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Peter Thompson

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## GROUNDING AT THE PLEADING STAGE: HOW DO TSA AGENTS ASSESS A PEACEFUL PROTEST VERSUS A DISRUPTIVE ONE?

PETER THOMPSON\*

### I. INTRODUCTION: FREE SPEECH VS. DISRUPTIVE BEHAVIOR

**I**N *TOBEY V. JONES*, the Fourth Circuit held that a man arrested by Transportation Security Administration (TSA) agents after he protested airport screening procedures by stripping off his shirt and displaying the text of the Fourth Amendment on his chest could proceed past the pleading stage on a potential First Amendment violation.<sup>1</sup> While the court properly found that “protest against governmental policies goes directly to the heart of the First Amendment,”<sup>2</sup> it failed to draw a line between what constitutes free speech and what constitutes disruptive behavior in a zone of high security.<sup>3</sup> The Fourth Circuit was correct in its decision; in a post-September 11, 2001 (9/11) age, the court valiantly took a stand against the continuous erosion of First Amendment rights by recognizing a person’s right to non-violent protest, even in an airport security line.<sup>4</sup> But while the court correctly determined that the agents may have responded unreasonably to Mr. Tobey’s “bizarre” exercise of free speech, it failed to provide guidance on what constitutes disruptive behavior.<sup>5</sup> The court’s position thus creates danger-

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\* Peter Thompson is a candidate for Juris Doctor, May 2015, at SMU Dedman School of Law. He received his B.A. in English and B.J. in Journalism from The University of Texas at Austin in 2001. Peter would like to thank his friends and family, especially his beautiful wife, Courtney, for their love and support.

<sup>1</sup> *Tobey v. Jones*, 706 F.3d 379, 383–84 (4th Cir. 2013).

<sup>2</sup> *See id.* at 393.

<sup>3</sup> *See id.* at 390–94.

<sup>4</sup> *See id.* at 387, 393.

<sup>5</sup> *See id.* at 388–90.

ous ambiguity for TSA agents assessing behavior in a high-security zone and needlessly exposes them to damages liability.<sup>6</sup>

In this case, "Aaron Tobey was scheduled to fly from Richmond[, Virginia] to Wisconsin."<sup>7</sup> He "waited until there was a short line at the TSA screening checkpoint . . . and proceeded to the conveyor belt area [where he] placed his belt, shoes, sweatshirt, and other carry-on items on the conveyor."<sup>8</sup> "Tobey was then diverted by [an agent] to the [Advanced Imaging Technology (AIT)] scanning unit for enhanced screening."<sup>9</sup> Because Tobey believed that enhanced screening was unconstitutional, he "had written the text of the Fourth Amendment on his chest."<sup>10</sup> He "calmly" took off his T-shirt and placed it on the conveyor belt.<sup>11</sup> A TSA agent told him not to remove his shirt, but Tobey "calmly responded that he wished to express his view that [the] TSA's enhanced screening procedures were unconstitutional."<sup>12</sup> The agent then "radioed for assistance," and Tobey was arrested shortly thereafter for disorderly conduct.<sup>13</sup>

The U.S. District Court for the Eastern District of Virginia originally granted the TSA's motion to dismiss in part and denied it in part.<sup>14</sup> The TSA then filed an interlocutory appeal of the district court's denial of qualified immunity with respect to the First Amendment retaliation claim.<sup>15</sup> The Fourth Circuit held that the complaint raised a plausible inference that TSA officials caused the arrest of the passenger and that the arrest gave rise to a cognizable First Amendment retaliation claim.<sup>16</sup>

## II. LEGAL FRAMEWORK: MAJORITY CALLS PROTEST PEACEFUL . . . AND POSSIBLY DISRUPTIVE?

In this case, the court reminded both parties that "the First Amendment prohibits an officer from retaliating against an individual for speaking critically of the government."<sup>17</sup> It invoked clearly established precedent "that the First Amendment pro-

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<sup>6</sup> *See id.* at 385-91.

<sup>7</sup> *Id.* at 383.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 384.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 383.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 383, 386-87.

<sup>17</sup> *Id.* at 391.

pects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it.”<sup>18</sup> Therefore, the court determined that Tobey’s right to engage in a “peaceful non-disruptive . . . protest of a government policy without recourse was clearly established at the time of his arrest.”<sup>19</sup> The court initially stated that Tobey’s behavior was “peaceful, cooperative, and polite” but ultimately held that it could not determine whether Tobey’s behavior was “disruptive” at the Rule 12(b)(6) motion to dismiss phase.<sup>20</sup>

The court relied on *Mills v. Alabama* to illustrate the “universal agreement that a major purpose of th[e First] Amendment [is] to protect the free discussion of governmental affairs.”<sup>21</sup> That case concerned the issue of whether a state could make it a crime for the editor of a daily newspaper to “publish[ ] an editorial on election day urging people to vote a particular way in the election.”<sup>22</sup> In the instant case, the *Tobey* court held that this principle of free discussion applies to many different forums, including an airport.<sup>23</sup> As discussed in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, the Supreme Court stated that “nondisruptive speech—such as the wearing of a T-shirt or a button that contains a political message—may not be ‘airport related,’ but [it] is still protected speech even in a non-public forum.”<sup>24</sup> In that case, the Supreme Court held that a broad ordinance restricting freedom of speech in an airport was unconstitutional.<sup>25</sup> The *Tobey* court concluded its analysis by quoting *United States v. Kokinda*, which held that “a government official cannot ‘suppress expression merely because [he or she] oppose[s] the speaker’s view.’”<sup>26</sup> But in *Kokinda*, the Supreme Court held that it was reasonable for the U.S. Postal Service to prohibit solicitation on a postal sidewalk “where the intrusion creates significant interference with Congress’ [sic] mandate to ensure the most effective and efficient distribution of the

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 393.

<sup>21</sup> *Id.* at 391 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>22</sup> *Mills*, 384 U.S. at 218.

<sup>23</sup> *Tobey*, 706 F.3d at 391.

<sup>24</sup> *See Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987).

<sup>25</sup> *See id.* at 570, 577.

<sup>26</sup> *See Tobey*, 706 F.3d at 391 (quoting *United States v. Kokinda*, 497 U.S. 720, 721 (1990)).

mails.”<sup>27</sup> The Court held that “[w]hether or not the [Postal] Service permits other forms of speech, . . . it is not unreasonable to prohibit solicitation on the ground that it is . . . disruptive of business” because it “impedes the normal flow of traffic.”<sup>28</sup>

### III. DISSENT: STRIPPING OFF SHIRT IS DISRUPTIVE AS A MATTER OF COMMON SENSE

Dissenting Judge Wilkinson honed in on the potentially disruptive nature of Tobey’s conduct in that “he began stripping off his clothes inside the security screening area and continued to do so even after [one defendant] advised that removal of clothing was unnecessary.”<sup>29</sup> The dissent emphasized how such “disruptive” behavior contradicted the majority’s determination that Tobey “remained quiet, composed, polite, cooperative, and complied with the requests of [the] agents and officers.”<sup>30</sup> In determining whether Tobey’s conduct was sufficiently “disruptive” so as to defeat his claim for relief, the dissent looked to *Ashcroft v. Iqbal* for guidance.<sup>31</sup> In that case, the Supreme Court held that when “[d]etermining whether a complaint states a plausible claim for relief[,] . . . the reviewing court [should] draw on its judicial experience and common sense.”<sup>32</sup> Judge Wilkinson asserted that taking off one’s shirt and exposing one’s chest in an airport screening area is disruptive as “a simple matter of common sense.”<sup>33</sup> The dissent pointed out that neither Tobey nor the majority cited any case involving “conduct that disrupts security-screening activities.”<sup>34</sup> In addition, the dissent emphasized that Tobey’s counsel conceded that Tobey’s behavior was “bizarre” and that even “Tobey himself anticipated the disruption his behavior might cause, . . . [such as] inevitabl[e] delays [to] the screening process for other passengers.”<sup>35</sup>

As stated above, the majority—while it determined that Tobey’s behavior was “peaceful” and “cooperative”—left open the door that Tobey’s behavior could somehow also be “disrup-

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<sup>27</sup> *Kokinda*, 497 U.S. at 735.

<sup>28</sup> *Id.* at 733.

<sup>29</sup> *See Tobey*, 706 F.3d at 397 (Wilkinson, J., dissenting).

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

<sup>33</sup> *See id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 397–98.

tive.”<sup>36</sup> The court found that “[w]hether Mr. Tobey was in fact ‘disruptive’ [wa]s a disputed question of fact”; the court continued, stating, “Appellants seem to think that removing clothing is *per se* disruptive. We beg to differ. Passengers routinely remove clothing at an airport screening station, and in fact are required to do so by TSA regulations.”<sup>37</sup> But in seeming contradiction, the court also suggested that Tobey could have been “disruptive” and even speculated that “[p]erhaps [he] took off his shirt, twirled it around his head, and ripped off his pants with a dramatic flourish, indeed causing a great spectacle.”<sup>38</sup> The court said that it could not decide this issue on a 12(b)(6) motion; “at this stage of the proceeding, [the court was] satisfied that Mr. Tobey ha[d] adequately pled that Appellants violated his clearly established First Amendment rights.”<sup>39</sup> But the dissent asserted that qualified immunity should apply to the TSA agents—thereby “lead[ing] inexorably to the conclusion that th[e] complaint must be dismissed”—because the conflicting “legal standard identified by Tobey and the majority as governing this case could not possibly have provided adequate notice to defendants that their alleged actions were unlawful.”<sup>40</sup>

#### IV. ANALYSIS: COURT REACHES RIGHT RESULT BUT CREATES DANGEROUS AMBIGUITY

The majority in *Tobey* reached the right result but ventured down a perilous path when it mentioned—but declined to fully address—what constitutes disruptive behavior at the pleading stage.<sup>41</sup> While it is true that what behavior qualifies as “disruptive” may be a question of fact, the court failed to properly consider both the safety issues at stake and the discretionary functions carried out by the TSA agents.<sup>42</sup> As the dissent pointed out, a disturbance at the airport security line could have created a diversion for some other terrorist activity to be carried out.<sup>43</sup> Here, the court sent mixed messages as to what kinds of behavior and what types of responses are appropriate in a high-secur-

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<sup>36</sup> *Id.* at 388–89, 393 (majority opinion).

<sup>37</sup> *Id.* 388–89.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 389, 394.

<sup>40</sup> *Id.* at 396 (Wilkinson, J., dissenting).

<sup>41</sup> *See id.* at 388–89, 393 (majority opinion).

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 394 (Wilkinson, J., dissenting).

ity zone.<sup>44</sup> The majority made a concrete determination that Tobey's behavior was clearly "peaceful, cooperative, and polite," but then later stated that such behavior could have very well been "disruptive."<sup>45</sup> These statements conflict and create potentially dangerous ambiguity. As the dissent warned, when a gray area exists as to what constitutes free speech and what constitutes disruptive behavior, it puts TSA agents into a difficult position, forcing them to make split-second judgment calls in a high-security area where—in the worst case—lives might be in danger.<sup>46</sup> This ambiguity could be avoided if the court simply addressed the subject matter relevant to the 12(b)(6) motion to dismiss. For instance, if Tobey was in fact peaceful and cooperative as suggested in the factual allegations of the pleadings, the court could have held there was *no question* that his First Amendment claim should advance past the pleading stage. Instead, the court needlessly complicated the issue by acknowledging that Tobey's behavior might have also been disruptive,<sup>47</sup> thereby creating an ambiguity that could confuse the standards under which TSA agents operate and potentially expose them to liability.<sup>48</sup>

#### A. TSA AGENTS NEED PROPER NOTICE OF LEGAL STANDARDS

TSA agents need a specific framework under which to operate when screening passengers at the airport. If they are forced to make split-second decisions about whether someone's behavior constitutes an expression of free speech or is "disruptive," and are then exposed to liability for taking action, they run the risk of losing their own rights to due process.<sup>49</sup> As government officials attempting to carry out discretionary functions, TSA agents should enjoy qualified immunity as "long as they do not violate 'clearly established' law."<sup>50</sup>

However, what constitutes "clearly established law" raises a challenging issue in this case. Initially, the court made the correct determination: this was a calm, non-disruptive protest carried out in a cooperative manner.<sup>51</sup> Therefore, since the First

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<sup>44</sup> *See id.* at 386–94 (majority opinion).

<sup>45</sup> *Id.* at 393.

<sup>46</sup> *See id.* at 394–95 (Wilkinson, J., dissenting).

<sup>47</sup> *See id.* at 393 (majority opinion).

<sup>48</sup> *See id.* at 394–95 (Wilkinson, J., dissenting).

<sup>49</sup> *See id.* at 394.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 393 (majority opinion).

Amendment applies to an airport screening area, the court held that the complaint should advance past the pleading stage.<sup>52</sup> But the court conditioned its finding on the premise that it could not determine whether Tobey's behavior was "disruptive" and that any number of scenarios might have existed where the behavior could have become disruptive.<sup>53</sup> This may show the court's unease with its own decision, or at the very least, its concern over the risks inherent in a high-security zone. But either way, it drastically undermines the court's initial confident assessment of the factual allegations in the pleadings.<sup>54</sup> The court's only charge was to determine the factual plausibility of the pleadings, and once it made this determination, it should not have injected uncertainty as to whether Tobey's behavior was disruptive.

As the dissent pointed out, TSA agents need bright-line rules to quickly confront security risks because any disruption may create "a diversion that nefarious actors could . . . exploit[ ] to dangerous effect."<sup>55</sup> But TSA agents can certainly go too far; in this case, if the factual allegations are true, the agents clearly violated Tobey's First Amendment rights when they immediately arrested him in the middle of a non-violent protest.<sup>56</sup> The court reached this result, but by stating it would not determine whether the action was disruptive,<sup>57</sup> it created an ambiguity that translates into a gray area for TSA agents attempting to carry out their duties. A man who quietly and calmly takes his shirt off in protest at an airport screening area is either properly exercising his First Amendment rights or he is creating a disruption. The court should not be able to firmly pick one conclusion, then open the door to the other conclusion and expect to create a stable framework under which TSA agents can operate. Because the court created this conflict between "peaceful, cooperative" conduct and potentially "disruptive" behavior,<sup>58</sup> TSA agents attempting to make the right judgment call now face "being hauled into court and threatened with damages liability for

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<sup>52</sup> See *id.* at 390–91.

<sup>53</sup> See *id.* at 388–89.

<sup>54</sup> See *id.* at 387–88.

<sup>55</sup> See *id.* at 394–95 (Wilkinson, J., dissenting).

<sup>56</sup> *Id.* at 387–88 (majority opinion).

<sup>57</sup> *Id.* at 387–89.

<sup>58</sup> *Id.*

those decisions, having never received sufficient notice as to the legal standards by which [their] conduct would be judged.”<sup>59</sup>

#### B. RULES NEED TO BE DETERMINED AT PLEADING STAGE

The majority emphasized that “[w]hether Mr. Tobey was in fact ‘disruptive’ [wa]s a disputed question of fact at this juncture.”<sup>60</sup> This is certainly true in one respect: once Tobey’s complaint advanced past the pleading stage, the agents were obviously free to argue that his behavior was disruptive. But, as stated above, the majority went further and asserted that “[a]ppellants seem to think that removing clothing is *per se* disruptive” and, furthermore, that “[p]assengers routinely remove clothing at an airport screening station.”<sup>61</sup> While the court may seem to be supporting its position here by stating that removing clothing is not *per se* disruptive, it opens up the topic of what constitutes disruptive behavior to further debate, which, as discussed above, clouds the picture for TSA agents on how they should address security issues.<sup>62</sup> The conflicting message this sends to TSA agents is as follows: (1) if the protest is peaceful and non-violent, you should not arrest; but (2) if a protestor quietly takes his shirt off, this is not *per se* disruptive, but may be, so if you choose to arrest, you may or may not be subject to liability.<sup>63</sup> Such ambiguity requires TSA agents to venture down an unnecessarily convoluted line of thinking when assessing security risks. What is supposedly a “question of fact” now becomes a point of confusion for a TSA agent forced to make a prompt judgment call.

Potential solutions for TSA agents may be derived from the leeway the Supreme Court granted the Postal Service in *Kokinda*.<sup>64</sup> In that case, the Court recognized the Postal Service’s need to prohibit solicitation on the grounds that it impeded Congress’s mandate to efficiently distribute the mail.<sup>65</sup> This constituted a legitimate reason separate from any desire by the Postal Service to “suppress expression merely because [it] oppose[s] the speaker’s view.”<sup>66</sup> Therefore, the Postal Service

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<sup>59</sup> *Id.* at 394 (Wilkinson, J., dissenting).

<sup>60</sup> *Id.* at 388 (majority opinion).

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 388–89.

<sup>63</sup> *See id.*

<sup>64</sup> *See United States v. Kokinda*, 497 U.S. 720, 735–37 (1990).

<sup>65</sup> *See id.* at 735, 737.

<sup>66</sup> *See id.* at 730, 732–37.

can now prohibit solicitation on its property—a clear bright-line rule that a postal worker can confidently follow without risking exposure to damages liability.<sup>67</sup> If someone pled a violation of First Amendment rights against a postal worker who prevented him from soliciting on post office property, the complaint would never advance past the pleading stage.<sup>68</sup> The need for similar clarity arises in the instant case. Congress has tasked TSA agents with the important duty of maintaining safety at airports and responding to security risks as they arise.<sup>69</sup> To facilitate the most rapid and effective response in this high-security atmosphere, it is imperative that TSA agents know what they can and cannot do to prevent unnecessary delays in the airport security line and, more importantly, to efficiently appraise security risks. This type of bright-line rule would also help the courts determine the validity of a complaint from the outset of a case.

Initially, the court here did exactly that when it held that free speech in an airport is well-established and that Tobey conducted himself in a non-violent manner.<sup>70</sup> But because the court considers whether behavior qualifies as “disruptive” to be a question of fact,<sup>71</sup> it creates a large gray area for TSA agents: government employees carrying out discretionary functions have no real bright-line rule to follow except for their own judgment, which could easily expose them to liability.<sup>72</sup> At the very least, the court here should determine whether the act of a man removing his shirt in an airport security line is disruptive; if done calmly and non-violently, it most certainly should be considered non-disruptive and a proper exercise of the man’s First Amendment rights. The court set out on this path but undermined itself with a risky detour that could expose TSA agents to unnecessary damages liability.<sup>73</sup>

## V. CONCLUSION

At first glance, the majority appeared to make a good decision in the case, but justice was fleeting as the court failed to properly account for the challenges that TSA scanners face in conducting their duties. Even on a Rule 12(b)(6) motion to dismiss, the

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<sup>67</sup> *See id.* at 732–37.

<sup>68</sup> *See id.*

<sup>69</sup> *See Tobey v. Jones*, 706 F.3d 379, 383 (4th Cir. 2013).

<sup>70</sup> *See id.* at 387, 391.

<sup>71</sup> *See id.* at 388.

<sup>72</sup> *See id.* at 394–95 (Wilkinson, J., dissenting).

<sup>73</sup> *See id.* at 387–89 (majority opinion).

court undermined its holding when it held that a peaceful and non-violent protest could also potentially be disruptive.<sup>74</sup> In the post-9/11 age, it is imperative for Americans to guard against the erosion of their First Amendment rights. But it is also important that security personnel have well-defined parameters for doing their jobs. While the court initially reached the right result in this case, it did so by sending a convoluted message that failed to fully appreciate the need for well-articulated rules that security personnel can follow. TSA agents—unlike judges and justices—do not have the luxury of thoughtfully appraising each situation they encounter. They frequently have only seconds to assess circumstances and make decisions. They do not need unnecessary gray areas. Here the court artfully concluded that it was plausible that agents violated Tobey's First Amendment rights. After reaching this determinative point, the court should have ended its analysis instead of venturing into the precarious land of liability outside of the factual allegations set forth in the pleadings.

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<sup>74</sup> *See id.*