No. 11-4292

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NICHOLAS GEORGE,
Plaintiff-Appellee,

v.

JOHN DOES 1–5,
Defendants-Appellants,

and

WILLIAM REHIEL, Philadelphia Police Officer, in his individual capacity;
EDWARD RICHARDS, Philadelphia Police Officer, in his individual capacity;
UNITED STATES OF AMERICA,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR PLAINTIFF-APPELLEE NICHOLAS GEORGE

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STATEMENT OF JURISDICTION

Ordinarily, there is no appellate jurisdiction "to review district court orders denying motions to dismiss or for summary judgment because there is no final order within the meaning of 28 U.S.C. § 1291." *Acierno v. Cloutier*, 40 F.3d 597, 605 (3d Cir. 1994). The Supreme Court has held, however, that courts of appeals have appellate jurisdiction over certain collateral orders, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), including "orders rejecting a defendant's entitlement to qualified immunity from suit *to the extent that the decision turns on issues of law*." *Acierno*, 40 F.3d at 605 (emphasis added) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 524–30 (1985) and *Kulwicki v. Dawson*, 969 F.2d 1454, 1459–61 (3d Cir. 1992)).

This Court, therefore, has jurisdiction over Defendants' interlocutory appeal on the question of whether they are entitled to qualified immunity as a matter of law. "In reviewing a denial of qualified immunity at the Rule 12(b)(6) stage of litigation," the Court of Appeals must "accept the plaintiff['s] allegations as true and draw all inferences in [his] favor." *Torisky v. Schweiker*, 446 F.3d 438, 442 (3d Cir. 2006) (citing *Larsen v. Senate of Commw. of Pa.*, 154 F.3d 82, 87 (3d Cir. 1998)). Put differently, this Court lacks jurisdiction to review the factual underpinnings of the Plaintiff's claims, and the Defendants may not challenge the veracity of those factual allegations during this appeal. Indeed, this Court has

recognized that a district court's "duty at the 12(b)(6) stage of the proceedings is only to construe the *presented* facts in the light most favorable to the plaintiff," and that, "[w]here the presented facts fail to make out a case for protection, official immunity is [properly] denied." *Kulwicki*, 969 F.2d at 1460 (emphasis original).

STATEMENT OF THE ISSUES PRESENTED

Defendants' appeal presents the following issues to this Court for resolution:

1. Whether the individual federal defendants are entitled to qualified immunity on Plaintiff's claims that they violated his Fourth Amendment right to be free from unreasonable searches and seizures, when the individual federal defendants detained, interrogated, and arrested Plaintiff without reasonable suspicion of criminality, much less probable cause for arrest, even after his initial passage through the airport security checkpoint made clear that Plaintiff had no weapons or explosives in his possession; and

2. Whether the individual federal defendants are entitled to qualified immunity on Plaintiff's claims that they singled him out for interrogation and suspicionless detention and arrest because of his possession of Arabic-English flashcards and a book critical of U.S. foreign policy, such that the Defendants' conduct amounted to unlawful retaliation for Plaintiff's possession of protected speech in violation of the First Amendment.

STATEMENT OF FACTS

I. Factual Background

On August 29, 2009, plaintiff-appellee Nicholas George, a 21-year-old U.S. citizen, was scheduled to fly from Philadelphia to California so that he could begin his senior year at Pomona College. *See generally* Am. Compl. for Damages (Am. Compl.), JA 32–53; *id.* ¶ 16, JA 36. After he arrived at the Philadelphia Airport, however, Mr. George was detained, interrogated, handcuffed, and then jailed simply because he was carrying a deck of Arabic-English flashcards and a book critical of American interventionism abroad. *Id.* ¶ 1, JA 32.[1] This appeal concerns

[1] Throughout their brief, Defendants improperly rely on facts not alleged in the amended complaint—in particular, to argue that their actions were based, at least in part, on Mr. George's recent foreign travel as reflected by his passport. *See, e.g.*, Br. for Defs.-Appellants (Defs.' Br.) 3, 13–14, 22, 24, 33. According to the amended complaint, however, none of the Transportation Security Administration (TSA) defendants questioned Mr. George about the contents of his passport or his lawful foreign travel. Am. Compl. ¶¶ 23–42, JA 37–42. Only *after* Mr. George had been arrested and held for over four hours did the Joint Terrorism Task Force (JTTF) defendants obtain his passport; their questions about his travels abroad, therefore, were not the grounds for his unlawful seizure. *Id.* ¶ 70, JA 46–47. Because this is an appeal from a denial of a motion to dismiss, the Court must accept as true Mr. George's factual allegations and draw all inferences in his favor, and may not consider facts not alleged. *Torisky*, 446 F.3d at 442. At the pleading stage, moreover, the Court must accept Plaintiff's allegations not only about what transpired, but also as to the Defendants' motivations. *See, e.g.*, *Fowler v. UPMC Shadyside*, 578 F.3d 203, 212 (3d Cir. 2009) (accepting as true the plaintiff's allegation that she was "terminated because she was disabled"). Thus, this Court must accept that Mr. George was detained "solely because he passed through an airport security checkpoint with a set of Arabic-English flashcards and a book critical of American foreign policy." Am. Compl. ¶ 1, JA 32. Defendants may not, at this stage, posit alternative rationales for their unconstitutional actions.

the participation of five federal officers in Mr. George's mistreatment: two Transportation Security Administration (TSA) screening officials, John Does 1 and 2; their supervisor, Jane Doe 3; and two officials with the FBI's Joint Terrorism Task Force (JTTF), John Does 4 and 5.[2]

Mr. George's ordeal began properly enough: after presenting his boarding pass and valid identification, he was held at the airport checkpoint for no more than 15 minutes while Does 1 and 2 conducted a thorough search of his single carry-on bag and personal effects for weapons and explosives. *Id.* ¶¶ 22–23, 27–28, JA 37–39. When Doe 1 directed Mr. George to empty his pockets, Mr. George complied, handing over a set of handmade Arabic-English flashcards that he had been using as a language study aid. *Id.* ¶¶ 23–26, JA 37–38. The flashcards included words commonly used in contemporary Middle Eastern newspapers, television programs,

[2] The complaint describes John Does 4 and 5 as Philadelphia Police Department detectives: John Doe 4 is alleged to have been affiliated with the Philadelphia Police Department's Homeland Security Unit, while John Doe 5 is alleged to have been affiliated with the FBI's Joint Terrorism Task Force. Am. Compl. ¶¶ 9, 63, JA 35, 45. Before the district court and in this appeal, however, the Defendants describe *both* Does 4 and 5 as JTTF officers and claim them as agents of the federal government. *See, e.g.*, Defs.' Br. 5. For the purposes of this appeal, Plaintiff agrees that John Does 4 and 5 should be treated as agents of the federal government, and therefore follows the Defendants in describing them as the "JTTF defendants." Plaintiff does not, however, foreclose the possibility that discovery may reveal that one or both of these defendants should properly be regarded as a state official liable under 42 U.S.C. § 1983 rather than *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

and other publications. *Id.* ¶¶ 24–26, JA 37–38.[3] It was Mr. George's objective to gain sufficient proficiency in Arabic to be able to read and understand what was being reported and debated in contemporary Middle Eastern media. *Id.*

Mr. George, who was double majoring in Physics and Middle Eastern Studies, had traveled to Jordan to study Arabic as part of a study abroad program organized by the Council on International Educational Exchange, a U.S. non-profit organization founded in 1947. *Id.* ¶¶ 4, 25, JA 33, 38. After completing his program—for which he received course credit at Pomona College—Mr. George spent approximately five weeks traveling in Ethiopia, Egypt, and Sudan as a tourist and to continue practicing his Arabic language skills. *Id.* None of the TSA defendants questioned Mr. George about his prior lawful foreign travels. *Id.* ¶¶ 23–42, JA 37–42.

Does 1 and 2 found no evidence whatsoever that Mr. George posed a threat to airline safety; they knew after their thorough search that Mr. George possessed no weapons, explosives, or other dangerous items. Mr. George cooperated fully with and responded truthfully to Does 1 and 2. *Id.* ¶¶ 27–32, JA 38–40. Yet instead of allowing him to go on his way, Does 1 and 2 detained Mr. George for an

[3] The flashcards included such words and phrases as "day before yesterday," "fat," "thin," "really," "nice," "sad," "cheap," "summer," "pink," and "friendly." Also included were the words "bomb," "terrorist," "an attack," "fighter," and "explosives." JA 56–75 (photocopies of flashcards).

additional 15 to 20 minutes while waiting for a TSA supervisor, Jane Doe 3, to arrive. *Id.* ¶¶ 28–33, JA 39–40.

Upon her arrival, Jane Doe 3 aggressively interrogated and further detained Mr. George for an additional 15 minutes. *Id.* ¶¶ 33–41, JA 40–42. The interrogation included the following exchange:

> **Jane Doe 3:** You know who did 9/11?
> **Mr. George:** Osama bin Laden.
> **Jane Doe 3:** Do you know what language he spoke?
> **Mr. George:** Arabic.
> **Jane Doe 3:** Do you see why these cards are suspicious?

Id. ¶¶ 37–39, JA 41. This interrogation plainly reveals that Mr. George was regarded as "suspicious" because of the Arabic-English flashcards he had in his possession. Mr. George, who had been studying Arabic for three years in connection with his Middle Eastern Studies major, was surprised and intimidated by Jane Doe 3's questions. *Id.* ¶ 40, JA 41. He explained to the TSA defendants that he was using the flashcards to learn Arabic vocabulary, in particular so that he could read the Arabic press. *Id.* ¶¶ 25–26, 40, JA 38, 41. Doe 3 also commented on Mr. George's possession of a book entitled "Rogue Nation: American Unilateralism and the Failure of Good Intentions," which criticized U.S. foreign policy in the Middle East. *Id.* ¶ 36, JA 40–41. In responding to Doe 3's questioning, Mr. George made no threatening statements, nor said or did anything else that would lead a reasonable official to regard him as a threat. *Id.* ¶ 33, JA 40.

Nevertheless, the TSA defendants further escalated Mr. George's already unlawful detention by summoning the local police and directing them to take Mr. George into custody. *Id.* ¶¶ 5–6, JA 34. As a result, Philadelphia police officer William Rehiel arrived at the airport screening area. Officer Rehiel immediately handcuffed Mr. George and led him, in plain view of other passengers, through the terminal and down a set of stairs to the airport police station, where he was locked in a cell.[4] *Id.* ¶¶ 42–46, 50–52, JA 42, 43. Except for a brief restroom break, Mr. George was left in the cell for more than four hours, during the first two hours of which he remained handcuffed. *Id.* ¶¶ 2, 53, 60–61, JA 33, 43–45.

The local police held Mr. George for further questioning by two JTTF officers, John Does 4 and 5. *Id.* ¶ 63, JA 45. While Mr. George was confined, the police asked him no questions and took no other meaningful steps to investigate whatever unfounded suspicions they may have had. Nor did anyone explain to Mr. George why he was being held. *Id.* ¶¶ 48, 51, 52, 62, JA 43, 45. Rather, the local police called the JTTF "in order to arrange for Mr. George to be interrogated," and were "expecting and waiting for the detectives to arrive" while Mr. George remained locked in his cell. *Id.* ¶ 63, JA 45. The complaint thus makes clear that the Philadelphia police acted in concert with and at the behest of the federal

[4] Mr. Rehiel, who is a defendant in this lawsuit, is not a party to this appeal.

defendants, prolonging Mr. George's detention by the four hours it took for the JTTF detectives to arrive at the police station.

When the JTTF defendants finally did arrive, they escorted Mr. George out of his cell and into a room where they interrogated him for 30 minutes, further extending his detention and arrest. *Id.* ¶ 67, JA 46. The interrogation strayed far from any purported concern about flight safety. *Id.* ¶¶ 68–72, JA 46–47 (recounting JTTF defendants' questions on such matters as Plaintiff's personal and religious beliefs, travel, educational background, and political and social associations). The JTTF defendants' questions make clear that they were investigating unsubstantiated and unreasonable suspicions that Mr. George was somehow involved in dubious political activities or terrorism. *See, e.g.*, *id.* ¶ 71, JA 47 (JTTF defendant asking Mr. George whether he was a member of "pro-Islamic" or "communist" groups on campus); *id.* ¶ 72, JA 47 (JTTF defendants asking Mr. George why he had chosen to study physics at a liberal arts college such as Pomona).

Finally, more than five hours after the TSA defendants first detained him and nearly five hours after the police handcuffed and arrested him, Mr. George was released from custody. *Id.* ¶ 74, JA 47. Prior to his release, Mr. George had not been free to leave at any stage of his detention. *Id.* ¶¶ 30, 41, 48, 66, JA 39–43, 46.

Nor had he been advised of any rights, such as the right to make a phone call or contact an attorney. *Id.* ¶¶ 47–48, 56, 66, JA 42–44, 46.

Together, the TSA officials and JTTF agents were engaged in a fishing expedition prompted by their unreasonable and unwarranted suspicions—suspicions triggered not by any physical contraband, but by Mr. George's Arabic-English flashcards and possession of a book that was critical of U.S. foreign policy. By this lawsuit, Mr. George seeks to vindicate his constitutional rights to be free from unreasonable seizure under the Fourth Amendment and from unlawful retaliation for First Amendment protected activities.

II. Procedural History

Mr. George filed this suit in the Eastern District of Pennsylvania asserting, as relevant here, constitutional claims pursuant to *Bivens v. Six Unknown Named Agents*[5] against five individual federal defendants: three TSA employees and two JTTF officers. The amended complaint alleges that these federal officials subjected Mr. George to an unreasonable search and seizure in violation of his clearly established Fourth Amendment rights, and detained Mr. George in retaliation for his possession of Arabic-language flashcards and a political book, in

[5] 403 U.S. 388 (1971).

violation of his clearly established First Amendment rights. Am. Compl. ¶¶ 81–83, JA 50.[6]

The individual federal defendants moved to dismiss the *Bivens* claims, JA 76–77, arguing that Mr. George's allegations did not establish violations of either the First or Fourth Amendment. They further argued that, even assuming that Mr. George had stated constitutional violations, the rights allegedly violated were not clearly established. For both reasons, the individual federal defendants argued that they were entitled to qualified immunity. The United States filed a separate motion to dismiss Mr. George's Federal Tort Claims Act claims. JA 54–55.

The district court denied both motions, holding in relevant part that the amended complaint "posits violations of the Fourth, First, and Fourteenth Amendments: an unreasonable search, seizure, and arrest; and an infringement of free speech in retaliation for the exercise of plaintiff's rights." JA 78; *see also id.* ("[T]he amended complaint alleges claims for relief that are 'plausible on [their] face.'" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The individual federal defendants moved for clarification in the district court, JA 79, and also filed a notice of appeal from the denial of their motion to dismiss with this Court. JA 92. The district court subsequently granted the motion

[6] Mr. George also alleges claims against two Philadelphia police officers (defendants William Rehiel and Edward Richards, Jr.), and against the United States under the Federal Tort Claims Act. Am. Compl. ¶¶ 81–91, JA 50–52. These claims are not at issue in this appeal.

for clarification, providing additional reasoning for its denial of the Defendants' motion to dismiss. JA 81–89. The court held that the amended complaint "contains sufficient factual allegations of specific conduct on the part of each defendant that, if true, constitute violations of plaintiff's First and Fourth Amendment rights." JA 81.

Addressing Mr. George's Fourth Amendment claim first, the district court explained that the "TSA's statutory and regulatory authority [to search Mr. George] appears to have been exhausted after the first 10-15 minutes, once [he] was found to possess nothing that would endanger air safety." JA 84 (citations omitted). The TSA defendants, therefore, had exceeded the scope of the administrative search doctrine, converting Mr. George's initial security search into an investigatory detention and, ultimately, an arrest. JA 85 ("If the facts alleged are true, the TSA's seizure of plaintiff amounted to an investigatory detention, which escalated to an arrest when the [Philadelphia Police Department] handcuffed and locked him in a cell at the direction of the TSA and JTTF."). Yet "investigatory detention and arrest are constitutional only if supported by reasonable suspicion of criminal activity or probable cause of a specific crime." JA 84 (citations omitted). "Here," the district court held, "the amended complaint does not provide a reasonable inference of individualized suspicion or probable cause for the prolonged detention and arrest of plaintiff." JA 85; *id.* ("There were

no grounds for reasonable suspicion of any criminality or probable cause. Early on, it was determined [by the TSA] that [Mr. George] posed no threat to airline safety."). Accordingly, the district court concluded, "the amended complaint adequately alleges that each individual federal defendant participated in subjecting plaintiff to an intrusion upon his personal freedom for more than five hours." JA 85.

The district court further held that the amended complaint "plausibly sets forth a First Amendment violation," as it "suggests that the entirety of plaintiff's airport experience may fairly be attributable to his possession of materials protected by the First Amendment." JA 85–86. Specifically, the court held, the "amended complaint adequately alleges that each defendant violated plaintiff's rights to read, study, and possess protected materials by arresting and detaining him for his exercise of those rights." *Id.* The district court explained that the precedent on which the Defendants relied was "not apposite" since the cases cited held "individuals criminally responsible for bomb threats." JA 86–87 (discussing cases). By contrast, the district court noted, Mr. George "made no threats," "took the flashcards out of his pocket only when ordered to do so by the TSA," and "remained polite, calm, and respectful and answered questions truthfully." JA 87.

The individual federal defendants filed a timely notice of appeal from the district court's order on their motion for clarification. JA 94–95. Following

receipt of that notice, the Clerk of this Court directed the parties to address whether the orders appealed from were "final orders" over which the Third Circuit could exercise jurisdiction. Ct. Order Req. Written Resp. 1 (Dec. 6, 2011). In response, Plaintiff noted the existence of appellate jurisdiction over the Defendants' entitlement to qualified immunity insofar as that question turns on issues of law. Resp. of Pl.-Appellee to Dec. 6, 2011 Ct. Order 1–3 (Dec. 20, 2011).

STANDARD OF REVIEW

The Court of Appeals reviews a motion to dismiss based on the defense of qualified immunity *de novo* to the extent it involves a pure question of law. *See, e.g.*, *McLaughlin v. Watson*, 271 F.3d 566, 570 (3d Cir. 2001). In reviewing a denial of qualified immunity at the Rule 12(b)(6) stage of litigation, the Court of Appeals must accept Plaintiff's allegations as true and draw all inferences in his favor. *Torisky*, 446 F.3d at 442; *see also, e.g.*, *Montanez v. Thompson*, 603 F.3d 243, 249 (3d Cir. 2010) (explaining that on an interlocutory appeal from a denial of qualified immunity on a Rule 12(b)(6) motion, the Court of Appeals "would not evaluate the underlying evidence to support the plaintiff's claims which the District Court chose to accept" (citation omitted)).

SUMMARY OF ARGUMENT

Defendants ask this Court to hold that a five-hour detention and arrest in the absence of any suspicion of criminal wrongdoing is constitutionally permissible as

a matter of law. To justify this extraordinary assertion, they distort both the relevant facts and the controlling law.

Mr. George's detention cannot be justified under the administrative search doctrine. Suspicionless administrative searches at airport checkpoints are permissible to preserve air travel safety. Such searches, however, are limited to ensuring that passengers are not in possession of weapons or explosives and may last no longer than is reasonably necessary to achieve that end. This Court has reaffirmed this basic principle time and time again.

Here, it is beyond dispute that any reasonable search for weapons and explosives was completed within approximately fifteen minutes, when Does 1 and 2 thoroughly searched Mr. George's carry-on items and person. Nonetheless, Mr. George was subjected to a prolonged detention and arrest that far exceeded the scope of a permissible airport security checkpoint stop.

Furthermore, in no way can Mr. George's prolonged seizure be justified as an investigatory detention or lawful arrest. Investigatory detentions and arrests are constitutional only if supported by reasonable suspicion of criminal activity and by probable cause of a specific crime, respectively. Few constitutional rules are more clearly established. Neither Mr. George's Arabic-English flashcards, nor his book critical of U.S. foreign policy, nor any other fact alleged in the complaint gave rise to reasonable suspicion, let alone probable cause, of criminal activity.

Even if the pleaded facts somehow added up to reasonable suspicion—which they do not—clearly established law requires officials to investigate such suspicions quickly and diligently. The Defendants violated these standards, leaving Mr. George locked in a jail cell for four hours (much of that time in handcuffs) without further investigation. The Defendants' personal participation in Mr. George's extended detention and arrest, therefore, violated the Fourth Amendment.

The Defendants seek to divide Mr. George's ordeal into discrete temporal units, urging the Court to review each time period in isolation from the others. In doing so, the Defendants attempt to limit their responsibility to brief and purportedly reasonable periods of detention. Yet the complaint expressly alleges that each Defendant was directly involved in detaining Mr. George and in instructing the local police to prolong his seizure. At this stage, the Court must accept these allegations as true—and, under the law of this Circuit, all of the Defendants are thus liable for Mr. George's unlawful seizure.

The First Amendment violation is equally apparent: government officials cannot retaliate against individuals for possessing First Amendment protected materials. Defendants effectively assert that certain words, when written in Arabic, are legitimate targets for adverse actions even in the absence of an actual threat or evidence of any criminality. The First Amendment does not countenance

such discriminatory retaliation. Mr. George did not communicate anything with his flashcards; indeed, he did not even take the cards out of his pocket until he was ordered to do so by Does 1 and 2. He *made no threat*. Each Defendant unlawfully burdened Mr. George's right to possess First Amendment protected materials, and each is liable for retaliating against Mr. George for the exercise of his First Amendment rights.

If the Defendants' contrary views are accepted, then airport officials will be free to jail innocent air travelers for hours at a time on the basis of nothing more than their possession of written materials that include certain words, or on the basis of pernicious stereotypes. That never has been, and is not, the law.

ARGUMENT

Qualified immunity shields official conduct from liability for civil damages where that conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether a defendant is entitled to qualified immunity, a court must determine (1) whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right," and (2) whether the constitutional right at issue was "clearly established." *Reedy v. Evanson*, 615 F.3d 197, 223–24 (3d Cir. 2010) (alterations in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Courts "have discretion to determine the order of the qualified immunity analysis in order to avoid unnecessary analysis of challenging constitutional questions." *Id.* at 224 n.36 (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)). In this case, the facts alleged demonstrate that the Defendants violated Mr. George's rights under the First and Fourth Amendments, and further show that those rights were "clearly established" at the time of the violations.

I. Defendants Violated Plaintiff's Clearly Established Fourth Amendment Rights by Detaining Him For More Than Five Hours Without Reasonable Suspicion of Criminality, Much Less Probable Cause, After It Had Been Determined That He Posed No Threat.

"[T]here can be no doubt that preventing terrorist attacks on airplanes is of paramount importance." *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006), *cert. denied*, 549 U.S. 945 (2006); *see also United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005). "[E]ven with the grave threat posed by airborne terrorist attacks," however, "the vital and hallowed strictures of the Fourth Amendment still apply: these searches must be reasonable to comport with the Constitution." *Marquez*, 410 F.3d at 618.

Mr. George was detained for more than five hours, Am. Compl. ¶ 74, JA 47, without probable cause or even reasonable suspicion of criminality. The Defendants seek to evade liability for this excessive and unconstitutional seizure by dividing Mr. George's ordeal into short temporal slices; by limiting each individual federal defendant's liability to a particular portion; and by insisting on

the reasonableness of each period of the seizure viewed in isolation. In so doing, the Defendants misconstrue both the facts of this case—which, as explained, must be accepted as true at this stage of the litigation, *Torisky*, 446 F.3d at 442—and the law that governs it.

Defendants assert that the TSA's seizure of Mr. George was lawful under the administrative search doctrine that governs airport checkpoint stops, Defs.' Br. 19–26, and that the JTTF defendants' questioning of Mr. George for "a relatively brief period" constituted neither an unreasonable search nor seizure, *id.* at 28.[7] Yet Mr. George's allegations demonstrate that *all* of the Defendants were responsible for each other's conduct in prolonging his seizure for more than five hours without constitutional warrant. The TSA defendants not only detained Mr. George for approximately 30 minutes after they had exhausted the scope of their lawful administrative search, Am. Compl. ¶¶ 27–30, JA 38–40, but they also summoned the local police to arrest Mr. George and to hold him for further questioning by other federal agents. *Id.* ¶¶ 5–6, JA 34. The local police then held Mr. George for more than four hours, acting in concert with and at the behest of the federal

[7] Defendants apparently have abandoned the argument that the JTTF defendants' actions were "an extension of the airport search . . . and should be evaluated for reasonableness under the airport security standard," Individual Federal Defendants' Motion to Dismiss Plaintiff's Constitutional Claims at 13, *George v. Rehiel, et al.*, No. 2:10-cv-586 (E.D. Pa. Oct. 5, 2010), evidently recognizing the overwhelming weight of authority foreclosing such a sweeping extension of the administrative search doctrine.

defendants to keep him in custody until the JTTF agents arrived. *Id.* ¶¶ 50–63, JA 43–45.

Tellingly, the Defendants' brief is structured to carve their actions into discrete, temporal segments unrelated to one another. *See* Defs.' Br. 19 (characterizing TSA's interactions with Mr. George as lasting 45 minutes); *id.* at 28 (characterizing the JTTF defendants' interactions with Mr. George as a search and questioning limited to "approximately 30 minutes"). This attempt to evade responsibility fails. Even if the Defendants' actions are considered in fragmented pieces, the Defendants' seizure of Mr. George after he successfully had passed through initial and secondary screening was without sufficient suspicion or probable cause, and was thus unconstitutional.

A. Defendants' seizure of Plaintiff for more than five hours cannot be justified as an airport checkpoint stop and violated clearly established law delineating such suspicionless seizures.

Mr. George's prolonged seizure—*after* the TSA's thorough search for weapons and explosives made clear that he was not a threat to either airport security or passenger safety—plainly exceeded the bounds of a permissible administrative search at an airport checkpoint.

Airport security screening falls within the "administrative search" doctrine and ordinarily does not require individualized suspicion of criminality. *Hartwell*, 436 F.3d at 178–79. Administrative checkpoint stops pass constitutional muster

where "the procedure is tailored to advance [the state's interest in preserving air travel safety] while proving to be only minimally invasive . . . ." *Id.* at 181; *see also, e.g.*, *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (en banc) ("A particular airport security screening search is constitutionally reasonable provided that it 'is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [] [and] it is confined in good faith to that purpose.'" (alterations in original) (quoting *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973)).[8]

Crucially, suspicionless searches at airports are permissible to "preserv[e] air travel safety," *Hartwell*, 436 F.3d at 181, by searching for "weapons or explosives that could be used to hijack an airplane," *Singleton v. Comm'r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979). Other courts are in accord that the sole legitimate purpose of an administrative airport stop is to detect weapons or explosives. *See, e.g.*, *Aukai*, 497 F.3d at 962 (holding an airport security search constitutional where procedures "were neither more extensive nor more intensive than necessary under the circumstances to rule out the presence of weapons or explosives"); *United States v. Fofana*, 620 F. Supp. 2d 857, 861–63 (S.D. Ohio 2009) (collecting cases

[8] This Court has cited sister circuit case law on airport security searches, and in particular the Ninth Circuit's law on this issue, with approval. *See Hartwell*, 436 F.3d at 177, 179, 180 & n.10 (citing *United States v. Marquez*, 410 F.3d 612 (9th Cir. 2005)). The Ninth Circuit likewise has relied on this Court's decision in *Hartwell*. *See Aukai*, 497 F.3d at 960, 962.

on airport checkpoint searches).[9] A reasonable official would know that, once he determined conclusively that an individual possessed neither weapons nor explosives, any further seizure—including an arrest—could not be justified as an administrative search.

The TSA's search and seizure of Mr. George far exceeded these constitutional limits. Doe Defendants 1 and 2 completed their legitimate administrative search for weapons and explosives within ten to fifteen minutes. Am. Compl. ¶¶ 27–28, JA 38–39. In addition to x-raying Mr. George's carry-on baggage, Does 1 and 2 carefully inspected all of his possessions by hand and twice swabbed his carry-on items to test for explosives. *Id.* Once Does 1 and 2 had completed those tasks, they had exhausted the legitimate bounds of an administrative search, and any further detention could not be justified without reasonable suspicion of criminality.

The complaint reveals that, during the balance of Mr. George's seizure at the airport checkpoint, the TSA defendants themselves appreciated that Mr. George was not carrying any items that could be used to endanger airline safety. After

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[9] *See also United States v. McCarty*, 648 F.3d 820, 831 (9th Cir. 2011) ("[B]ecause TSA screeners are limited to the single administrative goal of searching for possible safety threats related to explosives, the constitutional bounds of an airport administrative search require that the individual screener's actions be no more intrusive than necessary to determine the existence or absence of explosives that could result in harm to the passengers and aircraft." (citing *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1245 (9th Cir. 1989)).

their initial search of Mr. George's possessions, Does 1 and 2 made no further efforts to uncover weapons or explosives or other means of jeopardizing airline safety. Instead, they engaged in idle chit-chat to prolong Mr. George's detention for the 30 minutes it took for Jane Doe 3 to arrive. *Id.* ¶¶ 28–30, 33, JA 39–40. Jane Doe 3, in turn, was not interested in whether Mr. George had weapons or explosives, or indeed any other actual threats to airline safety. Rather, she was principally concerned with Mr. George's deck of flashcards—an item that can hardly be regarded as a threat to air travel. As her hostile interrogation of Mr. George made clear, Jane Doe 3 harbored farfetched and baseless suspicions that Mr. George's study of Arabic somehow indicated involvement in terrorist plots. *Id.* ¶¶ 33–40, JA 40–41.

Nor can the Defendants articulate a plausible theory of potential criminality on the basis of Mr. George's lawful foreign travels. Defendants contend that the TSA's treatment of Mr. George was reasonable on account of his passport, "which showed that he had recently returned from a lengthy stay in Jordan and shorter trips to Sudan, Malaysia, Indonesia, and Egypt, countries with significant links to terrorism and terrorist activities." Defs.' Br. 22; *id.* at 22–24 (discussing current events and State Department reports relating to specific incidents of violence in these countries). Defendants imply that Mr. George's lawful foreign travel, including academic study in Jordan, could justify his seizure.

The amended complaint includes no factual allegations indicating that the TSA officials singled Mr. George out on the basis of his lawful foreign travel. Nowhere in the complaint is it alleged that either Doe 1 or 2 asked Mr. George any questions about his time abroad, even as those Defendants scrambled to find topics of conversation to prolong Mr. George's detention. *See* Am. Compl. ¶ 28, JA 39 (alleging that TSA official "attempted to make small talk, asking Mr. George if he had seen the recent Philadelphia Phillies baseball game"). Likewise, there are no allegations in the complaint that Jane Doe 3 interrogated Mr. George and prolonged his detention as a result of his foreign travel. *See id.* ¶¶ 33–41, JA 40–42. At this stage of litigation, Defendants are not free to invent alternative rationales for their behavior. *See, e.g.*, *Larsen*, 154 F.3d at 87 ("For purposes of this appeal from the district court's denial of qualified immunity based upon the pleadings, we must accept Larsen's allegations as true and afford him the benefit of all reasonable inferences.").

Defendants argue that courts have upheld "escalating searches of an airline passenger after initial screening raised suspicions, even where the passenger did not pose an immediate threat to aircraft security." Defs.' Br. 24. This basic premise is true. Here, however, initial screening did not raise *any* reasonable suspicions. Indeed, the cases on which the Defendants rely support the conclusion that the Defendants far exceeded the scope of permissible administrative searches.

See Defs.' Br. 24–25. In each of those cases, the search of the passenger in question *did* raise reasonable suspicions of criminal activity.

For example, *United States v. Herzburn*, 723 F.2d 773 (11th Cir. 1984), involved "an attempt to smuggle cocaine through an airport security checkpoint onto an airplane." *Id.* at 774. Airport security screeners had noticed a "large, dark, unidentifiable mass" in Herzburn's carry-on luggage as he attempted to clear the security checkpoint. *Id.* When the screeners tried to open the bag and identify its contents, Herzburn became agitated, sought to abort his travel plans, and "made a hasty retreat toward the nearest exit and taxi stand." *Id.* at 775. Given these circumstances, the court held that "the arresting police officers . . . had probable cause to believe that the substance the two checkpoint inspectors had observed was either narcotics or explosives—it could have been little else." *Id.*

In *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973), FBI agents apprehended defendants Anthony Legato and Abraham Migdall at the Fort Lauderdale airport. The FBI had "received an anonymous tip over the telephone that someone carrying a bomb in an orange shopping bag would attempt to board an airplane leaving for Chicago" at a specific date and time, *and* both defendants were observed at the airport on that date "carrying a bright orange shopping bag in which a gift wrapped package was visible." *Id.* at 409–10. Both defendants were taken into police custody and interrogated; at that time, the two men—who had

been sitting together in a boarding area—denied knowing one another, and a Delta employee discovered that Legato was flying under an alias. An FBI agent asked Migdall to open the package; he refused, but "readily agreed to allow" the FBI agent to do so. The agent discovered "a white powdery substance" determined to be heroin. *Id.* at 410. The defendants argued that the search violated their Fourth Amendment rights; the court disagreed, holding that, "[u]nder the circumstances, it was clear that with only minimal inconvenience to all concerned, a brief stop and inquiry into the contents of the shopping bag could quickly and conclusively resolve what appeared to be an extraordinarily dangerous situation." *Id.* at 411–12.[10]

Finally, in *People v. Farlow*, 52 Cal. App. 3d 414 (Cal. Ct. App. 1975), an airport security screener discovered a crushproof cigarette box in Farlow's jacket pocket as he attempted to pass through the airport security checkpoint. The screener looked inside the box for "a weapon of some kind, a derringer, maybe a bomb," and found a few cigarettes and "an opaque plastic balloon containing a powder substance." *Id.* at 416. Unable to identify the substance, but reasonably believing that it could be a weapon or explosives, the screener consulted with her supervisor, who in turn asked a nearby police patrolman for assistance. The patrolman, believing that the balloon contained narcotics, arrested Farlow. *Id.* The

[10] *Legato* is a case about the investigatory detention doctrine rather than administrative searches relevant to airport security checkpoints.

court of appeal, emphasizing that the screener "was legally searching for weapons and bombs when she opened a cigarette box which contained something other than cigarettes," held that she had acted reasonably to "rule out [the balloon] being some kind of bomb." *Id.* at 417. The court noted that "[p]lastic containers, such as the one here, might hold explosives." *Id.*

In contrast to each of these cases, the thorough search of Mr. George disclosed no remotely suspicious items, let alone items giving rise to the requisite criminal suspicion for detention or arrest. Nonetheless, the Defendants imply that reasonable officials would have considered Mr. George to be a dangerous individual on account of his prior lawful foreign travel and his possession of Arabic language flashcards. Defs.' Br. 24 ("This information could lead reasonable screeners to fear that the plaintiff might intend to engage in terrorist activity against an aircraft, potentially working with other passengers or insiders to commit wrongful acts."). The fundamental flaw in this line of reasoning is immediately evident: millions of innocent Americans, like Mr. George, travel abroad and study—or know—foreign languages.[11] The Supreme Court has

[11] The Defendants' argument that knowledge of Arabic words related to terrorism inherently provides reasonable suspicion (or even probable cause), particularly when combined with travel to Arabic-speaking parts of the world that have experienced terrorism, has staggering ramifications. Carried to its logical conclusion, endorsing this view would permit TSA to detain and arrest every Arabic speaker (or at least everyone who speaks both English and Arabic) who

emphasized that conduct or circumstances that "describe a very large category of presumably innocent travelers" cannot form the basis of reasonable suspicion; otherwise, too many innocent travelers "would be subject to virtually random seizures" in violation of basic constitutional rights. *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam)[12]; *United States v. Sokolow*, 490 U.S. 1, 10 (1989); *see also Karnes v. Skrutski*, 62 F.3d 485, 493 (3d Cir. 1995) ("*Reid* and *Sokolow*, taken together, demonstrate it is not enough that law enforcement officials can articulate reasons why they stopped someone if those reasons are not probative of behavior in which few innocent people would engage—the factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied. This is a totality of the circumstances test."

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passes through our airports, and particularly the thousands who are from or have traveled to "suspect" countries.

[12] In *Reid*, the Supreme Court held that a Drug Enforcement Administration (DEA) agent "could not, as a matter of law, have reasonably suspected" an individual of criminal activity on the basis of the following observed circumstances: "(1) the petitioner had arrived from Fort Lauderdale, which the [DEA] agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags." 448 U.S. at 441.

(citation omitted)), *abrogated on other grounds by Curley v. Klem*, 499 F.3d 199, 209 (3d Cir. 2007).[13]

Neither the study of Arabic generally nor specific Arabic vocabulary can reasonably be considered a threat. It is immaterial that terms such as "terrorist" and "bomb" were included among the many words in Mr. George's flashcard deck. Those written words, alone, pose no threat to security—indeed, they exist in newspapers, books, and magazines sold in newsstands in every airport in the country.[14] Mr. George's possession of a book critical of U.S. foreign policy also cannot reasonably be considered a threat.

Likewise, Mr. George's prior, lawful foreign travel is an insufficient basis for reasonable suspicion of criminal activity.[15] There is absolutely no authority for

[13] *See also, e.g.*, *United States v. Guerrero*, 472 F.3d 784, 788 (10th Cir. 2007) ("The presence of religious iconography in the vehicle is, similarly, not merely consistent with innocent conduct but so broad as to provide no reasonable indicium of wrongdoing. . . . by citing undifferentiated 'religious iconography' as grounds for reasonable suspicion, Deputy Rhodd equates generalized religious expression with criminal activity, a connection that we cannot support as reasonable." (citations omitted)); *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) ("Reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination." (emphasis original)).

[14] As noted, *supra* note 3, the flashcard deck included many more innocuous terms than purportedly "threatening" ones.

[15] Without foregoing Plaintiff's objection to Defendants' efforts to recast the factual allegations that must govern in this appeal, this brief responds to the

the proposition that lawful foreign travel—even to countries with a history of political unrest or current violence, to which untold thousands of Americans nonetheless travel every year—is a sufficient basis for prolonged detention. It is unsurprising that courts have declined to endorse such a proposition. To do so would subject many categories of law-abiding travelers—journalists, diplomats, performing artists, students—to suspicionless and prolonged searches, detentions and arrests. *Reid*, 448 U.S. at 441.

Finally, even if the TSA defendants' search and seizure of Mr. George somehow could be justified as a proper airport security stop—which it cannot be—their failure to conduct a "minimally invasive" search violated clearly established rules governing administrative searches. *Hartwell* held that no constitutional violation had occurred where administrative search procedures "were well tailored to protect personal privacy, escalating in invasiveness only after a lower level of screening disclosed a reason to conduct a more probing search." 436 F.3d at 180.[16] Handcuffing Mr. George, and marching him through the terminal to the airport

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Defendants' claims regarding Mr. George's travels, explaining why these claims are not only impermissible but also unavailing.

[16] *See also McCarty*, 648 F.3d at 835 (approving "a stairstep approach" that "was both minimally intrusive and respectful of personal privacy," where "[e]ach level of increased invasiveness in the search was necessary and tailored to dispel the safety concerns presented"). As explained above, because Mr. George presented no safety concerns and was entirely cooperative—and because the TSA's thorough search of his possessions and person revealed no weapons or explosives—a "stairstep approach" was unwarranted in this case.

police station in plain view of other passengers, Am. Compl. ¶ 45, JA 42, is hardly "protect[ive of] personal privacy." *Hartwell*, 436 F.3d at 180.

Moreover, the sheer length of seizure—and the sluggishness with which the Defendants investigated whatever suspicions they might have had—compels the conclusion that Mr. George's clearly established constitutional rights were violated. The Supreme Court's decisions uniformly emphasize that, in order to pass constitutional muster, suspicionless administrative stops must be brief—that is, no longer than necessary to effectuate the purpose of the stop. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (upholding a police checkpoint because "each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds."); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448 (1990) (upholding a checkpoint where "the average delay for each vehicle was approximately 25 seconds"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 546–47 (1976) (upholding a checkpoint in which "the average length of an investigation in the secondary inspection area is three to five minutes"). Mr. George was detained for *more than five hours*. Far shorter airport seizures have been held unconstitutional—even where, unlike here, government officials had a reasonable suspicion of criminality. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 709 (1983) (observing that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the

seizure is so minimally intrusive as to be justifiable on reasonable suspicion," and holding, in assessing a ninety-minute detention at the airport to search for narcotics, that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause").[17]

B. Defendants lacked reasonable suspicion, much less probable cause, to detain Plaintiff for more than five hours, and so violated clearly established Fourth Amendment law governing investigatory detentions and lawful arrests.

The foregoing makes plain that the Defendants' attempt to justify their misconduct on the basis of the administrative search doctrine must fail. After the TSA's thorough search for weapons and explosives turned up nothing, Mr. George's seizure became an investigative detention justifiable only upon reasonable suspicion of criminality. And once Mr. George was handcuffed and taken to the airport jail to be incarcerated, his seizure clearly amounted to an arrest for Fourth Amendment purposes. Yet the facts disclose no basis for reasonable suspicion, much less probable cause, that would justify criminal detention. Even if this Court views each segment of Mr. George's detention in isolation—which, as

[17] Moreover, Mr. George's five-hour seizure included long stretches of time during which the Defendants undertook no efforts to all to investigate whether he possessed weapons or explosives or otherwise had the means to endanger flight safety. Am. Compl. ¶¶ 46–58, JA 42–44. This further proves that the seizure was unconstitutional. *See, e.g.*, *Place*, 462 U.S. at 709 ("[I]n assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.").

explained, is improper—each segment of suspicionless detention following the TSA's initial and secondary screenings violated the Fourth Amendment.

An investigative detention may be justified "if there is articulable suspicion that a person has committed or is about to commit a crime." *Florida v. Royer*, 460 U.S. 491, 498 (1983). The requisite reasonable suspicion, in turn, entails "something more substantial than an 'inchoate and unparticularized suspicion or hunch.'" *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). The detaining officials "must be able to point to 'some objective manifestation that [the plaintiff was], or [was] about to be, engaged in criminal activity." *Id.* (second alteration in original) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). And "[w]hether it would have been clear to a reasonable officer that probable cause justified [an] arrest requires an examination of the crime at issue." *Kelly v. Borough of Carlisle*, 622 F.3d 248, 256 (3d Cir. 2010) (second alteration in original) (quoting *Gilles v. Davis*, 427 F.3d 197, 204 (3d Cir. 2005)).

Surely, it cannot be the case that any student of Arabic who travels to the Middle East is reasonably suspected of criminality. Jane Doe 3's interrogation demonstrates that the Defendants' actual suspicions were patently unreasonable: the fact that Osama Bin Laden spoke Arabic does not render every or any student of the Arabic language a proper target of reasonable suspicion, much less probable

cause. *Sokolow*, 490 U.S. at 10; *Reid*, 448 U.S. at 441; *Karnes*, 62 F.3d at 493. The Defendants were acting on—at most—a "hunch" that the college student with Arabic flashcards and a political book was a threat to airline safety. Such a hunch is unquestionably insufficient to justify an investigative detention—much less Mr. George's five-hour detention. *See Johnson*, 332 F.3d at 206.[18]

Mr. George's seizure escalated from an investigatory stop to an arrest when the local police, acting on the TSA's request, handcuffed Mr. George, led him to the airport jail, and locked him in a cell. Am. Compl. ¶¶ 42–62, JA 42–45. The Supreme Court has repeatedly ruled that such actions constitute an arrest. *See Kaupp v. Texas*, 538 U.S. 626, 630–31 (2003) (handcuffing and transportation to police station interrogation room constituted arrest); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (transporting individual to police station and placing him in

[18] Even were this Court somehow to determine that Mr. George's ordeal could be regarded as nothing more than an investigatory detention (and not an arrest), *and* even if the Court found that the facts alleged disclosed reasonable suspicion justifying such a detention, the Court must *still* conclude that the Defendants violated the Fourth Amendment: "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Royer*, 460 U.S. at 500; *accord Place*, 462 U.S. at 709–10; *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975). Furthermore, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500; *see also United States v. Leal*, 235 F. App'x 937, 941 (3d Cir. 2007). The sheer length of Mr. George's seizure—combined with the Defendants' lassitude about investigating any supposed suspicions—constitute a violation of these clearly established limits on investigative detentions.

interrogation room was "indistinguishable from a traditional arrest").[19] Likewise, being jailed for more than four hours amounts to an arrest. *See, e.g.*, *Manzanares v. Higdon*, 575 F.3d 1135, 1148 (10th Cir. 2009) ("As the Supreme Court has noted, it has never held a detention of 90 minutes or longer to be anything short of an arrest. *United States v. Place*, 462 U.S. 696, 709–710 (1983). Higdon points us to no case, and our independent research reveals none, construing a detention of 90 minutes or longer as an investigative detention." (citations omitted)).

It is, of course, bedrock Fourth Amendment law that an arrest is constitutional only upon the existence of probable cause. *See, e.g.*, *Dunaway*, 442 U.S. at 200. "Probable cause 'means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Johnson*, 332 F.3d at 211 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)); *see also, e.g.*, *Schneyder v. Smith*, 653 F.3d 313, 323 (3d Cir. 2011) (quoting *Beck v. Ohio*, 379 U.S. 89, 91

[19] *See also, e.g.*, *United States v. Bloomfield*, 40 F.3d 910, 916–17 (8th Cir. 1994) (although there is no "bright line of demarcation between investigative stops and arrests, a *de facto* arrest occurs when the officers' conduct is more intrusive than necessary for an investigative stop" (internal quotations and citations omitted)). Key factors for courts to consider in distinguishing between investigative stops and *de facto* arrests include "delay unnecessary to the legitimate investigation of the law enforcement officers," the degree of fear and humiliation engendered by the law enforcement officials' conduct, the suspect's transportation to another location, the suspect's isolation, whether a suspect was handcuffed, and whether he was confined to a police car. *Id.* (internal quotations and citations omitted).

(1964)). "Stated differently, '[t]he substance of all the definitions of probable cause is a reasonable ground for belief *of guilt*.'" *Schneyder*, 653 F.3d at 323 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (alterations in original)). Defendants are unable to articulate how *any* of Mr. George's conduct or possessions, taken alone or together, give rise to a reasonable inference that he was involved in a crime. *See, e.g.*, *Shqeirat v. U.S. Airways Group, Inc.*, 645 F. Supp. 2d 765, 785 (D. Minn. 2009) (holding that airport police lacked probable cause to believe a crime was being or had been committed when they arrested plaintiffs and, at that time, had the following information about them: "there were six men of Middle Eastern descent; the men were praying loudly before the flight and chanting the word 'Allah'; the men talked about Saddam Hussein and cursed U.S. involvement in Iraq; three of these men had one-way tickets and no checked luggage; most of the men requested seatbelt extensions; a passenger was concerned about the praying and wrote a note to the pilot of Flight 300 to express that concern; and plaintiffs took a 'mysterious' seating arrangement on the plane." (footnotes omitted)).

C. The amended complaint demonstrates that each Defendant is liable for violating Mr. George's right to be free from unreasonable seizure under the Fourth Amendment.

According to Defendants, the district court "erred in suggesting that the TSA screening officials could be . . . held individually liable under the Fourth

Amendment because the plaintiff was handcuffed and detained by the Philadelphia police." Defs.' Br. 26. Yet this Court has made clear that an individual need not be physically present or even directly involved in every aspect of a constitutional violation in order to be liable for it. What is required, rather, is "personal involvement in the alleged wrongs." *Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003) (quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (internal quotation marks omitted)). Personal involvement can be established by alleging that a defendant "participated in violating [plaintiff's] rights, or . . . directed others to violate them, or . . . as the person in charge . . ., had knowledge of and acquiesced in his subordinates' violations." *Reedy*, 615 F.3d at 231 (quoting *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir. 1995) (internal quotation marks omitted)).

In the face of this controlling circuit precedent, the Doe Defendants argue that Mr. George alleges nothing more than vicarious liability, which is insufficient to state a *Bivens* claim. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Defs.' Br. 26. *Iqbal* was a case about the liability of supervisors—the Attorney General and FBI Director—for allegedly unconstitutional conduct committed by distant subordinates. The Supreme Court reaffirmed that in a *Bivens* action, supervisors are liable only for their own conduct and "may not be held accountable for the misdeeds of their agents" on a theory of "vicarious liability." *Id.* at 677. *Iqbal* did

not, however, establish a new rule about the liability of officers, like the Defendants in this case, who were "on the ground" and alleged to have been *directly involved* in the unconstitutional events. *See id.* ("[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct").

In fact, *Iqbal*'s reasoning accords with long-standing Third Circuit precedent. *See Rode*, 845 F.2d at 1207 ("A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of *respondeat superior*."). And this Court has reiterated the traditional rule after *Iqbal*, holding that individuals who "participate[] in" rights violations, "direct[]" others to violate rights, or "know[] of and acquiesce in" subordinates' constitutional violations can be held individually liable for their actions. *Reedy*, 615 F.3d at 231; *Argueta v. ICE*, 643 F.3d 60, 70 (3d Cir. 2011); *see also, e.g.*, *Marcavage v. Nat'l Park Serv.*, 777 F. Supp. 2d 858, 867 n.6 (E.D. Pa. 2011), *aff'd*, 666 F.3d 856 (3d Cir. 2012) (allegations that defendant-sheriff communicated with and directed arresting officer were sufficient to demonstrate sheriff's personal involvement in plaintiff's arrest).

Judged against these well-established principles, the allegations in the complaint amply demonstrate that the TSA and JTTF defendants are liable for Mr. George's seizure. Mr. George's claims are not predicated on a theory of vicarious

liability. Rather, Mr. George has alleged that *all* of the Defendants either participated in his five-hour seizure, directed it, or both. TSA defendants John Doe 1 and 2 directly participated by detaining Mr. George after any valid justification for the airport checkpoint stop had expired. Am. Compl. ¶ 28, JA 39. They unlawfully detained Mr. George after they completed their administrative search, *id.* ¶¶ 28, 30, JA 39–40 and they called in TSA supervisor, Jane Doe 3, to prolong the unlawful seizure, *id.* ¶ 29, JA 39. Jane Doe 3 continued Mr. George's unlawful detention while interrogating him regarding matters wholly unrelated to airline safety. *Id.* ¶¶ 33–39, JA 40–41 ("You know who did 9/11? . . . Do you know what language he spoke? . . . Do you see why these cards are suspicious?"). The TSA agents further participated by summoning the Philadelphia Police Department to arrest Mr. George and continue his detention in the airport jail. *Id.* ¶¶ 42–46, JA 42. In calling the local police, the TSA agents not only "participated in" the prolonged unlawful detention, but also "directed others to violate" Mr. George's rights, and they can be held liable on that basis as well. *Reedy*, 615 F.3d at 231.[20]

Contrary to the Defendants' claims, *see* Defs.' Br. 28, the complaint also clearly alleges the JTTF defendants' direct participation in Mr. George's unlawful seizure. The JTTF defendants not only prolonged Mr. George's hours-long

[20] It is thus inconsequential that the TSA agents "lack authority to make an arrest." Defs.' Br. 26. They directed the Philadelphia police to arrest Mr. George, and Mr. George was in fact arrested as a result. The TSA defendants may be held liable for their participation in this deprivation of Mr. George's constitutional rights.

unlawful seizure by interrogating him for thirty minutes without reasonable suspicion, much less probable cause, Am. Compl. ¶¶ 63–74, JA 45–47, but they also were responsible for the four hours that Mr. George spent in the airport jail cell prior to their arrival. Indeed, the complaint explicitly alleges that the local police were waiting for the JTTF defendants to arrive. *Id.* ¶ 63, JA 45. Moreover, the complaint clearly indicates that the JTTF defendants understood that they held the keys to Mr. George's freedom, and that their delayed arrival at the airport jail prolonged Mr. George's seizure. *Id.* ¶ 73, JA 47 (quoting one JTTF defendant as stating "[t]he police call us to evaluate whether there is a real threat" before telling Mr. George he was free to leave). As such, the JTTF defendants cannot evade responsibility for Mr. George's lengthy and unconstitutional seizure.

II. Defendants Violated Plaintiff's Clearly Established First Amendment Rights By Retaliating Against Him For Exercising His Right to Possess and Study Arabic-English Flashcards and a Book Critical of U.S. Foreign Policy.

The Defendants violated Mr. George's First Amendment rights by burdening his right to possess Arabic flashcards and a book critical of U.S. foreign policy and retaliating against him for exercising that right.[21] This Court has endorsed a three-part test for First Amendment retaliation claims: a plaintiff alleging retaliation must show "(1) that he engaged in constitutionally-protected activity; (2) that the

[21] The Supreme Court has confirmed that a cause of action for damages is available under *Bivens* for claims of retaliation in violation of the First Amendment. *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

government responded with retaliation; and (3) that the protected activity caused the retaliation." *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004) (citation omitted). The amended complaint satisfies each prong of this test.

First, the First Amendment protects Mr. George's right to possess and study the flashcards and book that he was carrying. As in all First Amendment cases, the court must "begin with the proposition that, except for certain narrow categories deemed unworthy of full First Amendment protection . . . all speech is protected by the First Amendment." *Id.* at 282–83 (citation omitted). Furthermore, "it is now well-established" that the First Amendment protects not only the individual's right to speak, but also "the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *See also, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (right to receive information prohibited school officials from removing books from library); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (citing cases). By carrying flashcards and the book with the intent of studying and reading their contents, Mr. George was exercising this clearly established right.

Individuals have a bedrock right to read, study, and possess First Amendment protected material. Even in the context of schools and prisons, where First Amendment rights are attenuated, the courts have confirmed the basic right to read and possess First Amendment protected written material. *See, e.g.*, *Pico*, 457 U.S. at 854 (holding, despite the special considerations that arise in public schools,

that the First Amendment prohibits officials from "remov[ing] books . . . simply because they dislike the ideas contained in those books"); *Monroe v. Beard*, 536 F.3d 198, 209 (3d Cir. 2008) (holding that even prison inmates "retain a broad First Amendment right to view and possess First Amendment materials").

The Defendants argue that their reaction to Mr. George was justified, in part, by the discovery that he "was carrying handwritten Arabic-English notecards containing a significant number of threatening words." Defs.' Br. 33. But Mr. George *made no threat*. Indeed, he did not communicate anything with the flashcards. Rather, the cards were intended for his private study. Mr. George's conduct at all times was consistent with that objective—he did not even take the flashcards out of his pocket until he was ordered to do so by Does 1 and 2. Although there is authority for the proposition that certain words may lose First Amendment protection when used in a manner that reasonably could be regarded as a threat,[22] there is no authority for the alarming proposition that certain words are per se forbidden in airports.[23]

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[22] *See, e.g.*, *United States v. Cothran*, 286 F.3d 173 (3d Cir. 2002) (sustaining conviction of defendant who made repeated false statements suggesting he would bomb an airplane); *see also, e.g.*, *United States v. Brahm*, 520 F. Supp. 2d 619, 627 (D.N.J. 2007) (holding, *inter alia*, that law criminalizing phony bomb threats was not overly broad, and noting that neither false statements nor "utterances that cause immediate public hazard, [such as] the proverbial shouting of fire in a public theater" generally enjoy First Amendment protection); *United States v. Lit*, Crim. No. 04-619, Civ. No. 07-903, 2007 WL 1725199 (E.D. Pa. June 12, 2007) (concerning an individual who pled guilty to a charge of threatening to use a

Mr. George easily satisfies the other two prongs of the retaliation test. Defendants appear not to dispute that an "adverse action" was taken against Mr. George; indeed, they could not. This Court has established that an adverse action exists if it is "sufficient to deter a person of ordinary firmness from exercising his First Amendment rights." *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000) (internal quotation marks omitted). This "threshold is very low. . . . [A] cause of action is supplied by all but truly de minimis violations." *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006). Mr. George's hostile interrogation, humiliating arrest, and five-hour seizure—much of which was spent handcuffed in a locked cell—is more than sufficiently adverse to state a claim.

And finally, the amended complaint alleges more than enough facts to state a plausible claim that Mr. George's five-hour seizure was caused by his exercise of his First Amendment right to possess protected written materials for the purpose of

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weapon of mass destruction by planting a fake bomb in an airport bathroom). Defendants relied on these cases below; the district court did not err when it concluded that they were inapposite given the fact that Mr. George made no threats. JA 86–87.

[23] Would Defendants contend the 9/11 Commission Report or accounts of the Oklahoma City bombing could be properly kept off planes? Or that an individual could be prohibited from putting novels like the bestseller *The Reluctant Fundamentalist* in his carry-on? Would Defendants argue they could prevent demolition experts from carrying professional literature regarding their trade onto a plane? All of these works make much more extensive reference to explosives than do Mr. George's flashcards. It is obvious that the First Amendment would not tolerate such censorship.

studying and reading them. The complaint explicitly alleges that Mr. George was "jailed for several hours . . . solely because he passed through an airport screening checkpoint with a set of Arabic-English flashcards and a book critical of American foreign policy." Am. Compl. ¶ 1, JA 32. Defendants, citing *Iqbal*, argue that Mr. George does not provide "sufficient factual matter" to allow the Court to draw the reasonable inference that they acted unlawfully. Defs.' Br. 32. To the contrary, the amended complaint clearly alleges that the individual federal defendants reacted as they did to Mr. George on account of his possession of First Amendment protected materials. For example, the complaint alleges that Does 1 and 2 examined the flashcards, flipped through Mr. George's reading material, and discussed the flashcards with Jane Doe 3 on the phone. Am. Compl. ¶¶ 27–29, JA 38–39. Jane Doe 3's interrogation was quite clearly motivated by the flashcards, which she found "suspicious" because they contained Arabic. *Id.* ¶¶ 37–39, JA 41. The complaint also alleges that this portion of the interrogation occurred after Jane Doe 3 noticed Mr. George's book. *Id.* ¶¶ 36–37, JA 40–41.

Defendants contend that a "TSA screening officer does not . . . violate the First Amendment by questioning a passenger further in circumstances where particular material in his possession suggests that he might pose a threat to aircraft security," and imply that Mr. George's copy of "Rogue Nation" was somehow akin to "books describing how to make explosive devices." Defs.' Br. 34. Once again,

Defendants fail to explain how a book that is critical of U.S. foreign policy can possibly suggest a "threat to aircraft security."

As explained above, Defendants' insistence that their reactions were in part due to the fact that Mr. George "was carrying a passport reflecting recent travel to countries with identifiable and recent links to terrorist groups or terrorist activity," Defs.' Br. 33, is improper. In any case, it does the Defendants no good to point to their baseless suspicions of Mr. George as an alternative and more "plausible" rationale for their conduct. On the facts alleged, it would have been apparent immediately to any reasonable officer that Mr. George was a college student studying a foreign language and reading about politics. Defendants cannot recast Mr. George's seizure as diligent and responsible airport security work, and thereby avoid accountability for the clear infringement of his First Amendment rights.

The foregoing makes plain that Mr. George's seizure was unlawful—the individual federal defendants lacked either a reasonable suspicion of criminality or probable cause to believe that Mr. George had committed any criminal violation. The Defendants' citation to and reliance on cases discussing the limits of First Amendment retaliation claims where probable cause *was* found to exist, therefore, is unavailing. Defs.' Br. 34–35. *See, e.g.*, *Reichle v. Howards*, 132 S. Ct. 2088 (2012) (holding that Secret Service agents were entitled to qualified immunity because, at the time of the relevant events, it was not clearly established that an

arrest *supported by probable cause* could give rise to a First Amendment violation); *Hartman v. Moore*, 547 U.S. 250 (2006) (holding, in *Bivens* action for retaliatory prosecution, plaintiff must plead and prove an absence of probable cause supporting the prosecution to prevail on First Amendment retaliation claim); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782 (3d Cir. 2000) (holding that school district's initiation of criminal proceedings and pressing of unfounded criminal charges against teacher could render the district liable for malicious prosecution even though the police may have acted on the reasonable belief that they had probable cause to arrest teacher).

Defendants violated Mr. George's clearly established First Amendment rights by retaliating against him for his possession of language flashcards and a political book.

III. Defendants Are Not Entitled To The Defense of Qualified Immunity Because The Complaint Alleges Violations of Clearly Established Constitutional Rights of Which The Defendants Should Have Known.

Throughout their brief, the Defendants argue that they are entitled to qualified immunity because the rights which they are alleged to have violated were not "clearly established" on August 29, 2009. They are incorrect.

Whether a right is clearly established turns on the "objective legal reasonableness of the [defendant's] action, assessed in light of the legal rules that were clearly established at the time it was taken," *Pearson*, 555 U.S. at 244

(citation omitted), and does not depend on the Defendants' subjective intentions or motives, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The Supreme Court has made clear that the ultimate question is simply whether the defendant "'had fair warning' that his conduct deprived his victim of a constitutional right." *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002). This Court has explained that "[i]n determining whether a right is clearly established, it is not necessary that the exact set of factual circumstances has been considered previously." *Kelly*, 622 F.3d at 259 (citing *Hope*, 536 U.S. at 739). "'[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances,' as long as the law gave the defendant officer 'fair warning' that his conduct was unconstitutional." *Id.* (alteration in original) (quoting *Hope*, 536 U.S. at 741).

Given this Court's "broad view of what constitutes an established right of which a reasonable person would have known," *Kopec v. Tate*, 361 F.3d 772, 778 (3d Cir. 2004) (citation omitted), it should not accept the Defendants' invitation to define the rights in question with inordinate specificity. *See, e.g.*, Defs.' Br. 30–31, 34. Although the Court must identify the specific right alleged to have been violated, it "would not be 'faithful to the purposes of immunity by permitting . . . officials one liability-free violation of a constitutional or statutory requirement.'" *Kopec*, 361 F.3d at 778 (quoting *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144–45 (3d Cir. 1984)); *see also Sterling v.*

Borough of Minersville, 232 F.3d 190, 198 (3d Cir. 2000) (holding that police violated clearly established law "notwithstanding the fact that the very action in question had not previously been held to be unlawful"). It is not the case that qualified immunity attaches unless a very similar or identical set of facts has been adjudicated previously.

Consistent with this approach, this Court has defined the rights at stake with sufficient specificity to protect government officials from liability where there has not been fair notice that their conduct is unconstitutional. But by the same token, the Court has not engaged in the kind of highly excessive parsing of the constitutional right that would result in qualified immunity in every case on the grounds that each case always has unique facts. To cite but two recent examples: *Kopec* rejected a claim of qualified immunity because it broadly held that "the use of excessive force by officers in effecting an arrest" was a clearly established right. 361 F.3d at 778. *Schneyder v. Smith*, 653 F.3d 313 (3d Cir. 2011), held that a prosecutor's failure to notify a judge of a trial continuance, which resulted in the prolonged incarceration of a material witness, violated the witness's clearly established Fourth Amendment right to be free from an unreasonable seizure. *Schneyder* reasoned, in part, that "numerous courts have reached the almost tautological conclusion that an individual in custody has a constitutional right to be released from confinement after it was or should have been known that the

detainee was entitled to release." *Id.* at 330 (internal quotation marks and citations omitted).[24]

In addition, this Court has held that "it is not necessary that there be binding precedent from this circuit" for a defendant to be on notice that his challenged conduct is unlawful.[25] *Williams v. Bitner*, 455 F.3d 186, 192–93 (3d Cir. 2006) (citation omitted); *see also, e.g.*, *Kelly*, 622 F.3d at 260 ("We have not addressed directly the right to videotape police officers. . . . [but] several other courts have addressed the right to record police while they perform their duties. We turn now to these cases, as well as cases regarding the more general right to record matters of public concern."); *Kopec*, 361 F.3d at 777–78 (holding, in light of Ninth Circuit precedent, that the use of excessive force in effecting an arrest was a clearly established violation of the Fourth Amendment).[26]

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[24] In fact, the *Schneyder* court had no trouble concluding that the state official had violated the plaintiff's clearly established constitutional right *even though* the court had to address a novel threshold question: whether the reasonableness of the seizure was to be assessed using the concept of "probable cause" when the person seized was a material witness rather than a suspected criminal. *See* 653 F.3d at 322–24.

[25] Taking account of the decisions of other circuits is particularly appropriate in this instance, because airport security is a federal responsibility administered primarily by federal agencies and officials according to nationally uniform standards. Furthermore, because the Defendants are federal agents, it is reasonable to expect them to know and abide by the leading authority from the federal appellate courts throughout the country.

[26] District court opinions may likewise be relevant to the "clearly established" determination. *See Williams*, 455 F.3d at 193 n.7 (citation omitted).

Applying these standards and the constitutional principles discussed at length above, while taking the facts alleged in the light most favorable to Plaintiff, it is undeniable that the Defendants violated Mr. George's clearly established First and Fourth Amendment rights.

IV. The District Court Correctly Concluded That The Defense of Qualified Immunity May Be Clarified Through Discovery.

Finally, Defendants argue that the district court erred in suggesting that "[t]he defense of qualified immunity in this case may be clarified by discovery." Defs.' Br. 31 (quoting JA 87). Yet, although it is true that the applicability of qualified immunity should be "resolved at the earliest possible stage of litigation," *Miller v. Clinton Cnty.*, 544 F.3d 542, 547 (3d Cir. 2008), this Court has routinely deferred qualified immunity determinations needing factual clarification. In *Torisky*, for example, this Court assessed a district court's rulings on a motion to dismiss under Rule 12(b)(6), and concluded "that plaintiffs may be able to prove facts consistent with [their] allegations that would establish a deprivation of liberty and a violation of [the relevant standard for] duty of care and protection." 446 F.3d at 448. The Court went on to remark that "a constitutional violation may have occurred," but "the current record does not provide an adequate basis for passing on the defendants' claim to qualified immunity." *Id.* Accordingly, the Court affirmed the district court's denial of the motion to dismiss on qualified immunity grounds "so that the matter of immunity can be determined on the basis of a more

fully developed record." *Id.*[27] Here, too, it may be the case that discovery and development of the factual record will clarify whether qualified immunity is available to one or more defendant. On a Rule 12(b)(6) motion to dismiss, however, the district court is obligated to evaluate the defense of qualified immunity on the facts as pleaded—precisely what the district court did below.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the individual federal defendants' motion to dismiss.

Respectfully Submitted,

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[27] *See also, e.g.*, *Al Shimari v. CACI Int'l, Inc.*, ___ F.3d ____, 2012 WL 1656773, at *11–13 (4th Cir. May 11, 2012) (en banc) ("Fundamentally, a court is entitled to have before it a proper record, sufficiently developed through discovery proceedings, to accurately assess any claim, including one of immunity. And even a party whose assertion of immunity ultimately proves worthy must submit to the burdens of litigation until a court becomes sufficiently informed to rule.").

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4. I, Mitra Ebadolahi, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit and that I am a member of good standing of the Court.

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CERTIFICATE OF SERVICE

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Ten copies of the Brief of Plaintiff-Appellee were mailed to the Court by UPS delivery, in accordance with Rule 31.0 of the Local Appellate Rules.

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