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

(1) RHONDA MENGERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 19-CV-00304-JED-JFJ**
	)	
(1) U.S. TRANSPORTATION SECURITY ADMINISTRATION;	)	
(2) UNKNOWN U.S. TRANSPORTATION SECURITY ADMINISTRATION AGENT 1;	)	
(3) UNKNOWN U.S. TRANSPORTATION SECURITY ADMINISTRATION AGENT 2,	)	
	)	
Defendants.	)	

INDIVIDUAL DEFENDANTS'
REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

The Individual Defendants, pursuant to Rule 12 of the Federal Rules of Civil Procedure and LCvR 7.2(h), respectfully submit this reply to Plaintiff's Opposition (Doc. 28) to their Motion to Dismiss.

ARGUMENTS & AUTHORITIES

A. This case presents a new context.

Plaintiff contends that this case does not present a new context distinct from *Bivens*, *Davis*, and *Carlson* because she believes there are "more similarities than differences." (Doc. 28 at 12). That is not the standard. Rather, a case presents a new context if it is different in any "meaningful way." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017). As explained in the Individual Defendants' motion, there are obvious meaningful differences between this case and the Supreme Court's seminal trio of *Bivens* decisions. (Doc. 25 at 13-14). The analysis ends there. The existence of any meaningful difference – even a "modest" one – is enough to make the context new and trigger the two-part analysis of available alternative processes and special factors. 137 S. Ct. at 1864.

Plaintiff resists this straightforward application of Supreme Court precedent by arguing that the differences pointed out in the Individual Defendants' motion are "trivial," and asserting that the motion "did not address" any of the seven types of differences listed as examples in *Abbasi*. (Doc. 28 at 13-14). Plaintiff is wrong. First, the motion plainly addresses some of the types of differences discussed in *Abbasi*. The motion explains that the *specific* "constitutional right at issue" here is different from what was at issue in *Bivens*, *Davis*, and *Carlson*. *See Abbasi*, 137 S. Ct. at 1860.[1] The motion also explains that "the statutory or other legal mandate under which the

[1] Plaintiff attempts to gloss over this point by defining the right at issue in this case at the highest level of generality. She argues that "[i]n both *Bivens* and this case, the Fourth Amendment right to be free from search and seizure [was] implicated." (Doc. 28 at 12). But as explained in the Individual Defendants' motion, Plaintiff's claims here concern different aspects of the Amendment's protection, (Doc. 25 at 13-14), and *Bivens* remedies "are not recognized

[Individual Defendants were] operating" at the TSA checkpoint is fundamentally different from the legal authorities that governed the defendants in *Bivens*, *Davis*, and *Carlson*. *Id.* Moreover, as Plaintiff recognizes, (Doc. 28 at 11), *Abbasi*'s exemplary "list of differences that are meaningful enough to make a given context a new one" was not intended to be "exhaustive," and it is therefore appropriate for the Court to consider all differences noted by the Individual Defendants. 137 S. Ct. at 1860. Plaintiff also ignores that prior to *Abbasi*, the Supreme Court provided another example of a meaningful difference that establishes a new context: a distinct "category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). Here, there is no question that TSA screeners, a unique class of non-law enforcement federal employees, are a new "category of defendants" different from the law enforcement officers, prison officials, and congressman who were the defendants in *Bivens*, *Davis*, and *Carlson*.

Moreover, the differences between this case and the only three cases in which the Supreme Court has ever allowed a *Bivens* remedy are hardly "trivial," as every court to consider the issue has held that TSA screening operations at airport checkpoints present a new context. *See, e.g.*, *Vanderklok*, 868 F.3d at 199 (recognizing "airport security" as a new "particular context"); *Scruggs v. Nielsen*, 2019 WL 1382159, at * 5 & n.9 (N.D. Ill. Mar. 27, 2019) (same). Plaintiff has not cited a single case holding otherwise.[2]

Amendment by Amendment in a wholesale fashion." *Wilson v. Libby*, 498 F. Supp. 2d 74, 86 (D.D.C. 2007); *see Vanderklok v. United States*, 868 F.3d 189, 199 (3d Cir. 2017) ("[R]ecognition of a cause of action under a constitutional amendment does not mean that such an action can vindicate every violation of the rights afforded by that particular amendment."); *Sanford v. Bruno*, 2018 WL 2198759, at *4 (E.D.N.Y. May 14, 2018) (although "the Supreme Court has recognized causes of action in *Bivens* under the Fourth Amendment" and "in *Davis* under the Fifth Amendment, . . . those cases do not guarantee that any cause of action may lie under those amendments").

[2] Plaintiff's reliance on *Tobey* and *Ibrahim* is misplaced. (Doc. 28 at 13). Neither decision analyzes the availability of a *Bivens* remedy against TSA screeners, and neither finds that TSA screening is *not* a new context for purposes of that analysis. *Tobey* appears to simply assume, without any

B. Non-monetary processes can preclude recognition of a *Bivens* claim.

Plaintiff passionately argues that she must be allowed to proceed with her *Bivens* claims because she will otherwise be left without an avenue to seek monetary compensation. (Doc. 28 at 9-10). She asserts that the Court should not hesitate to imply a new cause of action against TSA screeners because she is "entitled to be made whole" for her alleged emotional injuries. *Id.* at 9; *see also id.* at 17 (arguing that the Court "should carefully ensure that [her] injury would be *fully* redressed by alternative remedies before closing the door" to a *Bivens* claim). Plaintiff's argument is contrary to several well-settled principles. First, a judicially created cause of action "is not an automatic entitlement" just because there is no other way for a plaintiff to seek money damages. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Second, the law is clear that the existence of alternative processes can preclude recognition of a *Bivens* claim even when those processes do not provide for monetary compensation and will not make the plaintiff "whole" by affording complete relief. *See, e.g.*, *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1105 (10th Cir. 2005) ("[T]he Supreme Court has refused to imply a *Bivens* cause of action when there are alternative remedies, even when . . . those remedies do not provide complete relief for the plaintiff." (quotation omitted)); *Nat'l Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989) ("Although there may be no established mechanism for the recovery of damages . . . the

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discussion, that a First Amendment *Bivens* claim can be asserted against TSA screeners, but the issue was not raised by the parties. The only relevant discussion of context is in Judge Wilkinson's dissent, which repeatedly recognizes that TSA "security screening" at airports presents a "special" and "wholly different context." *Tobey v. Jones*, 706 F.3d 379, 401 (4th Cir. 2013). *Ibrahim* also appears to simply assume that a *Bivens* remedy exists, but again there is no discussion of the issue, it was not raised by the parties, and the defendant was a TSA office worker in Washington, DC, not a TSA screener at an airport checkpoint. *Ibrahim v. D.H.S.*, 538 F.3d 1250 (9th Cir. 2008). Moreover, both cases were decided before the Supreme Court signaled a sea change in *Abbasi*, which casts doubt on their current persuasive value concerning any *Bivens* issues. *See Vanderklok*, 868 F.3d at 199 (noting limited value of "past pronouncements" in light of *Abbasi*).

unavailability of complete relief does not mandate the creation of a *Bivens* remedy when other meaningful safeguards or remedies for the rights of persons situated as were the plaintiffs are available." (quotation omitted)); *accord De La Paz v. Coy*, 786 F.3d 367, 377 (5th Cir. 2015) ("The absence of monetary damages in the alternative remedial scheme is not ipso facto a basis for a *Bivens* claim."), *cert. denied*, 137 S. Ct. 2289 (2017). Third, when considering the sufficiency of existing processes, the Court should not analyze them one-by-one in isolation but, rather, consider the cumulative effect of *all* of them collectively and "taken together." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Taken together, the alternative processes discussed in the Individual Defendants' motion strongly counsel against the *Bivens* extension Plaintiff seeks.

1. The DHS and TSA complaint process

Plaintiff argues that an agency's "internal complaint process" should not be considered an alternative remedy when determining the availability of a *Bivens* cause of action. (Doc. 28 at 9).[3] She does not cite a single case to support that argument. As explained in the Individual Defendants' motion, courts routinely consider the existence of "[a]dministrative schemes that expose unconstitutional conduct by government officials, even if they do not provide a distinct remedy for that conduct," when deciding whether to recognize a *Bivens* remedy. *Bagola v. Kindt*, 131 F.3d 632, 644 (7th Cir. 1997); *see also Malesko*, 534 U.S. at 74 (no Bivens remedy for inmate in private halfway house since, inter alia, "[i]nmates in respondent's position . . . have full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive

[3] Plaintiff presses her argument to the extreme by contending that it was improper – and perhaps even sanctionable – for the Individual Defendants to present the TSA and DHS complaint process as an alternate remedy because doing so was "unsupported by law." (Doc. 28 at 9). Her contention is inexplicable. The Individual Defendants cited a raft of cases on the point. (Doc. 25 at 15, n.6 & n.11). As explained in the motion, courts have held that a variety of internal, administrative complaint processes – ranging from the BOP's inmate grievance system to a redress process for allegations of discrimination in federally conducted education programs – should be considered as part of the analysis of alternative remedies that may preclude recognition of a *Bivens* claim. *Id.*

relief and grievances filed through the BOP's Administrative Remedy Program"). There is no reason this Court should not do the same here.

2. A petition for review of TSA screening procedures

Plaintiff also argues that a petition for review of TSA screening procedures under 49 U.S.C. § 46110 should not be considered an alternate process. (Doc. 28 at 6-8). She contends that a petition would not help her because she does not challenge the constitutionality of TSA's standard operating procedure (SOP) for screening passengers,[4] and instead complains only that the Individual Defendants' alleged conduct was unconstitutional because it departed from what was prescribed in the SOP. *Id.* Plaintiff is wrong for two reasons. First, Plaintiff has no basis to plausibly claim that the Individual Defendants contravened the SOP, because the SOP is Sensitive Security Information (SSI) that is not public.[5] Plaintiff does not know how the SOP directs TSA employees to conduct additional screening to establish that an object under a passenger's clothing in the groin area is not a prohibited item or potential threat to transportation security. Accordingly, Plaintiff does not know whether and to what extent the Individual Defendants' alleged conduct was inconsistent with the SOP. The Court should therefore disregard Plaintiff's baseless, conclusory assertion that her constitutional claims unequivocally challenge only the Individual Defendants' alleged conduct and not TSA's procedures. A petition for review of the SOP is a means to allow her to seek assurance that TSA procedures do not violate the Fourth Amendment.

[4] The SOP is a TSA final order that is subject to review in the courts of appeals under § 46110. *See* (Doc. 25 at n.5); (Doc. 21 at 35-36). Plaintiff does not contest that point.

[5] Pursuant to 49 U.S.C. § 114(r) and 49 C.F.R. Part 1520, the SOP has been designated as SSI that cannot be publicly disclosed. *See* 49 C.F.R. § 1520.5(b)(9)(i); *Blitz v. Napolitano*, 700 F.3d 733, 737 (4th Cir. 2012) ("[T]he specifics of [TSA's checkpoint screening] procedures constitute sensitive security information."); *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 3 (D.C. Cir. 2011) (noting that "details of the screening process" are "documented in a set of Standard Operating Procedures not available to the public").

Second, for purposes of analyzing alternative processes to determine whether a *Bivens* cause of action should be recognized, the Court should consider any process that affords a forum for raising constitutional concerns about government conduct. A petition for review of TSA's SOP is plainly an avenue to bring to light how the agency screens airline passengers wearing feminine hygiene products and "request that the [court of appeals] try to prevent a *future* injury" to such passengers. (Doc. 28 at 8). "[A] means through which allegedly unconstitutional actions may be . . . prevented from recurring" is appropriately considered as part of the analysis of available alternative processes. *Richardson v. United States*, 2019 WL 4038223, at *5 (W.D. Okla. Jun. 28, 2019). Plaintiff is wrong that the only alternative processes that should be considered are those that redress her "existing injuries." (Doc. 28 at 8). She has cited no authority for that proposition, and the Court should not overlook the availability of a petition for review when evaluating the appropriateness of Plaintiff's requested *Bivens* extension.

3. The FTCA

Plaintiff contends that the Court should not consider the FTCA as an alternative process because the United States previously argued that she cannot assert an FTCA claim for false imprisonment in this case. (*See* Doc. 28 at 16). Plaintiff is wrong. The FTCA does not lose all significance as an alternative process just because one particular claim is not allowed under the statute. Here, the United States has argued that Plaintiff's false imprisonment claim should be dismissed under 28 U.S.C. § 2680(h). (Doc. 21 at 15-27). But the United States did not move to dismiss her other FTCA claim for intentional infliction of emotional distress (IIED) under § 2680(h). Thus, an FTCA claim for IIED may be an alternative process available to airline

passengers aggrieved by events during TSA screening.[6] That airline passengers can assert an IIED claim – or other claims that do not arise from one of the torts listed in § 2680(h) – against the United States is certainly an alternative process that counsels against the *Bivens* extension that Plaintiff seeks.[7]

C. There is no clearly established law that bars qualified immunity.

Plaintiff contends that the Individual Defendants are not entitled to qualified immunity because under TSA's SOP, it was clearly established that screening employees were prohibited "from conducting strip searches." (Doc. 28 at 19). Plaintiff's argument is plainly meritless. For purposes of the qualified immunity analysis, a particular constitutional right cannot be clearly established by an agency document. *See Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Herring v. Keenan*, 218 F.3d 1171, 1180 (10th Cir. 2000) (holding that "internal policies governing the conduct of a [federal] probation

[6] In this case, the United States moved to dismiss Plaintiff's IIED claim because it is unexhausted and because Plaintiff's allegations are insufficient. But a properly exhausted and sufficiently pled claim for IIED filed by an airline passenger could proceed against the United States under the FTCA. Plaintiff concedes that when an FTCA claim is allowed, the Court could consider the FTCA as an alternative process, and "the necessity for a *Bivens* claim is attenuated." (Doc. 28 at 16).

[7] Plaintiff cites *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 861, (10th Cir. 2016), to argue that state tort law does not adequately protect Fourth Amendment rights such that it should preclude recognition of a *Bivens* claim. Plaintiff's reliance on *Big Cats* is misplaced for several reasons. First, the cited language refers to the adequacy of state tort law as an alternative remedy for abuses by government actors "in the prototypical Fourth Amendment context" of the *Bivens* case itself – i.e., the context of a criminal law enforcement search executed by criminal law enforcement officers. *Id.* at 861. This case differs significantly from that "prototypical" context. Second, the Individual Defendants are not arguing that state tort law is, by itself, a wholly sufficient alternative process. Rather, they argue that state tort law and the FTCA, together with the other processes discussed in the motion, collectively counsel against extending *Bivens* to the novel context of this case. (Doc. 25 at 16 n.7). Third, *Big Cats* was decided before the Supreme Court's landmark decision in *Abbasi*, which casts doubt on the precedential value of its analysis of alternative processes.

officer" did not clearly establish a constitutional right). Instead, Plaintiff "must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as [she] maintains." *Callahan v. Unified Gov't of Wyandotte Cnty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (quotation omitted). As Plaintiff concedes, she has not cited any judicial decision regarding the reasonable scope under the Fourth Amendment of additional screening procedures to ensure that an object felt under clothing during an airport pat-down is not a prohibited item or potential threat to transportation security.[8] She has thus failed to carry her burden of pointing to clear, specific case law that was sufficient to put the Individual Defendants on notice that their alleged conduct was unconstitutional.

Plaintiff contends that even though there were no judicial decisions notifying the Individual Defendants that their alleged conduct violated the Fourth Amendment, they still could not have reasonably believed they were "doing the right thing" because they were on notice of "inherent limitations of the administrative search doctrine and clear TSA policy." (Doc. 28 at 20). She is wrong. She has not cited any authority for the proposition that agency policy or supposedly "inherent" elements of legal doctrines can put federal employees on notice of constitutional limitations even when there is no case law clearly stating those limitations. In fact, the provisions of the SOP or any other TSA policy are irrelevant to the qualified immunity analysis. *See Herring*, 218 F.3d at 1180 (only clear "indication from the courts," not agency "internal policy" can put

[8] In fact, Plaintiff cited only one case, *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973), that concerns airport security at all. The case was decided more than 45 years ago, before the 9/11 attacks and the creation of TSA. It does not discuss screening airline passengers with a pat-down, as the search at issue involved opening a briefcase and discovering a loaded revolver inside. And its central holding that an administrative search at an airport checkpoint is reasonable under the Fourth Amendment only if a passenger consents has been expressly overruled. *See United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (en banc). Accordingly, the Court should not find that *Davis* clearly established any particular Fourth Amendment right relevant to this case.

federal employees on notice of a clearly established right).[9] "Whether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of his conduct as measured by reference to clearly established *law*. No other circumstances are relevant to the issue[.]" *Scherer*, 468 U.S. at 191 (quotations omitted and emphasis added).[10]

As for "inherent limitations of the administrative search doctrine," Plaintiff did not cite a single case stating such limitations at a level of specificity that is relevant to the qualified immunity analysis here.[11] Instead, Plaintiff cited only the general principle that TSA screening procedures are reasonable under the Fourth Amendment if they are "no more extensive nor intensive than

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[9] Even if agency policy could be considered, Plaintiff has not identified any TSA policy that clearly and specifically prohibited the alleged conduct in this case. Plaintiff asserts that TSA's SOP contains an "order prohibiting checkpoint strip searches." (Doc. 28 at 18). As the only support for that assertion, Plaintiff cites to paragraph 31 of her First Amended Complaint, which in turn cites to nothing more than a TSA blog post from more than nine years ago stating, "TSA does not include strip searches in its protocols." (Doc. 12 at ¶ 31). But as explained above, Plaintiff does not know what the SOP says about how TSA employees should conduct additional screening to establish an object under a passenger's clothing in the groin area is not a prohibited item. She thus has no basis to plausibly claim that the SOP put the Individual Defendants on notice that their alleged conduct was not permissible. Moreover, the Court should disregard Plaintiff's inflammatory characterization of what occurred as a "strip search." Instead, the Court should consider only the actual substantive allegations about the Individual Defendants' conduct. As actually alleged, what the Individual Defendants did was not a "strip search." *See, e.g.*, *Wood v. Hancock Cnty. Sheriff's Dep't*, 354 F.3d 57, 65 (1st Cir. 2003) (considering "the critical question" of what constitutes a strip search as "whether viewing the naked body was an objective of the search, rather than an unavoidable incidental by-product"). Thus, even if TSA policy prohibits employees from performing a "strip search," the Individual Defendants had no reason to believe their alleged conduct contravened the policy.

[10] *See also Ernst v. Creek Cnty. Pub. Facilities Auth.*, 2016 WL 4442803, at *9 (N.D. Okla. Aug. 22, 2016) ("[A] failure to adhere to jail policies and administrative regulations does not, of itself, equate to a constitutional violation." (citing *Hovater v. Robinson*, 1 F.3d 1063, 1068 n.4 (10th Cir. 1993))), *aff'd*, 697 F. App'x 931 (10th Cir. 2017).

[11] *See Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995) ("In order to carry his burden, the plaintiff must do more than identify in the abstract a clearly established right and allege that defendant has violated it. Rather, the plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated that right with specificity."). Under *Romero*, Plaintiff's chart stating basic Fourth Amendment principles at a very high level of generality and her hyperbolic characterization of what occurred as a "strip search" without regard to the actual details of the Individual Defendants' alleged conduct are insufficient to defeat qualified immunity.

necessary, in light of current technology, to detect the presence of weapons or explosives," *Davis*, 482 F.2d at 913. (Doc. 28 at 17-18). Plaintiff offers no valid explanation as to how the Individual Defendants were unmistakably supposed to understand that high-level, general principle to prohibit their alleged conduct in this case.[12]

D. Plaintiff's invocation of Rule 11 is unwarranted.

Plaintiff contends that the Court should find that the Individual Defendants' arguments regarding a petition for review as an alternative process are "frivolous in violation of Fed. R. Civ. P. 11(b)(2)." (Doc. 28 at 8). As explained above, the availability of a petition for review of TSA's SOP under 49 U.S.C. § 46110 is a meaningful safeguard for airline passengers' constitutional rights at airport checkpoints. It is therefore appropriately considered as part of the analysis of alternative processes that may preclude the extension of *Bivens* to this context. Plaintiff has not cited any authority to the contrary, and her invocation of Rule 11 is unwarranted.[13]

CONCLUSION

For the foregoing reasons and the reasons included in the Individual Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Doc. 25), the Individual Defendants respectfully request that Plaintiff's *Bivens* claims asserted against them be dismissed with prejudice.

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[12] Plaintiff also asserts without any citation to authority that the Individual Defendants were on notice that a "strip search" is "never" reasonable as part of an administrative search. (Doc. 28 at 18). As Plaintiff cannot point to any case for that proposition, it is unclear how the Individual Defendants could have had adequate notice. Moreover, Plaintiff's assertion is at odds with the Tenth Circuit's statement that it has "not adopted a per se rule for when a strip search is permissible." *Archuleta v. Wagner*, 523 F.3d 1278, 1286 n.5 (10th Cir. 2008). And even if there was a rule against a "strip search" during an administrative search, "the Tenth Circuit has not defined what constitutes a strip search," *Sanchez v. Bauer*, 2015 WL 13730690, at *10 (D. Colo. Jun. 29, 2015), so there was no notice as to the specific conduct that was prohibited.

[13] Plaintiff also invoked Rule 11 in response to the United States and TSA's motion to dismiss. (Doc. 22 at 24). Invoking the rule is not appropriate as a routine way to signal disagreement with an argument. *See, e.g.*, *Sokoli v. J&M Sanitation, Inc.*, 2015 WL 7720466, at *6 (D. Idaho Nov. 27, 2015) ("Lawyers are not to hurl Rule 11 about like a handful of sand in the sandbox.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filings to the parties entitled to receive notice.

s/Michelle Hammock
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