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.	)	

TRANSPORTATION SECURITY ADMINISTRATION AND THE UNITED STATES OF AMERICA'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT & BRIEF IN SUPPORT

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COME NOW Defendants Transportation Security Administration (TSA) and United States of America[1] (collectively "Defendants"), through their undersigned attorneys, R. Trent Shores, United States Attorney for the Northern District of Oklahoma, and Rachael F. Zintgraff, Assistant United States Attorney, and pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) respectfully move the Court to dismiss all claims asserted against them in Plaintiff's First Amended Complaint (Doc. 12) filed on September 6, 2019.[2] In support of this motion, Defendants rely on the following memorandum of points and authorities and all matters of record.

BRIEF IN SUPPORT

I. BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff Rhonda Mengert brings this action asserting claims of false imprisonment, intentional infliction of emotional distress (IIED), and violation of the Fourth Amendment arising

[1] The United States is not named as a defendant in Plaintiff's First Amended Complaint, but by operation of Federal Rule of Civil Procedure 21 and 28 U.S.C. § 2679(d)(1), the United States should be substituted in place of "Unknown TSA Agent 1" and "Unknown TSA Agent 2" named in the First Amended Complaint as the sole defendant for Plaintiff's state law tort claims. The United States has filed a motion (Doc. 8) requesting such substitution based upon certification by the United States Attorney for the Northern District of Oklahoma (Doc. 8-1) that Unknown TSA Agent 1 and Unknown TSA Agent 2 were acting within the scope of their federal employment at the time of the events from which Plaintiff's claims arose. At this juncture, the undersigned attorney does not represent Unknown TSA Agent 1 and Unknown TSA Agent 2, who have been sued in their individual capacities, and this motion is submitted only on behalf of Defendants TSA and the United States.

[2] Defendants previously moved to dismiss Plaintiff's original Complaint (Doc. 2) in this action. Before the Court ruled on the motion to dismiss (Doc. 9), Plaintiff filed the First Amended Complaint (Doc. 12). Because the First Amended Complaint supersedes and replaces Plaintiff's original Complaint, its filing mooted the pending motion to dismiss. *See, e.g., Bivins v. Okla. ex rel. Rogers County Dep't of Human Servs.*, No. 13-cv-802, 2014 WL 1976463, at *1 n.1 (N.D. Okla. May 15, 2014). The instant motion is Defendants' response to the First Amended Complaint. *See Blagg v. Line*, No. 09-cv-703, 2012 WL 175425, at *2 n.5 (N.D. Okla. Jan. 20, 2012) (explaining that when the filing of an amended pleading moots a motion to dismiss, the party who filed the motion may file a new motion to dismiss the amended pleading).

from her pre-flight security screening at a Transportation Security Administration (TSA) checkpoint in Tulsa International Airport (TUL) on May 12, 2019. The events alleged in Plaintiff's First Amended Complaint, though not admitted, are summarized below.

At the checkpoint, Plaintiff was screened with a walk-through Advanced Imaging Technology (AIT) scanner. (Doc. 12 at ¶¶ 21, 23). The AIT scanner alarmed to indicate the possible presence of an item being carried on Plaintiff's body or in her clothing, and she was therefore required to undergo a pat-down procedure to resolve the alarm. *Id.* at ¶ 23. During the pat-down, the female TSA employee who was performing the procedure felt a "feminine hygiene product" that Plaintiff was wearing inside of her underwear. *Id.* at ¶¶ 23-27. Plaintiff alleges that she was subsequently required to go with two female TSA employees to a private screening room at the checkpoint, lower her pants and underwear to remove the "feminine hygiene product" she was wearing, and show the item to the TSA employees "for their visual inspection." *Id.* at ¶ 37. Plaintiff further alleges that after the visual inspection was complete, she asked to leave the private screening room three times, but the TSA employees ignored her requests, and she was not permitted to leave until she asked a fourth time. *Id.* at ¶¶ 41-42. She claims that these events caused her to "experience severe emotional distress," which manifested with the physical symptoms of "racing heart, shortness of breath, uncontrollable shaking, [and] nausea." *Id.* at ¶¶ 43-44. She also claims that whenever she "is reminded of the event, she experiences the same symptoms," as well as the additional physical symptoms of "sweating, tightness in throat, headache, and hot flashes." *Id.* at ¶¶ 46-47. Plaintiff alleges that she is "regularly reminded of the incident" because she "typically" travels by air more than once per month. *Id.* at ¶¶ 50-51.

Plaintiff asserts several legal claims against TSA and the two TSA employees in their individual capacities. With regard to the employees, Plaintiff claims that they violated the Fourth

Amendment and are therefore personally liable to her for money damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). At this juncture, the undersigned attorney does not represent the employees in their personal capacities, and this motion is not filed on their behalf and does not address Plaintiff's *Bivens* claims.

Plaintiff also claims that the TSA employees are liable in their individual capacities for committing the torts of false imprisonment and IIED. Because the Department of Justice has determined that the TSA employees were acting within the scope of their federal employment during the alleged events described in Plaintiff's First Amended Complaint, *see supra* n.1, the false imprisonment and IIED claims are deemed to be claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b)(1); 2671, *et seq.*, and they cannot be maintained against the employees in their personal capacities as "private citizens," (Doc. 12 at ¶¶ 67, 71).

When properly construed as FTCA claims against the United States, Plaintiff's false imprisonment and IIED claims are subject to the administrative exhaustion requirement of 28 U.S.C. § 2675(a). Under that statute, the Court lacks subject-matter jurisdiction over Plaintiff's claims unless they were presented to TSA, and the agency finally denied them, *before* Plaintiff filed an action in this Court. Final disposition of the claims by TSA is an "absolute prerequisite" to filing suit. *Lann v. Hill*, 436 F. Supp. 463, 466 (W.D. Okla. 1977). Here, Plaintiff did not present her claims to TSA before she filed this action. Plaintiff's original Complaint was filed on June 5, 2019, and Plaintiff's counsel did not submit notice of the false imprisonment and IIED claims to TSA until on or about June 17, 2019. Accordingly, Plaintiff did not exhaust her administrative remedies prior to filing suit, and her false imprisonment and IIED claims should be dismissed for lack of subject-matter jurisdiction.

Even if Plaintiff had satisfied the exhaustion requirement, her FTCA claims would still be subject to dismissal on additional, independent grounds. The false imprisonment claim should be dismissed for lack of subject-matter jurisdiction under 28 U.S.C. § 2680(h), which expressly provides that the United States has not waived its sovereign immunity from "[a]ny claim arising out of . . . false imprisonment" unless the claim is based upon the alleged conduct of an "investigative or law enforcement officer." *See Doe v. Lynch*, No. 14-cv-1100, 2015 WL 7017450, at *5 n.12 (W.D. Okla. Nov. 12, 2015) (noting in a case in which plaintiff failed to exhaust administrative remedies that § 2680(h) provided an independent, alternative basis for dismissal). As a matter of first impression in this district, the Court should find that Transportation Security Officers (TSOs) employed by TSA to perform airport security screening are not "investigative or law enforcement officers" within the meaning of the FTCA.

Plaintiff's IIED claim should be dismissed for failure to state a claim upon which relief can be granted because the First Amended Complaint does not plausibly plead sufficient factual allegations to establish the required elements of IIED under Oklahoma law. Specifically, the allegations are insufficient to state "extreme and outrageous" conduct or "severe" emotional distress as a matter of law.

Finally, with regard to TSA, Plaintiff asserts a claim seeking an injunction against the agency that would require it "to modify its policies and/or training" in an unspecified manner so as to "ensure that [Plaintiff] is not a victim of [allegedly injurious screening procedures] in the future." (Doc. 12 at ¶ 84). The Court lacks subject-matter jurisdiction to hear the injunction claim under 49 U.S.C. § 46110. That statute provides that any challenge to a TSA order, or any claim implicating review of such an order, can only be asserted in a petition for review filed in an appropriate Court of Appeals. Because the Courts of Appeals have exclusive jurisdiction over the

type of injunction claim asserted here, the claim should be dismissed with prejudice to re-filing in this Court or any other District Court.

II. STANDARDS OF REVIEW

A. Standard for dismissal under Rule 12(b)(1).

Federal courts may exercise jurisdiction only when specifically authorized to do so. *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994). The plaintiff bears the burden of establishing that jurisdiction is proper. *Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1299 (D. Kan. 2004). When jurisdiction is challenged, the plaintiff bears the burden of showing why the case should not be dismissed. *Id.* The Court has wide discretion to consider affidavits and other documents to resolve disputed jurisdictional facts, and reference to such evidence does not convert a motion to dismiss into a motion for summary judgment. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003) (citations omitted).

B. Standard for dismissal under Rule 12(b)(6).

To state a claim, a complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). The standard requires "enough facts to state a claim to relief that is plausible on its face," and not merely "speculative." *Id.* at 555–56, 570 (citations omitted). The Court must accept all well-pleaded, non-conclusory allegations as true and construe them in the light most favorable to the plaintiff. *Id.* at 555.

III. ARGUMENT

A. Plaintiff did not exhaust the administrative remedies for her FTCA claims prior to filing suit as required by 28 U.S.C. § 2675(a).

Plaintiff's First Amended Complaint must be construed as asserting her claims for false imprisonment and IIED against the United States under the FTCA. *See supra* n.1; *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995). "The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113 (1993). "This exhaustion requirement is jurisdictional and cannot be waived." *Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2016) (quotation omitted); *see also Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) (describing administrative exhaustion as "a jurisdictional prerequisite"). To satisfy the FTCA's exhaustion requirement set forth in 28 U.S.C. § 2675(a), a plaintiff must have presented a claim to the appropriate federal agency, and the claim must have been finally denied by the agency, *before* the plaintiff files suit. *See D'Addabbo v. United States*, 316 F. App'x 722, 725 (10th Cir. 2008) (finding that plaintiff's submission to an agency of a letter purporting to be a notice of claims "*after* filing suit" did not satisfy the FTCA's exhaustion requirement).

Here, there is no question that Plaintiff did not present her claims to TSA before she filed this action. The original Complaint was filed on June 5, 2019, and Plaintiff's counsel did not submit notice of the false imprisonment and IIED claims to TSA until on or about June 17, 2019.[3]

[3] Because it is clear that Plaintiff's counsel did not even present the notice of claims to TSA before filing suit, the Court need not consider any issues related to TSA's subsequent handling of the notice once it was received by the agency. *See Stevens v. United States*, 61 F. App'x 625, 627 (10th Cir. 2003) (explaining that when a plaintiff filed suit before exhausting administrative remedies, "the fact that he ultimately exhausted those remedies" with the relevant agency while the case remained pending "did not ripen the action" and give the district court subject-matter jurisdiction to adjudicate his claims).

See (Declaration of Brett Barber, attached as Exhibit 1). Accordingly, Plaintiff did not exhaust her administrative remedies prior to filing suit, and her false imprisonment and IIED claims should be dismissed for lack of subject-matter jurisdiction. *See Gabriel v. United States*, 683 F. App'x 671, 672 (10th Cir. 2017) ("The action was filed on July 14, 2014. As of that date, the plaintiff had not presented an administrative claim. Thus, the district court lacked subject-matter jurisdiction."); *Stone v. United States*, No. 06-cv-1024, 2006 WL 2990374 (W.D. Okla. Oct. 18, 2006) (finding no subject-matter jurisdiction over FTCA claims that were "prematurely filed" in court one day before they were presented to the relevant agency).

Importantly, Plaintiff's failure to exhaust her administrative remedies in accordance with 28 U.S.C. § 2675(a) *before* filing this lawsuit cannot be cured now, *after* she has already filed the action in this Court. "[A] premature complaint cannot be cured through amendment, but instead, [a] plaintiff must file a new suit." *Duplan*, 188 F.3d at 1199 (quotation omitted); *see also Gabriel*, 683 F. App'x at 672 ("When a claim is unexhausted prior to suit under the [FTCA], the claimant cannot cure the jurisdictional defect while the suit is pending." (quotation omitted)); *Moles v. Lappin*, No. 08-cv-594, 2010 WL 796756, at *9 (W.D. Okla. Feb. 26, 2010) ("If Plaintiff [had] not exhaust[ed] administrative remedies at the time he filed this action, his failure to do so is a jurisdictional defect that cannot be cured by a subsequent amendment of the complaint."). "Allowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the exhaustion requirement meaningless and impose an unnecessary burden on the judicial system." *Duplan*, 188 F.3d at 1199 (citations omitted). "Congress intended to require complete exhaustion . . . *before* invocation of the judicial process." *McNeil*, 508 U.S. at 112 (emphasis added).

Because Plaintiff irretrievably failed to present her false imprisonment and IIED claims to TSA before filing this action, the claims cannot be maintained as part of this case. Accordingly, Defendants respectfully request that dismissal of the claims be with prejudice to their re-assertion in this action, but without prejudice to re-filing in a *new* action if Plaintiff remains unsatisfied after exhausting her administrative remedies. *See Duplan*, 188 F.3d at 1199 (explaining that prematurely filing unexhausted FTCA claims in court must be cured by filing a new suit).

B. The Court lacks subject-matter jurisdiction over Plaintiff's claim for false imprisonment under 28 U.S.C. § 2680(h).

As an alternative basis for dismissal, the Court lacks subject-matter jurisdiction to hear Plaintiff's claim for false imprisonment under 28 U.S.C. § 2680(h), which expressly provides that the United States has not waived its sovereign immunity from "[a]ny claim arising out of . . . false imprisonment" unless the claim is based on alleged conduct of "investigative or law enforcement officers of the United States Government." In this case, "Unknown TSA Agent 1" and "Unknown TSA Agent 2" are Transportation Security Officers (TSOs) responsible for conducting airport security screening. TSOs do not have any criminal law enforcement powers, and they do not perform any criminal law enforcement function. They are not empowered to carry firearms, make arrests, execute warrants, or seize evidence, and their authority to perform searches is narrowly limited to conducting suspicionless administrative security screening at designated public locations in airports in accordance with a specific set of standard operating procedures. This Court should hold as a matter of first impression in this district that TSOs are not "investigative or law enforcement officers" within the meaning of the FTCA.

Section 2680(h) defines an "investigative or law enforcement officer" as any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests

for violations of Federal law." This sentence is ambiguous on its face in at least four ways. First, the sentence does not define the term "officer of the United States." Second, it does not explain the phrase "empowered by law." Third, it is not clear whether the phrase "for violations of Federal law" modifies only the immediately preceding phrase "to make arrests" or if it also modifies the earlier phrases "to execute searches" and "to seize evidence." Fourth, the sentence does not define the term "searches," and it is not self-evident that the term necessarily must have the exact same expansive meaning as it does in the Fourth Amendment.

The majority of the 32 federal judges who have considered the application of § 2680(h) to TSA's screening workforce — 22 judges — have agreed with Defendants that TSOs do not meet the definition of investigative or law enforcement officers.[4] By contrast, only 10 judges have held

[4] *Pellegrino v. U.S. Transp. Sec. Admin., Div. of Dep't of Homeland Sec.*, __ F. 3d __, 2019 WL 4125221, at *13-29 (3d Cir. Aug. 30, 2019) (dissenting opinion of Krause, J., joined by Jordan, J., Hardiman, J., and Scirica, J.); *Gesty v. United States*, No. 18-cv-533, 2019 WL 3253184 (D. Ariz. Jul. 19, 2019) (Collins, J.); *Leytman v. United States*, No. 17-cv-4455, (Doc. 47) (E.D.N.Y. Dec. 14, 2018) (Kuntz, II, J.) (unreported order granting motion to dismiss); *Adderley v. United States*, No. 17-cv-1431, 2018 WL 3819722 (N.D. Ala. Aug. 10, 2018) (Johnson, Jr., J.); *Iverson v. United States*, No. 18-cv-323, 2018 WL 3637530 (D. Minn. Jul. 31, 2018) (Magnuson, J.); *Wright ex rel. Wright v. United States*, 639 F. App'x 219, 222 (5th Cir. 2016) (per curiam opinion of King, J., Clement, J., and Owen, J.); *Vanderklok v. United States*, 142 F. Supp. 3d 356, 360-63 (E.D. Pa. 2015) (Pappert, J.), *rev'd in part on other grounds*, 868 F.3d 189 (3d Cir. 2017); *Corbett v. Transp. Sec. Admin.*, 568 F. App'x 690, 701 (11th Cir. 2014) (per curiam opinion of Hull, J., Wilson, J., and Anderson, J.), *cert. denied*, 135 S. Ct. 1559, 2015 WL 1280255 (Mar. 23, 2015); *Hernandez v. United States*, 34 F. Supp. 3d 1168, 1182 (D. Colo. 2014) (Babcock, J.); *Wright ex rel. Wright v. United States*, 69 F. Supp. 3d 606 (S.D. Miss. 2014) (Lee, J.), *aff'd*, 639 F. App'x 219 (5th Cir. 2016); *Koe v. United States*, No. 13-cv-1708, 2014 WL 3739417, at *2 n.1 (W.D. Wash. July 29, 2014) (Coughenour, J.); *Pellegrino v. Transp. Sec. Admin.*, No. 09-cv-5505, 2014 WL 1489939, at *7 (E.D. Pa. Apr. 16, 2014) (Joyner, J.), *amended on reconsideration*, 2014 WL 3952936 (E.D. Pa. Aug. 12, 2014), *aff'd*, 896 F.3d 207 (3d Cir. 2018), *rev'd*, 2019 WL 4125221 (3d Cir. 2019) (en banc); *Walcott v. United States*, No. 13-cv-2202, 2013 WL 5708044, at *1-4 (E.D.N.Y. Oct. 18, 2013) (Gleeson, J.); *Weinraub v. United States*, 927 F. Supp. 2d 258, 261-66 (E.D.N.C. 2012) (Flanagan, J.); *Corbett v. Transp. Sec. Admin.*, 968 F. Supp. 2d 1171, 1185 (S.D. Fla. 2012) (Lenard, J.), *aff'd*, 568 F. App'x 690 (11th Cir. 2014). In addition, at least one other federal judge has noted in dicta that TSOs are not law enforcement officers. *Tobey v. Napolitano*, 808 F. Supp. 2d 830, 850 (E.D. Va. 2011) (Hudson, J.), *aff'd*, 706 F.3d 379 (4th Cir. 2013). Defendants note

that TSOs should be considered investigative or law enforcement officers simply because they conduct transportation security screening, which has been recognized as a "search" under the Fourth Amendment.[5] Neither the Supreme Court nor the Court of Appeals for the Tenth Circuit has addressed the issue.[6] Because there is no controlling authority binding on this Court, the Court must independently analyze the issue as a matter of first impression. As in the persuasive opinions of more than two-thirds of federal judges who have addressed the issue, *see supra* n.4, Defendants respectfully request that the Court hold that TSOs are not investigative or law enforcement officers for purposes of the FTCA.[7]

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that other judges have also determined that TSOs do not qualify as investigative or law enforcement officers because "they are limited to performing consensual screenings." *See, e.g.*, *Hartwell v. United States*, 06-cv-121, (Doc. 23 at 6) (C.D. Cal. Aug. 16, 2006) (Otero, J.). Defendants do not rely on those decisions, and have not included them in the overall count presented here, because it is unclear if they were based upon misunderstanding TSA screening as a reasonable search under the Fourth Amendment due to consent rather than due to the administrative purpose of the search. *See United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) ("The constitutionality of an airport screening search, however, does not depend on consent[.]").

[5] Nine of these ten judges considered the question together in the Court of Appeals for the Third Circuit's en banc rehearing of the *Pellegrino* case. 2019 WL 4125221, at *1-13 (majority decision of Ambro, J., joined by Smith, C.J., McKee, J., Chagares, J., Greenaway, Jr., J., Shwartz, J., Restrepo, J., Bibas, J., and Porter, J.) The tenth judge considered the issue in *Armato v. Doe*, No. 11-cv-2462, 2012 WL 13027047 (D. Ariz. May 15, 2012) (Silver, J.). Defendants note that one Third Circuit judge who joined the majority opinion in *Pellegrino* had previously agreed with Defendants' position. Before his appointment to the Third Circuit, Judge Greenaway, Jr., held while serving as a district judge that "airport security screeners do not constitute investigative or law enforcement officials within the meaning of the FTCA." *Coulter v. U.S. Dep't of Homeland Sec.*, No. 07-cv-4894, 2008 WL 4416454, at *7 (D.N.J. Sep. 24, 2008) (Greenaway, Jr., J.).

[6] Only one district court within the Tenth Circuit has decided the issue. *Hernandez*, 34 F. Supp. 3d 1168.

[7] Any of the varied analyses contained in the decisions of the 22 judges set forth above in footnote 4 would be sufficient to bar Plaintiff's claim for false imprisonment in this case, and Defendants embrace the analysis in each of those decisions here. In particular, Defendants adopt and ask the Court to follow the thorough analysis in Judge Krause's dissenting opinion in *Pellegrino*, 2019

(1) TSOs are not "officers of the United States."

Under § 2680(h), an "'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." The FTCA does not define the phrase "any officer of the United States." The Court should find that the phrase "any officer of the United States" does not simply mean any federal employee. Instead, the statute should be read to give meaning to the congressional choice to use the term "officer" rather than "employee."

Given that Congress had adopted specific definitions of an "officer" and an "employee" in 5 U.S.C. §§ 2104-2105 at the time it enacted the law enforcement proviso of the FTCA,[8] Defendants believe that the best reading of the proviso is one that considers those definitions. Accordingly, Defendants understand the phrase "any officer of the United States" used in the law enforcement proviso to generally exclude ordinary federal employees who lack the type of independent discretion to exercise significant authority that is typically conferred on a criminal law enforcement officer. Moreover, TSA's organic statute, the Aviation and Transportation Security Act of 2001 ("ATSA"), expressly provides that "screening shall take place before boarding and shall be carried out by a Federal Government *employee* (as defined in section 2105 of title 5)." 49 U.S.C. § 44901(a) (emphasis added).

WL 4125221, at *13-29, and Judge Babcock's decision in *Hernandez*, 34 F. Supp. 3d 1168, which applied precedents from within this circuit.

[8] The definitions of "officer" and "employee" in §§ 2104 and 2105 were included in the original enactment of Title 5 in 1966. Pub. L. No. 89-554, 80 Stat. 378, 408-09 (Sep. 6, 1966). The law enforcement proviso was added to 28 U.S.C. § 2680(h) eight years later in 1974. Pub. L. No. 93-253, § 2, 88 Stat. 50 (Mar. 16, 1974). It is clear that TSOs are not "officers" under 5 U.S.C. § 2104, as they are not required by law to be appointed by the President, a court, the head of an Executive agency, or the Secretary of a military department.

(2) TSOs are not directly "empowered by law" to conduct security screening searches.

Even if TSOs could be considered "officers of the United States," they are not directly and specifically "empowered by law to execute searches." 28 U.S.C. § 2680(h). Instead, ATSA empowers the TSA *Administrator* – not individual TSA employees – to "provide for the screening of all passengers and property." 49 U.S.C. § 44901(a). Congress also chose in ATSA to make the TSA *Administrator* – not individual TSA employees – responsible for carrying out security screening at airports. *Id.* § 114(e). ATSA separately granted the TSA Administrator authority, in his or her discretion, to "designate an employee of the [TSA] or other Federal agency to serve as a law enforcement officer." *Id.* § 114(p)(1). Upon such a designation, the officer may carry a firearm, make arrests, and seek and execute warrants for arrest or seizure of evidence. *Id.* § 114(p)(2)(A)-(C). A TSA checkpoint screener, in contrast, has no statutory provision expressly authorizing and defining his or her powers. That fact clearly differentiates a TSA screener from other federal employee positions that have been recognized as "investigative or law enforcement officers" within the meaning of the FTCA. For those other positions, Congress has directly conferred on the position-holder the power to search, seize, or arrest. *United States v. Rubin*, 573 F. Supp. 1123, 1125 (D. Colo. 1983) (explaining that when courts have found a federal officer to be within the ambit of § 2680(h), "[i]n each of those instances the court was able to point to specific statutory language vesting the officer with search or arrest power").[9] In this respect, TSOs are

[9] *See, e.g.*, *Crow v. United States*, 659 F. Supp. 556, 569 (D. Kan. 1987) (holding that postal inspectors qualified as investigative or law enforcement officers because they were directly and specifically "authorized to serve warrants and make arrests"); *Caban v. United States*, 671 F.2d 1230, 1234 & n.4 (2d Cir. 1982) ("INS agents fall within the reach of § 2680(h) by virtue of the powers given them by 8 U.S.C. §§ 1225(a) and 1357"); *Celestine v. United States*, 841 F.2d 851, 853 (8th Cir. 1988) ("Under 38 U.S.C.A. § 218(b)(1)(C) . . . [Veterans' Affairs] police officers are empowered to make arrests for violation of federal law"); *Hernandez v. Lattimore*, 612 F.2d 61,

akin to Department of Transportation inspectors, who have investigative power and badges, but are not directly empowered by law to search, seize, or arrest, and thus are not considered "investigative or law enforcement officers" for purposes of the FTCA. *See Garrett's Worldwide Enters., LLC v. United States*, No. 14-cv-2281, 2015 WL 11825762, at *5 (D. Kan. Mar. 6, 2015).

(3) TSOs conduct airport screening only for the specific administrative purpose of ensuring transportation security and not for the purpose of finding or investigating "violations of Federal law."

Regardless of whether TSOs are "officers of the United States" and whether they are "empowered by law" to conduct security screening searches, the Court should not find that the searches they perform are "for violations of Federal law." 28 U.S.C. § 2680(h). To qualify as an investigative or law enforcement officer under the FTCA, an individual must be "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* It is not clear whether the phrase "for violations of Federal law" modifies the preceding phrase "to execute searches," but several judges have found that the statute should be read so that it does. *See supra* n.4. Defendants agree that is the best understanding of the provision. If § 2680(h) is read that way, then the question here is not simply whether TSOs are "empowered by law to execute searches," but whether TSOs are "empowered by law to execute searches . . . for violations of Federal law." The answer to that question is no. As explained below, the security screening performed by TSOs is not initiated based on a violation of federal law or a suspected violation of federal law, it is not aimed at finding or investigating a violation of federal law, and it is not for the purpose of obtaining evidence thereof.

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64 (2d Cir. 1979) (finding federal correctional officers "fall within the definition of 'investigative or law enforcement officers' by virtue of 18 U.S.C. § 3050").

The searches performed by TSOs are administrative in nature, performed only at designated public locations, and aimed solely at detecting prohibited items that could pose a risk to transportation security. *See United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (explaining that "airport screening searches . . . are conducted as part of a general regulatory scheme in furtherance of an administrative purpose"). TSOs do not perform searches to uncover "violations of Federal law" or obtain evidence thereof. Nor do they perform searches in service of any other criminal law enforcement purpose. *Pellegrino*, 2019 WL 4125221, at *16 (Krause, J., dissenting) ("[S]uch suspicionless screenings are not implemented to gather evidence of a crime with an eye toward criminal prosecution[.]"). "[N]o TSA screener at TUL is authorized to . . . execute a criminal investigative search." (Declaration of Steven Crawford, attached as Exhibit 2, at ¶ 9).[10] TSOs do nothing more than perform a specific, limited set of administrative search tasks prescribed by TSA's standard operating procedures. *Id.*; *see also Pellegrino*, 896 F.3d at 215 (describing the TSO role as "highly circumscribed and administrative [in] nature"). Their work "is not designed to serve the ordinary needs of law enforcement." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666 (1989). If a TSO believes that there may be a need for investigative or law enforcement activity beyond his or her narrow security screening authority, then the TSO must call for assistance from a law enforcement officer. (Exhibit 2 at ¶ 10); *see also Vanderklok*, 868 F.3d at 208 ("[L]ine TSA employees are not trained on issues of probable cause, reasonable suspicion, and other constitutional doctrines that govern law enforcement officers. Instead, they are instructed to carry out administrative searches and contact local law enforcement if they

[10] The Court may properly consider affidavits, and evidence such as official job descriptions, to determine whether particular federal employees are investigative or law enforcement officers under § 2680(h). *Vaupel v. United States*, 491 F. App'x 869, 872 (10th Cir. 2012).

encounter situations requiring action beyond their limited though important responsibilities."). Because TSOs do not have any criminal law enforcement or investigatory powers, the administrative security screenings they perform should not be considered "searches . . . for violations of Federal law."

(4) The statutory term "search" is undefined and should not be read to have the exact same expansive meaning as a "search" under the Fourth Amendment.

Even if the Court were to read § 2680(h) such that an individual qualifies as an "investigative or law enforcement officer" if he or she is "empowered by law" to execute *any* type of "searches" (rather than "searches . . . for violations of Federal law"), the Court would still have to consider the proper meaning of the term "searches." The FTCA does not define what constitutes a "search" for purposes of the law enforcement proviso, and it is not self-evident that the statutory term necessarily must have the same meaning as it does in the Fourth Amendment. *See, e.g.*, *Corbett*, 568 F. App'x at 701 (noting that defining "searches" in § 2680(h) is a "thorny" issue).

Defendants acknowledge, of course, that the security screening performed by TSOs is a search within the meaning of the Fourth Amendment. They emphasize only that it is a particular type of search – a suspicionless "administrative" or "special needs" search – that does not have any investigatory or criminal law enforcement purpose and can only be conducted at designated public locations where passengers are on notice that they are subject to the search. *See, e.g.*, *Corbett v. TSA*, 767 F.3d 1171, 1182 (11th Cir. 2014) ("Airport screening is a permissible administrative search; security officers search all passengers, abuse is unlikely because of its public nature, and passengers elect to travel by air knowing that they must undergo a search."). Although both administrative searches and traditional law enforcement searches are subject to the reasonableness requirement of the Fourth Amendment, the law has long distinguished between the

two, and the Court should consider whether Congress intended the phrase "execute searches" in the FTCA to refer only to the latter. *See, e.g.*, *Hernandez*, 34 F. Supp. 3d at 1179 ("[W]hen considered within the broader context of the 'law enforcement' proviso, the phrase 'to execute searches' does not contemplate the types of searches performed by TSA screeners.").

The intended meaning of § 2680(h) is best understood through holistic consideration of the "text, structure, context, purpose, and history" of the FTCA. *Pellegrino*, 896 F.3d at 216. Judges that have followed this approach have concluded that an "officer of the United States" qualifies as an "investigative or law enforcement officer" on the basis of being empowered to "execute searches" only when those searches have a traditional criminal law enforcement purpose. *See id.* With regard to the history and purpose of the law enforcement proviso, "Congress' decision to single out investigative and law enforcement officers from other federal employees reflects a concern that these officers, unlike other federal employees, are authorized to use force and threaten government action when necessary to carry out their investigative and law enforcement duties. This authority to use force and threaten government action carries with it the risk of abuse[.]" *Orsay v. U.S. Dep't of Justice*, 289 F.3d 1125, 1134 (9th Cir. 2002), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013).[11] Considering TSOs are not authorized to use

[11] "The FTCA's legislative history indicates that the investigative or law enforcement official exception was not intended to apply to airport security screeners." *Hernandez*, 34 F. Supp. 3d at 1181. Congress was concerned about law enforcement abuses of a type that TSOs are not in a position to commit. For example, a Senate report explains that the purpose of the law enforcement proviso is to "deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents" commit any of the enumerated torts so as to provide a remedy for "innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois." Sen. Rep. No. 93-588 at 3, 1974 U.S.C.C.A.N. 2789, 2791. The referenced raids in Collinsville were unlawfully warrantless "'no-knock' raids" on homes that involved "kick[ing] in the doors without warning, shouting obscenities, and threatening the occupants with drawn weapons." *Id.* at 2790. The legislative history thus "indicates that Congress was concerned with the kind of governmental activity that had occurred in *Bivens*," which was "the physical exertion

force, do not carry weapons, do not operate anywhere other than at designated airport checkpoints that members of the public freely elect to traverse, and do not "threaten government action," the heightened concern for potential abuse of authority is not present. *See United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir. 2006) (noting that during TSA security screening "the possibility for abuse is minimized by the public nature of the search").

When Congress enacted the law enforcement proviso in 1974, TSA did not exist and there was no large-scale, nationwide federal workforce performing transportation security screenings – or administrative searches of any kind – on a daily basis.[12] Congress therefore had no need to more specifically define the term "searches" in § 2680(h) to exclude administrative security screenings; at the time, nearly every Fourth Amendment search performed by a federal officer was a traditional criminal law enforcement search – federal administrative or "special needs" searches were unusual.

When Congress first made federal administrative searches a routine part of American daily life by establishing TSA in 2001, it specifically directed that airport security screening was to be performed by federal "employees" rather than "officers," 49 U.S.C. § 44901(a), and it did not

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of governmental authority directly on the individual in the course of a criminal investigation." *Art Metal-U.S.A., Inc. v. United States*, 577 F. Supp. 182, 185 (D.D.C. 1983). TSOs are not engaged in that type of activity. They work only at designated public locations, do not raid homes, do not have weapons to draw, do not conduct criminal investigations, and do not physically exert governmental authority directly on individuals. *See* (Exhibit 2 at ¶ 10) ("TSA's SOP does not provide for TSA screeners to exert force or physically restrain an individual.").

[12] Until the establishment of TSA in 2001, airport security screening was performed by the private sector. The searches performed by federal employees at ports of entry to the United States are "border searches," which are doctrinally distinct from administrative or special needs searches like those performed by TSOs. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 572-73 (2004) (separately identifying "border searches" and "administrative searches" as among the "plethora of exceptions to the presumptive unreasonableness" of performing a search without a warrant).

amend the FTCA to specify that the enormous new workforce of security screeners should be considered "investigative or law enforcement officers." *See* TSA Website, "TSA by the Numbers," available at: https://www.tsa.gov/sites/default/files/resources/tsabythenumbers_factsheet.pdf (last accessed Sep. 12, 2019) (stating that TSA employs more than 43,000 TSOs). Congress also has not acted in response to the significant body of case law from around the country holding that TSOs are not investigative or law enforcement officers. Until the *Pellegrino* decision last month, courts throughout the country had consistently held for more than a decade, with only one exception, that the FTCA's law enforcement proviso does not cover TSOs. *See supra* n.4 & 5. If Congress was dissatisfied with the courts' reading of § 2680(h), it could have acted to amend the statute and clarify that the United States is liable for the enumerated torts when committed by TSOs. *See Feres v. United States*, 340 U.S. 135, 138 (1950) (explaining that when Congress is dissatisfied that the judiciary is misinterpreting a statute, Congress "possesses a ready remedy"). Congress has not done so.

Instead, since the law enforcement proviso was enacted in 1974, Congress has not passed any of the numerous legislative proposals that would have amended or replaced it.[13] Most relevant here, Congress recently declined to consider a proposal specifically aimed at changing the law enforcement proviso so that it covers TSOs. *See* S. Amdt. 3689, H.R. 4, 115th Cong., 164 Cong. Rec. S5589-01 (Aug. 1, 2018). The proposal would have amended the statute by adding the following underlined language: "For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States, including an employee of the Transportation Security Administration, who is empowered by law to execute searches, to seize

[13] *See, e.g.*, S. 1975, 100th Cong. (1987); H.R. 449, 99th Cong. (1985); H.R. 3142, 98th Cong. (1983); H.R. 7034, 97th Cong. (1982); H.R. 9219, 95th Cong. (1978).

evidence, or to make arrests for violations of Federal law." *Id.* Congress tabled this proposal and has never returned it to consideration. *Id.* In light of the unsuccessful proposal, there can be no doubt that Congress is aware that many courts have decided that the law enforcement proviso of § 2680(h) excludes TSOs. *See Walcott*, 2013 WL 5708044, at *4 ("If Congress means to permit lawsuits arising from the TSA's 1.7 million daily screenings [at the time in 2013], it may easily do so in a clearer fashion." (internal citation omitted)).

Finally, concluding that the term "searches" in § 2680(h) excludes the administrative security screening performed by TSOs is consistent with how courts have ruled with respect to other types of federal employees who lack criminal justice powers yet perform duties that might sometimes include a search within the meaning of the Fourth Amendment. Within this circuit, courts have held that neither Department of Transportation inspectors who had investigation powers nor a postal supervisor who assisted with a criminal investigation were covered by § 2680(h). *Garrett's Worldwide*, 2015 WL 11825762, at *5; *Turner v. United States*, No. 89-cv-2293, 1990 WL 254982, at *2 (D. Kan. Dec. 20, 1990) (finding as a matter of law that postal supervisor who assisted with criminal investigation involving surveillance of a letter carrier was "not an investigative or law enforcement officer for purposes of section 2680(h)"). Beyond this circuit, many courts have reached the same conclusion with respect to even more types of federal employees who lack criminal law enforcement powers but might still engage in activities constituting a Fourth Amendment search or seizure.[14]

[14] *See Lorsch v. United States*, No. 14-cv-2202, 2015 WL 6673464, at *11 (C.D. Cal. Oct. 29, 2015) (holding that Veterinary Medical Officers and Animal Care Inspectors employed by the Department of Agriculture's Animal and Plant Health Inspection Service were not investigative or law enforcement officers under § 2680(h) even though they were empowered to execute an investigative inspection of facilities that qualifies as a "search" within the meaning of the Fourth Amendment); *Martin v. United States*, No. 15-cv-278, 2016 WL 4542289, at *4-6 (S.D. Cal. Aug.

For the foregoing reasons, even if the Court finds that the phrase "for violations of Federal law" does not modify the phrase "to execute searches" in § 2680(h), the Court should understand the term "searches" to exclude the administrative security screenings performed by TSOs and still conclude that TSOs are not investigative or law enforcement officers.

C. The First Amended Complaint fails to state a claim for IIED under Oklahoma law.

Setting aside Plaintiff's failure to exhaust her administrative remedies prior to filing suit, her claim for IIED is also subject to dismissal on alternative grounds: it should be dismissed for failure to state a claim upon which relief can be granted because the factual allegations pled in the First Amended Complaint are insufficient to plausibly establish the required elements of IIED under Oklahoma law.[15] Specifically, the allegations in the First Amended Complaint are

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31, 2016) (holding that Federal Aviation Administration operations inspector was not an investigative or law enforcement officer even though he "could plausibly" have authority to perform "administrative inspections and investigations" that amount to searches under the Fourth Amendment); *Wilson v. United States*, 959 F.2d 12, 15 (2d Cir. 1992) (federal parole officers are not investigative or law enforcement officers); *Solomon v. United States*, 559 F.2d 309, 310 (5th Cir. 1977) (security guards at military exchange are not investigative or law enforcement officers despite power to stop and search suspected shoplifters); *DeLong v. United States*, 600 F. Supp. 331, 332-36 (D. Alaska 1984) (holding that members of the Marine Corps who were posted as "guards" or "sentries" at restricted areas of a naval station were not investigative or law enforcement officers even though their duties included "initial apprehension and detention of suspected intruders," searching anyone detained for weapons or contraband, and "disarm[ing] an individual or temporarily seiz[ing] an item the individual is carrying"); *Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank of San Francisco*, 724 F. Supp. 683, 689 (N.D. Cal. 1989) (holding that Federal Savings and Loan Insurance Corporation (FSLIC) examiners who could access and take documentary records from FSLIC-insured financial institutions for enforcement purposes were not investigative or law enforcement officers).

[15] Under the FTCA, the law of the place where the allegedly tortious acts or omissions occurred governs tort claims asserted against the United States. 28 U.S.C. § 1346(b)(1); *Richards v. United States*, 369 U.S. 1 (1962).

insufficient to establish "extreme and outrageous" conduct or "severe" emotional distress as a matter of law. *Ridings v Maze*, 414 P.3d 835, 839 (Okla. 2018).

To state a plausible claim for IIED under Oklahoma law, "a plaintiff must allege that '(1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe.'" *Romero v. City of Miami*, 8 F. Supp. 3d 1321, 1334 (N.D. Okla. 2014) (Dowdell, J.) (quoting *Schovanec v. Archdiocese of Okla. City*, 188 P.3d 158, 175 (Okla. 2008)). The sufficiency of a plaintiff's allegations is judged "by the narrow standards laid out in the Restatement Second of Torts, § 46." *Id.* (citing *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 149 (Okla. 1998)). In this case, the allegations in the First Amended Complaint do not meet the Restatement standards with regard to the second and fourth elements required to state a claim – extreme and outrageous conduct and severe emotional distress.

"Under Oklahoma law, the trial court must assume a gatekeeper role" with regard to whether alleged conduct is sufficiently extreme and outrageous. *Id.* (quotation omitted). The Court should dismiss an IIED claim when the alleged conduct is not "so outrageous in character, *and* so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1376 (Okla. 1978) (emphasis added). When the allegations in a complaint amount to no more than mere "indignities, threats, annoyances, [and] petty oppressions," they are not sufficient to state a claim for IIED. *Id.* "The level of offense necessary to prove an IIED claim – that the conduct be 'so extreme in degree, as to go beyond all possible bounds of decency' – constitutes, by its own terms, a very high burden" for a plaintiff to satisfy in pleading a complaint.

Romero, 8 F. Supp. 3d at 1334. Alleged "[c]onduct could reasonably be viewed as highly offensive while still not rising to the level of extreme and outrageous." *Id.*

In this case, it is clear that the alleged conduct of TSA employees was not extreme and outrageous as a matter of law. Plaintiff alleges that, after an alarm during AIT screening indicated the presence of an item in her groin area and TSA employees could not confirm during a pat-down that the item was safe for air travel,[16] she was asked to lower her shorts and underwear in a private screening room in the presence of two other members of her gender. (Doc. 12 at ¶¶ 33-37). She further alleges that she was asked to show the female TSA employees a "feminine hygiene product" she was wearing. *Id.* And she alleges that after her screening was complete, she had to ask four times before she was allowed to leave the private screening room. *Id.* at ¶¶ 41-42. Given the prevalence of communal locker rooms in American society – at workplaces, schools, and community spaces like public pools – a privacy intrusion akin to what is experienced there is certainly not "so extreme in degree" as to be "utterly intolerable in a civilized community," *Breeden*, 575 P.2d at 1376, particularly when the intrusion occurs as part of a screening process

[16] Courts have "had little trouble concluding that the substantial danger to life and property that could result from airplane terrorism outweigh[s] the possible intrusion of TSA's AIT and pat-down screening procedures on airline passengers." *Corbett v. TSA*, __ F.3d __, 2019 WL 3244082 (11th Cir. July 19, 2019). We live "[i]n a world where air passenger safety must contend with such nuanced threats as attempts to convert underwear into bombs." *George v. Rehiel*, 738 F. 3d 562, 578 (3d Cir. 2013); *see also Corbett*, 767 F.3d at 1180 ("For example, on December 25, 2009, a terrorist attempted to detonate a nonmetallic explosive device hidden in his underwear while aboard an American aircraft flying over the United States, for which Al Qaeda claimed credit."). While Plaintiff and others who are not transportation security professionals may not grasp the critical importance of fully resolving an AIT alarm in the groin area even when doing so entails some intrusion on passenger privacy, the Court should not overlook the need to ensure that screening is sufficiently thorough in light of modern threats. *See United States v. McCarty*, 648 F.3d 820, 825 (9th Cir. 2011) (noting that "thin, flat explosives called 'sheet explosives' may be disguised as a simple piece of paper or cardboard, and may be hidden in just about anything").

that is essential to ensuring the safety and security of all Americans. In other words, even if the TSA employees were wrong in asking for a visual inspection of the feminine hygiene product Plaintiff was wearing, brief exposure to the view of other members of the same gender while in a state of partial undress in a private setting is not an experience that is outrageously outside the bounds of society. *See Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1558 (10th Cir. 1995) ("Nothing short of *extraordinary* transgressions of the bounds of civility will give rise to liability for [IIED]." (quotation omitted)).

Plaintiff's allegations that TSA employees "ignored" her requests to leave "without any reason apparent" until she had asked four times, (Doc. 12 at ¶¶ 41-42), also do not suffice to elevate her screening experience into something extreme and outrageous. *See, e.g.*, *Young v. City of Idabel*, 721 F. App'x 789, 805 (10th Cir. 2018) (applying Oklahoma law and noting that "rude or hostile treatment" without more "is not enough to meet the IIED standard"); *Starr*, 54 F.3d at 1559 (noting the "bounds between what is merely rude and objectionable and what is actionable"); *Miller v. Miller*, 956 P.2d 887, 901 (Okla. 1998) ("The test [for IIED] is whether the alleged tortfeasor's conduct is simply one of those unpleasant examples of human behavior which we all must endure for time to time, or whether it has so totally and completely exceeded the bounds of acceptable social interaction that the law must provide redress."); *Eddy v. Brown*, 715 P.2d 74, 77 (Okla. 1986) ("Not every . . . offensive verbal encounter may be converted into a tort[.]"). In sum, even if Plaintiff's screening experience "could be considered highly offensive to a reasonable person," that is not enough to support an IIED claim. *Romero*, 8 F. Supp. 3d at 1334. The standard for pleading an IIED claim is more "onerous," and the allegations in the First Amended Complaint here are insufficient to meet it. *Id.*

Importantly, whether the TSA employees' alleged conduct violated the Fourth Amendment or any other applicable law or policy is a separate inquiry from determining if the conduct rose to the "extreme and outrageous" level required to state a claim for IIED. *See Pebsworth v. Spirit AeroSystems, Inc.*, No. 16-cv-644, 2018 WL 1569496, at *4 (N.D. Okla. Mar. 30, 2018) ("[A]lleged law violations, even physical violations such as assault and battery, do not automatically trigger liability for IIED."). For example, in *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003), the Tenth Circuit Court of Appeals considered Fourth Amendment and IIED claims based on the same set of facts and held that the constitutional claim could proceed but the tort claim could not. The plaintiffs in *Dubbs* complained that their "pre-school children enrolled in the Head Start program in Tulsa . . . were subjected to intrusive physical examinations, including genital examinations and blood tests, on school premises without parental notice or consent." 336 F.3d at 1197. The district court granted summary judgment in favor of the defendants on both the plaintiffs' Fourth Amendment claim and IIED claim under Oklahoma law. With respect to the constitutional claim, the Court of Appeals reversed the district court, finding that a violation of the Fourth Amendment would be established if the plaintiffs proved at trial that they did not consent to the physical exams of their children. *Id.* at 1207-12. With respect to the IIED claim, however, the Court of Appeals affirmed the district court's holding that the defendants' conduct in performing the physical exams did not "rise to the level of extreme outrageousness required for liability on a claim of [IIED]" regardless of whether the plaintiff parents could prove that they did not consent to the exams. *Id.* at 1218.

Comparing this case to *Dubbs*, it is clear that Plaintiff's allegations here are not sufficient to state a claim for IIED. *See Zeran v. Diamond Broadcasting*, 203 F.3d 714, 721 (10th Cir. 2000) (evaluating whether alleged conduct was extreme and outrageous through comparison "to the

kinds of conduct that have sustained IIED claims" in other cases). In *Dubbs*, the challenged search procedures involved touching exposed genitals and blood testing of pre-school children, allegedly without their parents' consent. Despite the obvious gravity of the defendants' conduct in searching the children, the Court of Appeals held that it was not extreme enough to support an IIED claim. Plaintiff's alleged screening experience in this case was far less invasive and offensive. Accordingly, her IIED claim should be dismissed.

Plaintiff's First Amended Complaint also fails to state sufficient factual allegations to establish that she suffered truly "severe" emotional distress. *See Zeran*, 203 F.3d at 721 ("It is also the trial court's initial responsibility to determine whether the distress allegedly suffered by the plaintiff is severe emotional distress.") (citation omitted); *Wheeler v. Spirit AeroSystems, Inc.*, No. 13-cv-421, 2013 WL 5520012, at *5 (N.D. Okla. Oct. 1, 2013) ("The Court is to make a . . . threshold determination with regard to the fourth prong, the presence of severe emotional distress."). As with the standard for pleading extreme and outrageous conduct, stating sufficient factual allegations to establish "severe" distress is also "a high bar to clear." *Young*, 721 F. App'x at 805. To state a claim for IIED, a plaintiff's complaint must allege distress "of such a character that 'no reasonable person could be expected to endure it.'" *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1389 (10th Cir. 1991) (applying Oklahoma law and quoting Restatement (Second) of Torts § 46, cmt. j). Accordingly, a plaintiff must present factual allegations that plausibly establish interference with her "ability to conduct [her] daily life affairs." *Zeran*, 203 F.3d at 721. "[F]ederal courts in Oklahoma considering" the sufficiency of a complaint have held that "general allegations of emotional distress do not comply with federal pleading requirements." *Velazquez v. Helmerich & Payne Int'l Drilling Co.*, No. 15-cv-17, 2015 WL 871339, at *6 (N.D. Okla. Feb. 27, 2015) (citations omitted).

In this case, Plaintiff's factual allegations concerning her emotional distress are insufficient to establish the level of severity that is "an essential element" of a claim for IIED. *Id.* Plaintiff's only support for her claim that she "experience[d] severe emotional distress during and after the incident," (Doc. 12 at ¶ 43), is a list of the physical symptoms that she allegedly suffered "during the incident," *id.* at ¶ 44, and suffers again "whenever [she] is reminded of the event," *id.* at ¶ 46. Those symptoms are "racing heart, shortness of breath, uncontrollable shaking, [and] nausea." *Id.* at ¶¶ 44. In addition, Plaintiff alleges that when she is reminded of the event, she also suffers the additional physical symptoms of "sweating, tightness in throat, headache, and hot flashes." *Id.* at ¶ 47.[17] The Court of Appeals for the Tenth Circuit has rejected evidence of similar transient symptoms as insufficient to support a claim. *Daemi*, 931 F.2d at 1389 (holding that distress that "made [plaintiff] literally sick to his stomach" for which he sought treatment from a doctor was "legally insufficient under Oklahoma law" to establish a claim for IIED). Plaintiff has not alleged that she ever sought counseling or psychological treatment for her emotional distress. She also has not alleged that she ever sought medical treatment for the purported physical symptoms of her distress. Nor has she alleged "that the distress interfered with [her] ability to conduct [her] daily life affairs" to such a degree that no reasonable person would be able to cope. *Zeran*, 203 F.3d at 721. Indeed, Plaintiff has expressly alleged that she successfully continues to travel by air "more often than monthly" despite her emotional distress; she is plainly able to endure the distress and cope while conducting her life. (Doc. 12 at ¶ 50). The burden of having to manage "transient" emotional distress that arises in particular situations is not actionable, but "a part of the price of

[17] Plaintiff also alleges that she experienced "fear of loss of control of her body" and "emotional numbness," (Doc. 12 at ¶ 47), but those allegations refer to her mental state rather than any physical symptom. The allegations of "fear" and "emotional numbness" appear indistinct from the conclusory allegation that Plaintiff "experience[d] severe emotional distress," *id.* at ¶ 43.

living among people." Restatement (Second) of Torts § 46, cmt. j. Aside from coping with her distress and alleged physical symptoms when she travels by air, which she is apparently able to manage successfully, the only other impact on Plaintiff's life is that she "attempts to avoid thinking about the event or talking with others about the event." (Doc. 12 at ¶ 49). Accordingly, while Defendants do not intend to trivialize Plaintiff's subjective distress, the law is clear that her allegations are insufficient to meet the objective pleading standard for stating actionable severity. *See Zeran*, 19 F. Supp. 2d at 1254 (noting that when the level of distress is not severe, an IIED claim cannot proceed even if "the court sympathizes with the plaintiff and acknowledges and does not intend to belittle the distress and discomfort he experienced"), *aff'd*, 203 F.3d 714 (10th Cir. 2000).

D. Under 49 U.S.C. § 46110, the Court lacks subject-matter jurisdiction over Plaintiff's claim seeking an injunction.

Finally, Plaintiff's claim seeking an injunction against TSA should also be dismissed for lack of subject-matter jurisdiction. Plaintiff seeks a Court order requiring "TSA to modify its policies and/or training" in an unspecified manner "to ensure that she is not a victim" of the alleged harm she suffered at TUL in the future. (Doc. 12 at ¶ 84). The First Amended Complaint does not identify any legal basis for the request for an injunction. There is no allegation stating a particular statute that gives the Court subject-matter jurisdiction over the injunction request, nor is there any indication of which substantive law TSA's policies purportedly violate. Notwithstanding this vagueness, 49 U.S.C. § 46110 requires any challenge to a TSA order or any claim implicating review of such an order to be filed as a petition for review in an appropriate Court of Appeals. The Courts of Appeals have "*exclusive* jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the . . . Administrator of [TSA] . . . to conduct further proceedings." 49

U.S.C. § 46110(c) (emphasis added); *see also Pinkerton v. TSA*, No. 11-cv-421, 2014 WL 1310203, at *7-8 (N.D. Okla. Mar. 31, 2014) (Dowdell, J.) (holding that TSA's revocation of a hazardous materials endorsement on a commercial driver's license "is an order exclusively reviewable in the United States Courts of Appeals" under 49 U.S.C. § 46110). Because the statute grants the Courts of Appeals exclusive jurisdiction over claims seeking review of TSA orders, this Court lacks subject-matter jurisdiction over Plaintiff's claim for an injunction. *See, e.g.*, *Corbett v. United States*, 458 F. App'x 866 (11th Cir.) (affirming district court's dismissal for lack of subject-matter jurisdiction of "a complaint asserting that the use of AIT devices and pat-down searches" violated the Fourth Amendment), *cert. denied*, 568 U.S. 819 (2012); *Durso v. Napolitano*, 795 F. Supp. 2d 63 (D.D.C. 2011) (finding no subject-matter jurisdiction over Fourth Amendment claims challenging TSA's use of AIT and pat-downs "because the challenged screening procedures are employed pursuant to a TSA order").

Plaintiff's claim seeks an order directing TSA to change its procedures for conducting passenger security screening at airport checkpoints and/or its training regarding those procedures. The agency's security screening procedures are set forth in a comprehensive document titled Screening Checkpoint Standard Operating Procedures (SOP). *See, e.g.*, *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 3 (D.C. Cir. 2011) ("[D]etails of the screening process" are "documented in a set of Standard Operating Procedures not available to the public."). That document "is an 'order' within the meaning of § 46110." *Durso*, 795 F. Supp. 2d at 69; *accord Corbett*, 458 F. App'x at 869 ("[C]onstruing the term 'order' broadly, the SOP was an order under § 46110."); *Blitz v. Napolitano*, 700 F.3d 733, 740 (4th Cir. 2012) ("[T]he Checkpoint Screening SOP constitutes an order of the TSA Administrator under § 46110."); *Roberts v. Napolitano*, 463 F. App'x 4, 5 (D.C.

Cir. 2012) (holding that TSA's "SOPs are 'orders' within the meaning of section 46110").[18] Accordingly, Plaintiff's claim necessarily seeks review of a TSA order, and it can only be asserted in a petition for review in an appropriate Court of Appeals.

Moreover, even if Plaintiff's claim can be read such that it is not a direct challenge to TSA's screening procedures, the claim is still barred in this Court under the "inescapable-intertwinement doctrine" applicable to Section 46110. The doctrine requires that Section 46110 be interpreted to "give the courts of appeals [exclusive] jurisdiction over not only challenges to final [TSA] orders but also any claims inescapably intertwined with the review of those orders." *Durso*, 795 F. Supp. 2d at 69; *accord Pinkerton*, 2014 WL 1310203, at *8 ("District courts are precluded from hearing matters that are 'inescapably intertwined' with orders falling within exclusive review statutes such as § 46110."); *Corbett*, 458 F. App'x at 871 (holding that "Corbett cannot escape the jurisdictional limitations of § 46110 by claiming that he asserts a broad constitutional challenge" because such a challenge "is inextricably intertwined with the SOP"). "A basic purpose" of the "inescapable-intertwinement doctrine" is to prevent plaintiffs from avoiding the jurisdictional requirement of Section 46110 "through creative pleading."[19] *Durso*, 795 F. Supp. 2d at 70.

[18] The Court of Appeals for the Tenth Circuit has not specifically considered whether TSA's SOP is an "order" within the meaning of 49 U.S.C. § 46110, but it has generally addressed what constitutes an "order" under the statute in a manner consistent with precedent from the circuits cited here. *See Tulsa Airports Improvement Trust v. FAA*, 839 F.3d 945, 949-50 (10th Cir. 2016).

[19] Given the vagueness of the claim for an injunction in this case, it appears possible that Plaintiff's counsel has deliberately engaged in this sort of creative pleading with the goal of circumventing Section 46110. Plaintiff's counsel Jonathan Corbett was himself the *pro se* plaintiff in the *Corbett* case, 458 F. App'x 866, so he should be well aware that Section 46110 bars the assertion in district court of any claims intertwined with review of TSA's screening procedures. *See also Corbett*, 2019 WL 3244082, at *2 (noting that Mr. Corbett "has brought at least five suits challenging [TSA's] screening policies" on his own behalf as a *pro se* plaintiff).

Here, no matter how Plaintiff's claim for an injunction is construed, this Court's consideration of the claim would necessarily implicate review of TSA's SOP. This Court could not adjudicate Plaintiff's request to "order the TSA to modify its policies and/or training" pertinent to how TSA employees perform screening functions at the checkpoint without evaluating the SOP and understanding its relationship to any particular policy or training to which Plaintiff raises a challenge. Accordingly, even if Plaintiff's claim is not read as a direct challenge to TSA's SOP, adjudication of the claim would certainly be inescapably intertwined with review of the SOP. The claim is therefore barred from being heard in this Court, and it should be dismissed for lack of subject-matter jurisdiction. *See Pinkerton*, 2014 WL 1310203, at *8.

IV. CONCLUSION

For the foregoing reasons, Defendants TSA and the United States respectfully request that all of Plaintiff's claims asserted against them in the First Amended Complaint be dismissed with prejudice to their reassertion in this action, but without prejudice to re-filing in a new action as appropriate.

Respectfully submitted,

UNITED STATES OF AMERICA

R. TRENT SHORES
United States Attorney

s/Rachael F. Zintgraff

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, 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/Sarah Coffey
Sarah Coffey
Paralegal Specialist