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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

STUART F. DELERY
Acting Assistant Attorney General

ZANE D. MEMEGER
United States Attorney

MARK B. STERN
(202) 514-5089
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT. 1

ARGUMENT 4

A. Plaintiff's Search And Questioning By TSA Employees and His Later Questioning by JTTF Employees Were Wholly Reasonable and Violated No Fourth Or First Amendment Standard. 4

B. The Individual Federal Defendants Did Not Detain The Plaintiff For Five Hours, And The Question Of The Lawfulness Of His Detention By The Philadelphia Police Is Not Before The Court. 13

CONCLUSION. 19

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

***Cases*:**

Argueta v. U.S. Immigration & Customs Enforcement,
643 F.3d 60 (3d Cir. 2011). 15

Ashcroft v. Al-Kidd, 131 S. Ct. 2074 (2011). 2, 8

Ashcroft v. Iqbal, 556 U.S. 662 (2009). 1, 4, 6, 7, 10, 14, 16, 18

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). 10, 14

Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971). 9, 15

Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009).. . . . . 4, 10

Hartman v. Moore, 547 U.S. 250 (2006). 9

Marcavage v. National Park Serv., 666 F.3d 856 (3d Cir. 2012). 15

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990). 11

Mosley v. Wilson, 102 F.3d 85 (3d Cir. 1996) 8

Palmer v. Nassan, No. 11-1753, 2011 WL 6062064
(3d Cir. Dec. 7, 2011). 8

Reedy v. Evanson, 615 F.3d 197, 231 (3d Cir. 2010),
cert. denied, 131 S. Ct. 1571 (2011).. 15

Reichle v. Howards, 132 S. Ct. 2088 (2012).. 9

Reid v. Georgia, 448 U.S. 438 (1980).. 12

Santiago v. Warminster Township, 629 F.3d 121 (3d Cir. 2010).. . . . . 4, 16, 17

Siegert v. Gilley, 500 U.S. 226 (1991). 18

United States v. Hartwell, 436 F.3d 174 (3d Cir. 2006). 11, 12

United States v. Herzbrun, 723 F.2d 773 (11th Cir. 1984). 12

United States v. McCarty, 648 F.3d 820 (9th Cir. 2011). 13

United States v. Sokolow, 490 U.S. 1 (1989). 11, 12

Wayte v. United States, 470 U.S. 598 (1985). 9

***Constitution*:**

United States Constitution:
First Amendment. 1, 4, 8, 9
Fourth Amendment. 1, 2, 4, 6, 8, 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-4292

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal involves claims against five individuals, sued for damages in their individual capacities for alleged violations of the First and Fourth Amendments. To survive a motion to dismiss, plaintiff must allege well-pleaded facts showing, for each individual defendant and each constitutional claim, that the defendant's own conduct is unlawful. *Ashcraft v. Iqbal*, 556 U.S. 662, 676-

683 (2009). Furthermore, because the individual defendants are protected by qualified immunity, plaintiff's claims survive dismissal only if the conduct alleged is so egregious that only "the plainly incompetent or those who knowingly violate the law" would have engaged in it. *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

Plaintiff's allegations do not come close to satisfying this standard with regard to either of the claims against any of the five named defendants.

The TSA screeners. The two TSA screeners at the screening checkpoint were confronted with a 21-year-old man with handwritten Arabic-English notecards containing violent and threatening words and a U.S. passport showing extensive travel to countries with significant links to terrorism and terrorist activity. Plaintiff himself acknowledges that the TSA screeners acted "properly" when they conducted a more extensive search after discovering the notecards he was carrying. *See* Brief for Plaintiff-Appellee (Appellee Br.) 4-5. Plaintiff nevertheless allege that the screeners violated the Fourth Amendment by calling a supervisor to the scene. Nothing in precedent or common sense supports that conclusion.

The TSA Supervisor. The allegations regarding the TSA supervisor show little more than that the supervisor responded to the request for assistance from the two screeners. The sum total of the well-pleaded factual allegations regarding the

supervisor are that she questioned the plaintiff for several minutes and allegedly inquired about plaintiff's reasons for carrying the note cards, his views on 9/11, and a book in the plaintiff's luggage that criticized U.S. foreign policy in the Middle East. Amended Complaint ¶¶ 33-41, JA 40-42. Like the allegations regarding the two screeners, these allegations do not state a constitutional violation, much less the violation of a clearly established right that would deprive the TSA supervisor of immunity.

While the TSA supervisor was speaking to plaintiff, a Philadelphia police officer arrived and led plaintiff away. Amended Complaint ¶¶ 42-45, JA 45. Plaintiff's factual allegations do not establish a basis for his assertion that the TSA supervisor instructed the Philadelphia police to detain plaintiff or had any authority to direct the subsequent actions of local police.

The Joint Terrorism Task Force Officers. The allegations against the two FBI Joint Terrorist Task Force (JTTF) officials, like the allegations regarding the TSA supervisor, consist largely of the claim that they responded to a call for assistance. At the request of the Philadelphia police, the JTTF employees questioned the plaintiff for approximately 30 minutes to determine whether he posed a threat, and concluded that he did not.

Neither the original search and questioning by TSA employees nor the later search and questioning by JTTF employees were constitutionally unreasonable,

and they certainly did not violate clearly established Fourth Amendment standards. Plaintiff's First Amendment claim is equally insubstantial: the officials charged with maintaining aviation security were not constitutionally barred from considering written materials in an individual's possession in determining whether he might pose a threat.

ARGUMENT

A. Plaintiff's Search And Questioning By TSA Employees and His Later Questioning by JTTF Employees Were Wholly Reasonable and Violated No Fourth Or First Amendment Standard.

1. In refusing to dismiss the claims against the individual federal defendants, the district court apparently took as true plaintiff's sweeping and conclusory assertions that his constitutional rights were violated by all of the individual federal defendants. *See* 10/28/11 Order, at 5, 6, JA 85-86. In order to survive dismissal, however, a plaintiff must put forward sufficient facts to establish that each individual violated his constitutional rights. *See Santiago v. Warminster Township*, 629 F.3d 121, 128-134 (3d Cir. 2010); *see also Iqbal*, 556 U.S. at 677. He cannot carry this burden with conclusory assertions or allegations that simply restate an element of the cause of action. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

According to plaintiff's allegations, he presented himself at an airport security screening checkpoint with a passport showing recent travel to multiple countries with links to terrorism, and was asked to submit to an additional search. Amended Complaint ¶¶ 17-23, JA 36-37. That search disclosed that the plaintiff was carrying handwritten Arabic-English notecards containing many words of a violent and threatening nature, including "bomb," "terrorist," "explosion," "an attack," "battle," "to kill," "to target," "to kidnap," and "to wound." Amended Complaint ¶¶ 23-24, JA 37-38; United States' Motion to Dismiss, Exh. A (copy of cards), Dkt. 25-1, JA 58-75. The two TSA screeners conducting a search of the plaintiff and his belongings swabbed his phone for explosives, and searched his carry-on items. Amended Complaint ¶¶ 27-28, JA 38-39. One of the screeners allegedly placed a telephone call. Amended Complaint ¶ 29, JA 39.

Within thirty minutes of the time the search began, a TSA supervisor arrived on the site and questioned the plaintiff for several minutes. Amended Complaint ¶¶ 30, 33-34, JA 39, 40. This official allegedly inquired about plaintiff's reasons for carrying the cards, his views on 9/11, and a book in the plaintiff's luggage that criticized U.S. foreign policy in the Middle East. Amended Complaint ¶¶ 34-41, JA 40-42. Plaintiff alleges that the supervisor's questioning was interrupted by the arrival of a Philadelphia police officer, who handcuffed the plaintiff and led him to an airport police station. Complaint ¶¶ 42-46, JA 42.

2. Plaintiff cannot plausibly claim that the Fourth Amendment prohibits additional scrutiny of a passenger carrying handwritten notecards that contain a substantial number of threatening or violent words, along with a U.S. passport showing months' worth of recent residence and travel to countries with significant links to terrorism. The question in this case is not, as plaintiff mistakenly suggests, whether "any student of Arabic who travels to the Middle East is reasonably suspected of criminality," Appellee Br. 32, or whether "lawful foreign travel * * * is a sufficient basis for prolonged detention." Appellee Br. 29. Rather, it is whether a reasonable officer could believe that the items in plaintiff's possession warranted additional searching and limited questioning to rule out the possibility that he posed a risk to aviation security.

Plaintiff accuses defendants of trying "to invent alternative rationales for their behavior," Appellee Br. 23, but his argument turns the relevant analysis on its head. *Iqbal* requires a court to determine whether a complaint states a plausible claim to relief based on its well-pleaded facts, viewed in light of context, "judicial experience," and "common sense." 556 U.S. at 679. Plaintiff, on the other hand, asks the Court to discount the content of his allegations and to accept his unsupported inferences of improper motivation.

For example, plaintiff's own allegations state that he had recently traveled to Jordan, Sudan, Egypt, Indonesia, Malaysia, and Ethiopia; that his foreign travel was reflected in his passport; and that TSA screening officials searched all of his belongings and took custody of his passport. Amended Complaint ¶¶ 2, 25, 70, JA 33-34, 38, 46-47. An official in the position of the TSA screeners could reasonably conclude that this travel was relevant in determining whether to conduct a further search of plaintiff's baggage and whether to consult their supervisor. Plaintiff is quite wrong to urge that this Court may not consider his foreign travel in determining whether the individual federal defendants' conduct was reasonable. Appellee Br. 3 n.1, 23.

Plaintiff mistakenly attempts to cast doubt on the validity of the questioning by dissecting his allegations concerning his dialogue with TSA employees. He notes that (according to his allegations) the screeners did not ask him any questions about his travel while searching his baggage; that they attempted to engage him in conversation while waiting for their supervisor to arrive; and the supervisor did not ask him about weapons or explosives. Appellee Br. 21-22.

These allegations do not remotely suggest that the individual defendants were not concerned with aviation safety. Plaintiff's conjectures seek to circumvent *Iqbal's* directive that a Court evaluate the well-pled facts in the complaint to determine whether they show an alternate explanation for challenged

conduct at least as plausible as the plaintiff's theory of wrongdoing. 556 U.S. at 681-683.

Plaintiff's mode of analysis also disregards the Supreme Court's admonition that qualified immunity does not turn on the subjective motivation of an individual federal defendant. *See Al-Kidd*, 131 S. Ct. 2082-2083, 2085; *see also, e.g., Mosley v. Wilson*, 102 F.3d 85, 95 (3d Cir. 1996) (liability for unlawful arrest under 42 U.S.C. § 1983 does not turn on officer's "underlying motivation" but instead on whether conduct was "objectively reasonable under the circumstances and facts confronting him"); *Palmer v. Nassan*, No. 11-1753, 2011 WL 6062064, *2 (3d Cir. Dec. 7, 2011) (same). The only question is the objective reasonableness of the defendants' conduct in light of the information known to them at the time of the search.

3. Instead of confronting the plainly legitimate grounds established by his complaint for additional search and questioning by TSA screening officials, plaintiff instead asserts that the TSA officials were actually motivated by hostility to his past travel, his study of Arabic, or his perceived political views, in asserted violation of the First Amendment.

As we have shown, the individual federal defendants had adequate grounds under the Fourth Amendment to search and question the plaintiff. And, as we

explained in our opening brief, their reasonable search and questioning therefore cannot provide the basis for a First Amendment challenge to the same conduct. *See Hartman v. Moore,* 547 U.S. 250, 256, 265-266 (2006).[1]

In any event, plaintiff's factual allegations do not state a First Amendment claim, much less a violation of clearly established First Amendment precepts. Plaintiff alleges that the TSA supervisor asked him about written materials in his possession, but it is not unlawful for officials to consider the content of First Amendment materials in evaluating whether an individual is reasonably believed to pose a risk. *See Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012) (an officer "may decide to arrest the suspect because his speech * * * suggests a potential threat"); *cf. Wayte v. United States*, 470 U.S. 598, 612-613 (1985) (recognizing that letter of protest written to Secret Service can be relevant "evidence of the nonregistrant's intent not to comply," an element of the crime).

---

[1] Although the Supreme Court recently found it unnecessary in *Reichle v. Howards*, 132 S. Ct. 2088 (2012), to decide whether this principle extends to a claim for retaliatory arrest, the Court held it was "at least arguable" that the same legal principle applies and accordingly held that the individual defendants' conduct was protected by qualified immunity. *Id.* at 2095-2096. In this case, likewise, because it is at least arguable that *Hartman*'s rationale bars a claim for First Amendment retaliatory search and detention, the individual federal defendants may not be held liable for such a claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

As for plaintiff's allegations of discriminatory motive, they are wholly conclusory and are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 680-681. Indeed, the very cases on which plaintiff relies demonstrate the inadequacy of his allegations. In *Fowler*, this Court held that the plaintiff stated a valid claim for discrimination by alleging that she was injured at work and regarded as disabled by her employer; that she was temporarily assigned to light-duty work and applied for an available job opening but was not transferred to that position; that she contacted a human resources representative regarding a number of other vacant jobs that she could have performed, but never received a response about any of the positions; and that she was never transferred to another position but was instead discharged. 578 F.3d at 212. The Court did not, as the plaintiff contends, simply "accept[] as true the plaintiff's allegation that she was 'terminated because she was disabled,'" Appellee Br. 3 n.1, but carefully evaluated the complaint and concluded that this allegation was plausible based on the well-pleaded facts. 578 F.3d at 212. Here, in contrast, plaintiff's conclusory and unsupported allegations that TSA screening officials were motivated by invidious discrimination fail to nudge his claims "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

4. Unsurprisingly, none the cases relied on by plaintiff suggests that the conduct of the TSA officials violated any constitutional stricture, and they certainly provide no support for plaintiff's assertion that the individual defendants violated clearly established constitutional rights.

Although the plaintiff argues that airport security screeners must use the least intrusive methods available to search for weapons and explosives, Appellee Br. 19-20, this Court has refused to adopt any "bright-line test" under the Fourth Amendment for airport searches. *United States v. Hartwell*, 436 F.3d 174, 180 & n.10 (3d Cir. 2006). As the Court emphasized in *Hartwell*, screening officials must have the ability to choose between "'reasonable alternatives,'" taking into account "'limited public resources.'" *Id.* at 179 n.9 (quoting and discussing *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453-454 (1990)); *see also United States v. Sokolow*, 490 U.S. 1, 10-11 (1989) (holding that the reasonableness of investigatory stop "does not turn on the availability of less intrusive investigatory techniques").

Plaintiff likewise errs in urging that he was constitutionally entitled to proceed directly to boarding after the TSA screeners did not immediately find explosives or weapons. As we showed in our opening brief (at 24-25), courts have routinely upheld airport searches in which screeners seek assistance from

supervisors or law enforcement officers when they are unable to resolve concerns that the passenger poses a security risk. Permitting lower-level screeners to seek help in evaluating a potential risk is particularly appropriate in the context of airport searches. Terrorists have repeatedly circumvented detection through the development of new types of explosives and weapons, and have worked in teams to carry out coordinated attacks.

Plaintiff is also mistaken in urging that that the screeners were required to have "articulable suspicion" or even "probable cause" to believe he had committed a crime, before he could be subjected to additional scrutiny. Appellee Br. 31-33. The cases he cites involve investigatory stops and detentions, for which officers must have "a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *see also Sokolow*, 490 U.S. at 7-8. In contrast, an administrative search at an airport security checkpoint requires no individualized suspicion at all. *See Hartwell*, 436 F.3d at 178-181. Furthermore, an airport search can escalate in intrusiveness, as this Court held in *Hartwell*, as long as a lower level of screening "disclose[s] a reason to conduct a more probing search." 436 F.3d at 180; *see also, e.g., United States v. Herzbrun*, 723 F.2d 773, 776-777 (11th Cir. 1984) (upholding airport search based on "mere" suspicion). At a minimum, in light of this decisional law,

a reasonable official in the position of the TSA screeners could have believed that his conduct was lawful.[2]

5. Finally, plaintiff's allegations regarding the conduct of the two members of the Joint Terrorism Task Force are insubstantial on their face. Plaintiff's allegations demonstrate only that these individual defendants questioned him for approximately 30 minutes after he had been detained by the Philadelphia police for several hours. Amended Complaint ¶¶ 63-73, JA 45-47. The officials determined that plaintiff did not pose a risk to aviation security and informed him accordingly. Amended Complaint ¶ 73, JA 47.

These two federal employees violated no constitutional prohibition by responding to a request for assistance and speaking to plaintiff for half an hour. Nothing in common sense or relevant authority suggests otherwise.

B. The Individual Federal Defendants Did Not Detain The Plaintiff For Five Hours, And The Question Of The Lawfulness Of His Detention By The Philadelphia Police Is Not Before The Court.

---

[2] *United States v. McCarty*, 648 F.3d 820 (9th Cir. 2011), cited by plaintiff, was decided almost two years after the search of plaintiff at issue in this lawsuit, and is readily distinguishable. That case involved a search of checked baggage by TSA resulting in the discovery of suspected child pornography, *not* a suspected threat to aviation security. The court had no occasion to consider whether screeners could continue to search a passenger for weapons and explosives, and to question him, when that passenger was reasonably believed to pose a threat based on factors other than the immediate discovery of suspected explosives.

Plaintiff's amended complaint makes clear that he was searched and questioned only briefly by federal officials, and that most of his detention was at the hands of the Philadelphia police. At bottom, plaintiff's constitutional claim requires the Court to attribute to the individual federal employees responsibility for the entire period of his detention, including the four-hour period during which he was handcuffed, led away, and detained by the Philadelphia police. *See, e.g.,* Appellee Br. 13, 15, 17, 19, 30-32. The apparent theme of his argument is that the individual federal defendants were all involved in a joint conspiracy to detain him for the full 5-hour period and that the Court must accept as true his factually unsupported claim that each individual federal defendant "was directly involved in detaining [him] and in instructing the local police to prolong his seizure." Appellee Br. 15.

Plaintiff seeks to proceed in precisely the manner foreclosed by *Iqbal.* The Supreme Court reaffirmed in that case that conclusory allegations that individuals were working in concert with one another or were "instrumental" in or "agreed to" unlawful conduct are *not* entitled to be treated as true. *Iqbal*, 556 U.S. at 680-681 (refusing to accept conclusory allegations that officials "knew of, condoned, and willfully and maliciously agreed" to detention policy, that one official was the "principal architect" of the policy, and that another official was "instrumental" in adopting and executing it); *see also Twombly*, 550 U.S. at 564-565 (refusing to

accept as true allegations that defendants "have entered into a contract, combination, or conspiracy to prevent competitive entry into [the relevant markets] and have agreed not to compete with one another").

Plaintiff relies on cases in which supervisors are alleged to have directed their subordinate employees to violate a plaintiff's constitutional rights, Appellee Br. 36-37, but those decisions have no application to the relationship of any of the individual federal defendants to the Philadelphia police. Furthermore, in each case, the supervisors' conduct was held to be lawful or protected by qualified immunity. *See Reedy v. Evanson*, 615 F.3d 197, 231 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1571 (2011); *Argueta v. ICE*, 643 F.3d 60, 70 (3d Cir. 2011); *Marcavage v. National Park Serv.*, 666 F.3d 856, 859-861 (3d Cir. 2012). Even if the plaintiff's legal theory were correct, it would not be so clearly established as to defeat qualified immunity.[3]

In any event, the plaintiff's allegations do not support an inference that any of the individual federal defendants participated in or directed his detention by the

---

[3] Plaintiff also suggests that individual defendants can be liable under *Bivens* if they knew of and acquiesced in constitutional violations committed by their subordinates. Appellee Br. 37. Apart from the fact that the Philadelphia police were not subordinates of the individual federal defendants, there is substantial doubt, as this Court has recognized, whether that theory of individual liability remains valid following *Iqbal*. *See Argueta*, 643 F.3d at 70. Regardless, plaintiff does not argue that any individual defendants is liable based on his or her failure to stop third parties from engaging in unlawful conduct.

Philadelphia police. As this Court held in *Santiago*, in order to plead a valid claim on this basis, the plaintiff must allege sufficient facts to show that a supervisory official directed subordinates to engage in conduct that the supervisor knew or should have known would violate an individual's constitutional rights. 629 F.3d at 130.

The only well-pled facts in plaintiff's complaint relevant to this theory of liability are that, after the two TSA screeners searched and questioned the plaintiff, one of them made a telephone call to an unknown person and "sp[oke] on the phone for some time." Amended Complaint ¶ 29, JA 39. The plaintiff also alleges that, while he was subsequently being questioned by the TSA supervisor, a Philadelphia police officer arrived on the scene and, without speaking to any of the TSA officials, immediately handcuffed the plaintiff and led him away. Amended Complaint ¶¶ 42-46, JA 42. These allegations do not come close to establishing a basis for holding the TSA officials liable for the conduct of the Philadelphia police.

Plaintiff makes two other allegations against the TSA screeners that are too conclusory to be credited as true under *Iqbal* and *Santiago*. Plaintiff's allegation that "upon information and belief" that TSA screeners John Does 1 and 2 "summoned * * * the Philadelphia Police Department [] for further interrogation, detention, and arrest of Mr. George," Amended Complaint ¶ 5, JA 34, is

essentially an allegation that the officers "told [the police] to do what they did," which is not entitled to be taken as true. *Santiago*, 629 F.3d at 131. Similarly, the allegation that the TSA supervisor "turned [Mr. George] over to Defendant Rehiel to be handcuffed, arrested, jailed, and further interrogated," Amended Complaint ¶ 6, JA 34, is simply a conclusory assertion that the supervisor ordered unconstitutional conduct, which is insufficient to state a valid claim. *Santiago,* 629 F.3d at 131. Indeed, plaintiff's own allegations are that the Philadelphia police handcuffed and detained him without even speaking with the TSA supervisor who was questioning him, much less soliciting her view. Amended Complaint ¶¶ 42-47, JA 42. On their face, plaintiff's allegations suggest that the local police were *not* operating under the direction of any TSA employee.

Plaintiff's allegations regarding the relationship of the JTTF employees and the Philadelphia police are, if anything, even more tenuous than those about the TSA officials. By plaintiff's own account, these defendants were called in to question plaintiff at the end of his detention by the Philadelphia police. Amended Complaint ¶¶ 63, 73-74, JA 45, 47. There is no basis for inferring that these defendants exercised any control over the local officials.

Finally, plaintiff also argues that he should be allowed to conduct discovery against the individual federal defendants to clarify the applicability of qualified immunity. Appellee Br. 49-50. This assertion fundamentally misunderstands the

nature of qualified immunity. As the Supreme Court made clear in *Iqbal*, "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" 556 U.S. at 685 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). The plaintiff's failure to allege facts that support a plausible claim to relief and overcome the defendants' qualified immunity mandates dismissal on the pleadings.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief for Defendants-Appellants, this Court should reverse the judgment of the district court and remand with instructions to dismiss with prejudice the claims against the individual federal defendants.

STUART F. DELERY
Acting Assistant Attorney General

ZANE D. MEMEGER
United States Attorney

MARK B. STERN
(202) 514-5089
/s/ Sharon Swingle
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

JULY 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman. The brief complies with the word limits of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 3,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The text of the paper copy of this brief and the text of the "PDF" version of the brief filed electronically through ECF are identical. A virus check was performed on the electronic version of the brief, using Trend Micro OfficeScan Client (version 6.5) software, and no virus was detected.

/s/ Sharon Swingle
Sharon Swingle
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief for Defendants-Appellants was served through the CM/ECF system on July 12, 2012, to:

Mitra Ebadolahi
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

David Rudovsky
Kairys, Rudovsky, Messing & Feinberg LLP
718 Arch Street, Suite 501 South
Philadelphia, PA 19106

Seema Saifee
American Civil Liberties Union Foundation of Pennsylvania
P.O. Box 40008
Philadelphia, PA 19106

/s/ Sharon Swingle
Sharon Swingle
Counsel for Defendants-Appellants