individuals on a daily basis. TSA screeners, as all government officials, *should* "hesitate" before they intrude upon someone's liberty. The individual defendants attempt to paint a battlefield at the checkpoint where "quick decisions" are required and any "hesitancy" might allow the next 9/11 to happen. But anyone who has actually been to a TSA checkpoint knows the process is anything but "quick," and if a TSA screener is unsure as to the boundaries of their duties, they can pause the screening process to speak with a supervisor to get direction instead of, *e.g.*, taking it upon themselves to create a new strip-search policy.

Last, the individual defendants argue that alternative remedies are sufficient and therefore a court-created remedy is not necessary. As discussed *supra*, the availability of a complaint process is not in any way a "remedy." This leaves us with the FTCA, under which the government argues lies no claim, which, also as discussed *supra*, means that the FTCA cannot be used to demonstrate the availability of an alternative remedy.

Should the Court decide to allow Plaintiff's FTCA claims to proceed, Plaintiff concedes that the necessity for a *Bivens* claim is attenuated. However, the availability of an alternative remedy does not automatically preclude a *Bivens* claim. If the alternative remedy cannot fully redress the injury, for example, then a *Bivens* remedy may still be necessary, and the U.S Supreme "Court has so far rejected the notion that state tort law can adequately protect a citizen's 'absolute right to be free from unreasonable searches.'" *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 861 (10th Cir. 2016); *citing* *Bivens* at 392. It is not clear that the FTCA would allow for

a remedy for an unlawful search by TSA screeners if it were done without committing a common-law tort at the same time. It is not clear that the nature of the damages – for example, the exclusion of punitive damages – afforded by FTCA, but expanded by *Bivens*, would be sufficient to vindicate a constitutional right where part of the goal of litigation is to give the government incentive to stop the offending conduct.

Accordingly, although Plaintiff's position is that a new context does not exist and therefore alternative remedies do not need to be considered, if the Court does find that this is a new *Bivens* context, it should carefully ensure that Plaintiff's injury would be *fully* redressed by alternative remedies before closing the door.

D. The Individual Defendants Are Not Entitled to Qualified Immunity

It is clearly established law across the nation that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Big Cats* at 865, *citing Arizona v. Gant*, 556 U.S. 332, 338 (2009). As there was no warrant issued for the strip search of Plaintiff, the individual defendant must rely on one of those "well-delineated exceptions," and the only one applicable here is the administrative search doctrine.

Administrative searches are only allowed when narrowly tailored "to further a regulatory scheme." *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). The whole idea behind the administrative search doctrine is that the government is permitted an extremely *limited* search to address a *specific* public safety concern. *Davis* at 913 ("no more extensive nor intensive than necessary, in the light

of current technology, to detect the presence of weapons or explosives"). As such, the administrative search doctrine has never, in any context, in any court, included a strip search.

The regulatory scheme in this instance was created to prevent dangerous items from being carried on board airplanes and, relevant to passengers, was codified at 49 U.S.C. § 44901, "Screening passengers and property." Subsection (a) of that statute starts, "The Administrator of the Transportation Security Administration shall provide for the screening of all passengers…" *Id*. Therefore, an order of the Administrator of the TSA providing that a specific type of search is outside of the scope of passenger screening would place such a search outside of the regulatory scheme, and thus outside of the exception created by the administrative search doctrine, and thus Fourth Amendment unreasonable if conducted by a TSA screener at the checkpoint without a warrant. As alleged by Plaintiff, First Amended Complaint, ¶ 31, and undisputed thus far by the government, the Administrator of the TSA has issued just such an order prohibiting checkpoint strip searches.

As a visual, the following chart explains the flow of how each and every TSA screener is on notice that strip searches are outside of the exception created by the administrative search doctrine and would thus constitute a violation of constitutional rights:

TSA screeners are on notice…	**…as a result of:**
That searches without a warrant or exception to the warrant requirement are unconstitutional	*Arizona v. Gant*
That the administrative search doctrine exception will only allow them to conduct searches in furtherance of the regulatory scheme for passenger screening	*Donovan v. Dewey*

That the Administrator of the TSA sets the parameters for passenger screening	The plain language of 49 U.S.C. § 44901
That the Administrator of the TSA has prohibited checkpoint screeners from conducting strip searches	The plain language of the Screening Checkpoint Standard Operating Procedures, a TSA internal document provided to all checkpoint screeners to read, that constitutes an Order of the Administrator of the TSA

Qualified "immunity protects all but the plainly incompetent or those who knowingly violate the law." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (*internal citations and quotations omitted*). "Don't strip search people" is not a hard rule to follow. It requires no nuance or finesse to understand or comply with. Normal people don't have trouble avoiding "accidentally" strip searching someone (even if their job is passenger screening at the airport). The individual defendants are either plainly incompetent or abused Plaintiff on purpose. They are not entitled to qualified immunity.

Forecasting the individual defendants' reply, they may argue, "there may be case law that police officers can't strip search without warrant/incident to arrest/*etc*., but there's no law on point in this circuit regarding TSA employees." There's probably also no case law on point that a high school janitor cannot strip search a student suspected of stealing a roll of toilet paper, that a post office clerk cannot strip search a customer for using the wrong postage, or that a forecaster with the National Weather Service cannot check his or her colleagues' undergarments for a lost weather report. Notwithstanding, a court would have no problem refusing to immunize these individuals because the law is clear: "searches without a warrant are illegal" is the rule, and that absent authorization via an exception, or at least a reasonable belief that one may be authorized, to conduct a search, one may not conduct that search. All that is required to defeat qualified immunity is that

"the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, (1987). Objectively, no reasonable belief that strip searching Plaintiff was "doing the right thing" may have been formed by the individual defendants here due to the inherent limitations of the administrative search doctrine and clear TSA policy that placed the individual defendants on notice.

To hold otherwise would require a separate case on point for each of the thousands of job titles of government employees before the public could finally rest assured that they cannot be dragged into a back room and strip searched with impunity. It would also give more power to minimally trained and qualified TSA screeners than to police officers, FBI agents, customs officers, or even the U.S. Secret Service. Such a leap is not necessary: Plaintiff will show during discovery – should the defendants continue to press the issue – that no reasonable TSA screener would have thought they were authorized to conduct a strip search, ever, and that only one who is plainly incompetent or intentionally abusive would conduct one.

Finally, TSA's argument that Plaintiff has only alleged "collective allegations" rather than individualized wrongdoing also borders on frivolous. Individual Defendants' Mot. to Dismiss, pp. 28, 29. When two government employees together take a person into a back room and force them to remove their clothing without lawful authority, they have both fulfilled the "direct participation" required to be individually liable for the violation of that person's rights. *Pahls v. Thomas*, 718 F.3d 1210, 1228 (10th Cir. 2013).

In *Pahls* – the case the individual defendants attempt to use to further the "collective allegations" defense – the plaintiff sued a large group of police officers and U.S. Secret Service

agents alleging that the security plan that they created and enforced during a presidential visit interfered with their ability to protest based on the content of their speech. *Id*. at 1216. The *Pahls* court merely insisted that the plaintiffs demonstrate, and the district court consider, the personal participation of each defendant separately rather than treat the incident spanning multiple hours as a whole perpetrated by all. *Pahls* most certainly does not stand for the proposition that when two government officials confront a member of the public, only the official who actually speaks the unlawful order is liable, or that failure to identify which official was the verbal one requires dismissal of the case[6].

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IV. Conclusion

For the foregoing reasons, Defendants' motion to dismiss should be **denied** in its entirety and individual defendants should be **ordered** to answer the first amended complaint within 14 days.

Dated: Tulsa, OK
January 7th, 2020

Respectfully submitted,

/s/

Jonathan Corbett, Esq.
Attorney for Plaintiff (CA Bar #325608)
958 N. Western Ave. #765
Hollywood, CA 90029
E-mail: jon@corbettrights.com
Phone/FAX: (310) 684-3870

[6] Furthermore, Plaintiff is entitled to discovery to determine which of the two screeners the TSA has identified was the one who actually spoke the words that effected the unlawful search and seizure. There is a reason Plaintiff has not yet amended her complaint to name the two "Jane Doe" defendants.