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14 UNITED STATES DISTRICT COURT
15 FOR THE DISTRICT OF NEW MEXICO
16

17 PHILLIP MOCEK,
18 Plaintiffs,

19 v.

20 CITY OF ALBUQUERQUE,
ALBUQUERQUE AVIATION POLICE
21 DEPARTMENT, MARSHALL KATZ, in
his official capacity as Chief of Police of the
22 Albuquerque Aviation Police Department,
JONATHAN BREEDON, GERALD
23 ROMERO, ANTHONY SCHREINER,
ROBERT F. DILLEY a/k/a BOBBY
24 DILLEY, LANDRA WIGGINS, JULIO DE
LA PENA, and DOES 1–25, inclusive,

25 Defendants,
26

No. 1:11-cv-01009-BB-KBM

**PLAINTIFF'S [AMENDED]
OPPOSITION TO FEDERAL
DEFENDANTS' MOTION TO DISMISS**

1 **I. DEFENDANTS CANNOT RECAST AND MISCHARACTERIZE THE FACTS**
2 **AND ALLEGATIONS IN THE COMPLAINT**

3 On a motion to dismiss under Rule 12(b)(6) the Court accepts the complaint as it is written and
4 must view the allegations in the light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d
5 1090, 1098 (10th Cir. 2009). Accordingly, the federal defendants may neither add facts that contradict
6 the complaint's allegations, nor recast them in a light unfavorable to the plaintiff. Defendants' motion
7 is replete with both errors. Just two examples illustrate the point that the federal defendants have
8 added facts or misinterpreted them to contradict or recast the allegations of the complaint.
9

10 **A. Mocek did not premeditatedly decide to film his interaction at the Albuquerque**
11 **Sunport and did not know it was likely that that his inability to provide I.D. would result**
12 **in his denial of access to enter secure areas of the airport**

13 The federal defendants imply that plaintiff Mocek premeditatedly decided to video record his
14 interactions with TSA staff and employees. (Mtn. at 4.) The complaint describes no such
15 premeditation. Mocek did conduct research into laws and regulations regarding photography at various
16 airports. However, Mocek began using his camera at the Sunport only after it became clear that
17 Albuquerque TSA employees were subjecting him to an "atypical, alternative identification policy."
18 Compl. ¶ 46.

19 Defendants also claim that Mocek "knew it was likely that his refusal to provide I.D. would
20 result in him being denied access to the secure areas of the airport, including the departure gates."
21 (Mtn. at 14.) This claim is false and contradicts the complaint's allegations. In fact, Mocek had
22 successfully flown without I.D. since 2007, and believed that if he attempted to fly without I.D., the
23 typical TSA reaction would be to send him to a separate line to await assistance and additional
24 questioning from a TSA employee. Compl. ¶¶ 27-28.
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26 **B. Mocek did not engage in disorderly or disruptive conduct**
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1 Throughout their memorandum, the federal defendants attempt to rewrite the narrative of
2 events, casting Mocek as a disorderly passenger intent on acting disruptively.¹ They use variations of
3 “disrupt” and “disturb” 24 times in a 27 page brief. They even title one section with the heading
4 “Plaintiff’s Complaint Describes a Reasonable Response by the Individual TSA Defendants to
5 Disruptive Activity in the Airport Security Screening Area.” (Mtn. at 11.) At another point the
6 memorandum claims, “The complaint clearly states that the Plaintiff intended to disrupt the screening
7 process by willfully failing to follow TSA’s screening procedures and the TSOs’ instructions.” (Mtn. at
8 12.)²

10 The complaint alleges otherwise. Mocek at no time acted disruptively. “Mocek in fact
11 consistently used a calm, quiet tone of voice. Mocek did not yell at any TSA agents or law
12 enforcement officers. Mocek did not yell ‘I know my rights.’” Compl. ¶ 71. Mocek’s conduct even in
13 declining to follow TSA’s unlawful orders was “calm” and “restrained” even in the face of TSA
14 agents’ and law enforcement officers’ increasingly agitated behavior. Compl. ¶¶ 4, 5; *see also* Compl.
15 ¶¶ 69, 71.

17 Nor was there any evidence that Mocek’s behavior disturbed other passengers. “[V]ideo
18 footage shows people walking by without any hesitation” and “the traveling public in general did not
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20 1 Notably, the defendants’ own factual background section does not suggest that Mocek acted in a
21 disruptive manner, only noting that one of the police officers said that Mocek was “causing a
22 commotion.” (Mtn. at 6 (citing Compl. ¶ 51).) The complete paragraph in the complaint reads as
23 follows: “Dilley told Mocek to comply with the TSA agents’ instructions or else he would be escorted
24 out of the airport. One of the officers said that Mocek was causing a commotion. Mocek said, ‘I
25 haven’t raised my voice. I’m not trying to stop you from doing your job.’ Mocek said that he intended
26 to comply with all of the TSA’s rules and regulations.” Compl. ¶ 51.

27 2 The memorandum further describes generally that “TSOs must have discretion to ask a passenger
28 to refrain from filming and refer him or her to law enforcement officers when he or she refuses to
comply with multiple TSA procedures and causes a disruption.” (Mtn. at 14.) Such a discussion of
what TSOs generally may do is irrelevant where the passenger did not act in this manner: Mocek
neither refused to comply with multiple procedures nor caused any disruption.

1 ‘stop and take notice.’” Compl. ¶¶ 71, 73. The TSA’s own written statements, moreover (which the
2 federal defendants have attached as exhibits to their motion), make no suggestion that Mocek caused
3 any public disturbance. Compl. ¶ 79. At all times, Mocek never went through the security checkpoint
4 and remained in publicly accessible areas of the airport. Compl. ¶¶ 5, 56.

5
6 By attempting to characterize Mocek and his behavior as disruptive, the federal defendants in
7 their motion are attempting to do precisely what they did in November 2009—to falsely accuse Mocek
8 of disorderly conduct. The criminal accusations of disorderly conduct were deemed false by a jury.

9 The federal defendants should not be permitted to justify their unlawful behavior on a motion
10 under FRCP 12(b)(6) by creating a narrative of the events that is at odds with the allegations in the
11 complaint and is based on statements and characterizations already found to be untrue.

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13 **II. THE COMPLAINT PROPERLY ALLEGES VIOLATIONS OF MOCEK’S WELL**
14 **ESTABLISHED FIRST AMENDMENT RIGHTS BY THE FEDERAL**
15 **DEFENDANTS**

16 The federal defendants note that plaintiff was arrested by the state defendants for disorderly
17 conduct; concealing identity with intent to obstruct, intimidate, hinder, or interrupt; resisting,
18 obstructing, or refusing to obey a lawful order of an officer; and criminal trespass. None of these was
19 true and at trial, Plaintiff won a swift and full acquittal.

20 The federal defendants argue for dismissal on three major points. First, they argue that
21 whatever the local police may have done with regard to the arrest confiscation and handling of Mr.
22 Mocek’s property, the federal defendants did nothing wrong. They argue that they merely called the
23 police, that the police “took control,” and that any unconstitutional acts are attributed solely to the
24 police. Secondly, they argue there is no right to record events occurring in a public place. Thirdly,
25 they argue that if there is such a right to record, it was not clearly established. They are wrong on all
26 three points.
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1 While it is true that the local police defendants conducted the arrest and seizure, the federal
2 defendants must answer for the unlawful, unreasonable and unconstitutional order to cease recording
3 events of public interest occurring in a public place. Their orders to cease engaging in perfectly lawful
4 and peaceful activity that posed no threat to anyone – conduct with a First Amendment component –
5 created a constitutional injury. (See the “unconstitutional order” discussion citing [Wright v. Georgia,](#)
6 [373 U.S. 284, 291–92, 83 S.Ct. 1240, 10 L.Ed.2d 349 \(1963\)](#), as well as the “chilling effect”
7 discussion citing *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. 1994), *infra*.) The injury was compounded
8 when, in order to put that order into effect, the federal defendants enlisted the police to give force to
9 their unconstitutional demand.

11 Therefore, it is to the remaining arguments - whether there is a constitutional right, whether the
12 elements for a retaliation cause of action have been met, and whether the constitutional right was
13 clearly established - that we now turn.

15 **III. PLAINTIFF CAN ESTABLISH ALL THE ELEMENTS TO ESTABLISH A FIRST 16 AMENDMENT CLAIM**

17 To establish a claim that his First Amendment rights were violated, the Plaintiff must establish
18 the following elements: “(1) that the plaintiff was engaged in constitutionally protected activity; (2)
19 that the defendant’s action caused the plaintiff to suffer an injury that would chill a person of ordinary
20 firmness from continuing to engage in that activity; and (3) that the defendant’s adverse action was
21 substantially motivated as a response to the plaintiff’s exercise of constitutionally protected conduct.”
22 *Klen v. City of Loveland*, 661 F.3d 498, 508 (10th Cir. 2011) (citing *Worrell v. Henry*, 219 F.3d 1197,
23 1212 (10th Cir. 2000)).

24 An act taken in retaliation for the exercise of a constitutionally protected right is actionable under
25 § 1983 even if the act, when taken for a different reason, would have been proper. [DeLoach v. Bevers,](#)
26 [922 F.2d 618, 620 \(10th Cir.1990\)](#). The federal courts have allowed *Bivens* suits for a wide variety
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1 of constitutional violations, including the First Amendment. *Dellums v. Powell*, 566 F.2d 167, 194-
2 195 (D.C. Cir. 1977).

3 **A. THE FIRST AMENDMENT PROTECTS THE PUBLIC’S RIGHT TO**
4 **GATHER INFORMATION**

5 Gathering information is among the freedoms that are “necessary to the enjoyment of other
6 First Amendment rights.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). The
7 First Amendment “embodies more than a commitment to free expression and communicative exchange
8 for their own sakes; it has a structural role to play in securing and fostering our republican system of
9 self-government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586-88 (1980) (Brennan, J.,
10 concurring).

11 It has now long been established that information gathering is an activity protected by the First
12 Amendment. *See id.* at 576 (plurality opinion) (noting that the First Amendment incorporates a right
13 “to gather information”); *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (“The
14 Supreme Court has recognized that newsgathering is an activity protected by the First Amendment.”).
15 The Supreme Court has held that the government may not “limit[] the stock of information from which
16 members of the public may draw.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). For this
17 reason, therefore, “[t]here is an undoubted right to gather news ‘from any source by means within the
18 law.’ ” *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665,
19 681-82 (1972)).³

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24 ³ To the extent the federal defendants attempt to conflate Mocek’s failure to have
25 identification with the recording of their conduct and so render all of his acts that day unlawful,
26 they mislead the court. First, Mocek’s failure to have identification is not a violation of any
27 law. In any case it has a simple and direct remedy – he is no longer permitted to go through
28 the security check or enter the secure area. He is told to depart. But that is not why he was
confronted, nor why the agents created any disturbance. It occurred because the federal
defendants on their own fabricated a false and unconstitutional order and then sought to
enforce it with escalating means. The order they manufactured ran counter to their own
agency’s policy. Mocek did not violate any law, rule or policy in trying to gather information;

(Continued...)

1 Importantly, this First Amendment right to gather information is not limited to newsgathering
 2 or to members of the press; it applies equally to all citizens. *See, e.g., CBS Inc. v. Young*, 522 F.2d 234,
 3 238 (6th Cir. 1975) (“[T]he First Amendment guarantee of freedom of the press is for the benefit of all
 4 the people and not a device to give the press a favored status in society.”). Indeed, “[i]t is not just news
 5 organizations . . . who have First Amendment rights to make and display videotapes of events.” *Smith*
 6 *v. City of Cumming*, 212 F.2d 1332, 1333 (11th Cir. 2000) (citing *Lambert v. Polk Co.*, 723 F. Supp.
 7 128, 133 (S.D. Iowa 1989)). Therefore activists – even pesky ones – enjoy a right to gather
 8 information about their cause so that they may communicate to interested members of the public
 9 information about the conduct and policies of the public servants who act in our name.
 10

11 **B. DEFENDANTS’ ACTIONS CAUSED MOCEK TO SUFFER AN INJURY**
 12 **THAT WOULD CHILL A PERSON OF ORDINARY FIRMNESS FROM**
 13 **CONTINUING TO ENGAGE IN THAT ACTIVITY**

14 Governmental action designed to prevent and chill a plaintiff’s “confrontational yet non-violent
 15 political activities...strikes at the heart of the First Amendment.” *Gibson v. United States*, 781 F.2d
 16 [1334, 1338 \(9th Cir.1986\)](#), *cert. denied*, [479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 \(1987\)](#).
 17 “Accordingly, the victim of such action is entitled to sue the responsible” officers. *Id.* A plaintiff “may
 18 not recover merely on the basis of a speculative ‘chill’ due to generalized and legitimate law
 19 enforcement initiatives.” *Id.* However, where a plaintiff “allege[s] discrete acts of police surveillance
 20 and intimidation directed solely at silencing” her or him, a civil rights claim will lie. *Id.* The
 21 defendant's intent *is* an element of the claim. *See* [Thomas v. Carpenter](#), [881 F.2d 828, 829 \(9th](#)
 22 [Cir.1989\)](#) [to avoid dismissal of claim for retaliatory firing, plaintiff need only allege that defendant's
 23 conduct “was motivated by an intent to retaliate for [the plaintiff’s] exercise of constitutionally
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25 _____
 26 (...Continued)

27 the federal defendants did when they tried to stop him from engaging in peaceful,
 28 constitutionally protected conduct.

1 protected rights”], *cert. denied*, [494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612](#) and *cert. denied*, [497](#)
2 [U.S. 1003, 110 S.Ct. 3236, 111 L.Ed.2d 747 \(1990\)](#). As to this element, a reasonable
3 construction of the Complaint shows that the federal defendants caused plaintiff “an injury that would
4 chill a person of ordinary firmness from continuing to engage in that activity.” Defendants’ adverse
5 actions were substantially – if not entirely -- motivated by plaintiff’s exercise of constitutionally
6 protected conduct. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)). Also see [Lackey v.](#)
7 [County of Bernalillo, 1999 WL 2461, at *3.](#)

9 The most fundamental activity, of course, was the information gathering itself. There are also
10 allegations that defendant Romero repeatedly ordered Mocek to put down the camera and repeatedly
11 tried to seize the camera. (Complaint, ¶ 48). Breedon committed the same acts as Romero.
12 (Complaint, ¶ 46). Breedon asked Schreiner, the supervisory TSO, to call the state police officers;
13 Schreiner relayed the request. (Complaint, ¶¶ 21, 75-77) After Mocek “challenged the notion that
14 taking pictures was prohibited”, Schreiner complained to state defendant police officer Dilley about
15 Mocek’s taping and picture taking. (Complaint ¶ 77) Schreiner’s report after the arrest described
16 Mocek as “hostile”, “belligerent”, and “taking photographs in a threatening manner”. (Complaint, ¶¶
17 77-78). TSA agents, which may have included one or more of the federal defendants, made the
18 following statements to the state defendants about the plaintiff: “creating a disturbance”, “he won’t put
19 his camera down, either” and “taking pictures of all of us”. (Complaint, ¶ 49) None of Mocek’s
20 actions violated any law, regulation or policy. Mocek never entered the security checkpoint, remaining
21 within the publicly accessible areas of the airport during the entire airport encounter. (Complaint, ¶
22 56).

24 While Mocek showed an extraordinary amount of fortitude in continuing to exercise his
25 rights, that is not the test. These federal defendants intended to do everything they could to prevent
26 that exercise. Their very purpose in issuing the orders was to not only chill but freeze his right to
27 gather information about public officials conducting public duties in a public place. All three of them
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1 did this by repeatedly - and with increasing vigor - ordering him to halt his information gathering and
2 to turn off the recorder. Breedon and Romero also attempted to seize the recorder away from Mocek's
3 possession. Each of those acts chilled Mocek's First Amendment rights. A plaintiff of "ordinary
4 firmness" would be inclined to discontinue such activity.

5
6 **C. THE PLEADINGS ALSO SHOW THAT THE DEFENDANTS' ADVERSE**
7 **ACTION WAS SUBSTANTIALLY MOTIVATED AS A RESPONSE TO**
8 **MOSEK'S EXERCISE OF CONSTITUTIONALLY PROTECTED**
9 **CONDUCT**

10 The federal defendants' adverse action was substantially motivated as a response to Mocek's
11 exercise of constitutionally protected conduct. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000).

12 Also see [Lackey v. County of Bernalillo, 1999 WL 2461, at *3.](#)

13 Mocek's complaint contains all necessary allegations that defendants' adverse action was
14 substantially motivated as a response to his exercise of constitutionally protected conduct – the
15 recording. When Mocek told Breedon that he thought he was not required to provide ID, Breedon's
16 response was that Mocek was correct, that he would contact TSA's Security Operations Center, and
17 that if Mocek could not be identified, Mocek would not be allowed to proceed through the security
18 checkpoint. At this point in time, there was no indication from any of the TSA agents present that
19 there was any intent to order him to cease doing anything or, when their unlawful orders were not
20 followed, to involve law enforcement. (Complaint, ¶ 45). It was only when Mocek began filming the
21 Defendants' activities that the activities described above took place. (Complaint, ¶¶ 46-50; 75-76).
22 Breedon asked Schreiner, the supervisory TSO, to call the state police officers; Schreiner relayed the
23 request. (Complaint, ¶¶ 21, 75-77) When Mocek "challenged the notion that taking pictures was
24 prohibited", Schreiner falsely claimed that Mocek was "hostile", "belligerent", and "taking
25 photographs in a threatening manner". (Complaint, ¶¶ 77-78). State defendant Dilley finally told
26 Mocek to "comply with the TSA agents' instructions or else he would be escorted out of the airport".
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1 (Complaint, ¶¶ 51). When Mocek again stated that he had the right to record, the state defendants
2 arrested him for doing that. The impetus for arrest is clear, because Mocek never refused to leave the
3 airport; in fact he acceded to it. (Complaint, ¶¶ 52-55).

4 **IV. QUALIFIED IMMUNITY IS NOT AVAILABLE, AS THIS RIGHT TO GATHER**
5 **NEWS WAS CLEARLY ESTABLISHED**

6
7 At this stage, Plaintiff has the duty to state the clearly established constitutional right and the
8 defendant's conduct which violated the right with specificity, and demonstrate a 'substantial
9 correspondence between the conduct in question and prior law ... establishing that the defendant's
10 actions were clearly prohibited.' ” *Romero v. Fay*, 45 F.2d 1472, 1475 (10th Cir. 1995). The right to
11 engage in information gathering is a right that was already clearly established. The Supreme Court has
12 held that the government may not “limit[] the stock of information from which members of the public
13 may draw.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). The federal defendants’ prolonged
14 argument about how judges are confused is a red herring, and is discussed in greater detail below. But
15 as a threshold matter, at the time of the incident, Defendants’ agency’s own policy was clear and had
16 been communicated in writing, directly to the Plaintiff, as well as to the general public: Recording was
17 permitted. The federal defendants nowhere contradict that this was in fact the agency’s policy at the
18 time. That was also the law at the time. But these federal defendants cannot be heard to say that an
19 activity was clearly permitted but then, when they issue a command that contradicts this, claim their
20 own confusion somehow reflects confusion in the law.
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23 The “clearly established” inquiry does not require “a case directly on point.” *Ashcroft v. al-*
24 *Kidd*, 131 S. Ct. 2074, 2093 (2011). Importantly, to overcome a defense of qualified immunity, there
25 need not be “a published case involving identical facts,” for “otherwise we would be required to find
26 qualified immunity wherever we have a new fact pattern.” *York v. City of Las Cruces*, 523 F.3d 1205,
27 1212 (10th Cir. 2008) (internal quotation marks omitted). Rather, “a general constitutional rule can
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1 apply with obvious clarity to the specific conduct in question, even though such conduct has not
2 previously been held unlawful.” *Id.* (internal quotation marks and alterations omitted). Thus, the court
3 must “look to the ‘general constitutional rule.’ ” *Id.* (citing *Casey v. City of Federal Heights*, 509 F.3d
4 1278, 1284 (10th Cir. 2007)).

5 Many circuits have held that recording police officers and officials in the course of carrying out
6 their duties is directly protected by the First Amendment. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78, 82-
7 84 (1st Cir. 2011) (“The filming of government officials engaged in their duties in a public place,
8 including police officers performing their responsibilities, fits comfortably within [First Amendment]
9 principles.”); *Gilles v. Davis*, 427 F.3d 197, 212 (3d Cir. 2005) (“[V]ideotaping or photographing the
10 police in the performance of their duties on public property may be a [First Amendment] protected
11 activity.”); *Smith*, 212 F.2d at 1333 (“The First Amendment protects the right to gather information
12 about what public officials do on public property, and specifically, a right to record matters of public
13 interest.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 438-39 (9th Cir. 1995) (recognizing, in case where
14 the plaintiff claimed that police violated his First Amendment rights by interfering with his attempts to
15 videotape a protest march, that the right to gather information includes a “First Amendment right to
16 film matters of public interest”).

17 The weight of circuit authority thus supports Mocek’s right to gather news via his video and
18 audio recording, with this authority established well before the November 2009 incident.⁴ The federal
19 defendants assert that the existence of this right to record is unsettled in the courts. For example, the
20 federal defendants cite *Kelly v. Borough of Carlisle*, 622 F.3d 248, 251 (3d Cir. 2010), and *Szymecki v.*
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25 ⁴ *Glik v. Cunniffe*, discussed below, was decided in 2011, but it relied in turn on an
26 earlier First Circuit case, *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999), which obviously predates
27 Mocek’s arrest. *Iacobucci* denied qualified immunity for police officers who arrested a journalist for
28 filming officials in a hallway outside a public meeting. *Iacobucci*, 193 F.3d at 18.

1 *Houck*, 353 F. App'x 852, 853 (4th Cir. 2009), as evidence of disagreement among the circuits.

2 However, the cases are unavailing here.⁵

3 The First Circuit in *Glik* explicitly rejected the use of these cases in the defendants' attempts to
4 support qualified immunity, holding that neither case was relevant to the determination of whether the
5 right to film police in the performance of their duties in a public place was clearly established. As to
6 *Szymecki*, the *Glik* court noted that *Szymecki* was an unpublished opinion with no precedential value,
7 and that the case at any rate only summarily concluded that the right to record police was not clearly
8 established. There was no discussion of facts or relevant law. *See Glik*, 655 F.3d at 84. Next, *Kelly* is
9 distinguishable for a multitude of reasons. The *Glik* court noted that *Kelly* involved a traffic stop in
10 Pennsylvania, which was a factual scenario "worlds apart" from the arrest involved in Massachusetts,
11 in part because of the dangers of traffic. *See id.*

12
13 Moreover, even *Kelly* itself acknowledged that there is a "broad right to videotape police,"
14 narrowed only by the qualification that "videotaping without an expressive purpose may not be
15 protected." *Kelly*, 622 F.3d at 262. Thus, if the plaintiff in *Kelly* had had an expressive purpose behind
16 his videotaping of the officers, the analysis and result might well have been different. *See id.* at 251
17 (noting that it was the plaintiff's habit "to record people for no particular reason").⁶ In the instant case,
18 contrary to the federal defendants' claims, Mocek clearly had an expressive purpose here in
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21 _____
22 ⁵ Notably, both cases post-date the events here. Any uncertainty in the law then arguably came
23 *after* the events here. As noted the law was actually quite clear before these more recent cases, which
24 have also been both distinguished and disregarded as wrongly decided.

25 ⁶ An additional reason cited by the *Kelly* court for its conclusion was the fact that a
26 traffic stop is an "inherently dangerous" situation, making such scenarios unique for the "risk of harm
27 to both the police and the occupants [of a stopped vehicle]" such that an officer's unquestioned
28 command of the situation is justified. *Kelly*, 622 F.3d at 262-63 (quoting *Arizona v. Johnson*, 555 U.S.
323, 330 (2009)). Here, there is no such inherent danger to the public official, the information gatherer
or any third party. The most dangerous wheeled vehicle in a security checkpoint is a baby stroller.

1 documenting what he perceived to be an atypical, alternative identification policy, making *Kelly* of
2 little value to the federal defendants. *See* Compl. ¶¶ 1, 3, 46.

3 The “chilling effect” in this case is similar to that in *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir.
4 1994). In *Sloman*, the plaintiff campaigning for a ballot measure on a public sidewalk alleged that a
5 police officer “used his official powers, specifically his power to warn, cite, and arrest, to retaliate
6 against *Sloman*'s exercise of his free speech rights, and to deter *Sloman*'s exercise of those rights in the
7 future”. *Id.*, at 1469. As in *Sloman*, “Although officials may constitutionally impose time, place, and
8 manner restrictions on political expression carried out on sidewalks and median strips, they may not
9 “discriminate in the regulation of expression on the basis of the content of that expression.” [*Hudgens v.*](#)
10 [*NLRB*, 424 U.S. 507, 520, 96 S.Ct. 1029, 1036, 47 L.Ed.2d 196 \(1976\)](#). Minimal time, place, and
11 manner restrictions were in place here. The only rule was “don’t photograph the TSA computer
12 monitors” – there is no contention in Defendants’ motion nor any allegation in the Complaint that
13 Plaintiff did anything of the kind. (Complaint, ¶¶ 35, 42). Under *Sloman*, the federal defendants
14 violated *Mocek*'s First Amendment rights if their actions deterred or chilled *Mocek*'s newsgathering
15 and expressive conduct, and such deterrence was a substantial or motivating factor in federal
16 defendants’ conduct in convincing the state defendants to issue citations and warnings to him. Also
17 see *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 464 (9th Cir. 1994).

18 Finally, what the federal defendants perceive to be a lack of clarity in this area of First
19 Amendment law has a perfectly reasonable explanation: The “terseness” and “brevity” of First
20 Amendment discussion in those cases that have recognized a right to film government officials or
21 matters of public interest in public spaces is a result of the “fundamental and *virtually self-evident*
22 *nature* of the First Amendment’s protections in this area.” *Glik*, 655 F.3d at 85 (emphasis added).
23 Indeed, some constitutional violations are so “self-evident” that no particularized case law is needed to
24 substantiate them. *Lee v. Gregory*, 363 F.3d 931, 936 (9th Cir. 2004). The court here should recognize
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1 the well-established authority protecting the right of anyone to gather nondisruptive information by
2 video or audio recording of public officials in the performance of their public duties in a public space.

3 If any more authority on this issue was necessary on the day of the event, it can be found in the
4 very agency in question. When asked in 2009, agency personnel stated unequivocally that recording
5 was permitted in public areas. To claim at this remove that whether recording was permitted was
6 confusing or unknown is absurd – the agency did not hesitate to give its answer and the agency got it
7 right. As held in *Calhoun v. Gaines*, 982 F.2d 1470, 1475 (10th Cir. 1992), officials have a duty to
8 "know well developed legal principles and to relate and apply them to analogous factual situations".
9 The fault lies not in confusion about the constitution or the law, it lies in these federal defendants who
10 took it upon themselves to fabricate an order that ran counter to the constitution and the agency's own
11 policies. Put simply, they got it wrong, and it was not a close call.

12 13 14 **V. THESE DEFENDANTS ALSO VIOLATED MOCEK'S FOURTH AMENDMENT RIGHTS**

15 Plaintiff's Count III alleges that the unconstitutional conduct of the TSA Defendants resulted in
16 Mocek's arrest, detention, (and) seizure...institution of baseless criminal proceedings against him, and
17 other financial and emotional distress". (Complaint, paragraphs 89, 96). It further alleges that he was
18 subjected to excessive force, searching his person, seizing and searching his camera and memory
19 contained therein..." (Complaint, paragraph 97). The complaint repeatedly states

20 that Plaintiff engaged in no commotion, disruption or interference with the duties of the Defendants.

21 As stated in Section I, this is a 12(b)(6) proceeding, and Defendants have to accept the complaint as
22 written, not as they'd like it to be written . They use various forms of the word "disturb" and
23 corollaries like "disrupt" on virtually every page, trying to paint a false picture of a Phil Mocek – just
24 as they did in 2009 – as someone bent on distracting them and preventing them from doing their job.
25
26

27 The federal defendants also attempt to confuse the Court by conflating Mocek's lack of
28 possession of ID with the recording. They are not related. They did not stop him from going about his

1 business because of the recording; they did it because he did not have ID. Federal defendants have
2 policies and procedures deal with this, and a host of other things regularly prevent them from
3 processing someone quickly (ID that has expired; people in wheelchairs; elderly people who need help;
4 language issues; purportedly-random selection of people for more invasive searches and X-rays). But
5 in any case, the recording did not disrupt or interfere with anything.
6

7 The state defendant police officers were not contacted by the federal defendants because of the
8 ID issue; nor was the Plaintiff arrested for that. Not only are these claims wholly inaccurate, they
9 directly contradict the complaint. But for the acts of the federal defendants, Plaintiff would not have
10 been arrested. The federal defendants contacted the state defendants expressly because he would not
11 follow their illegal order to stop filming. And the state defendant police officers adopted this line of
12 attack, ordering the Plaintiff to comply with federal defendants' unlawful orders under threats of
13 ejection from the airport and of arrest. The federal defendants violated the Constitution with their
14 blatantly illegal order, for which the law was clearly established.
15

16 The federal defendants compounded their already unconstitutional activities in two additional
17 ways. First was the order to the Plaintiff to turn off the recorder, closely followed by grabbing at the
18 recorder in efforts to take it away from the Plaintiff. In and of itself, those acts chilled the Plaintiff's
19 First Amendment rights. A plaintiff of "ordinary firmness" would not be inclined to continue such
20 activity.
21

22 Secondly, federal defendants falsely accused the Plaintiff of committing disorderly conduct. As
23 stated in Paragraph 70: "According to De La Pena's report, TSA agents reported to Dilley that Mocek
24 was causing a disturbance by 'yelling at officers.'" Paragraph 71 establishes that "Mocek in fact
25 consistently used a calm quiet tone of voice. Mocek did not yell at any TSA agents or law
26 enforcement officers". Plaintiff was still in the public area of the airport (not the screening section)
27 and had taken reasonable steps to ensure that he was not in violation of any TSA regulation by filming
28

1 in that area. (Complaint, paragraphs 31-44). State defendants will doubtlessly argue that they
2 “reasonably relied” on this false statement at summary judgment. Only at that stage can it be
3 determined if any of the defendants had a nondisputed factual basis to complain about Mocek’s
4 conduct that could be used as a basis for probable cause.

5 **VI. THE FOURTH AMENDMENT PROTECTS THE PLAINTIFF’S RIGHT FROM**
6 **WRONGFUL ARREST, AND THE FEDERAL DEFENDANTS WERE THE**
7 **DIRECT CAUSE OF THE WRONGFUL ARREST WITH THEIR**
8 **UNCONSTITUTIONAL DEMAND TO HALT RECORDING**

9 The pleading standard established in *Ashcroft v. Iqbal* requires the plaintiff to allege facts sufficient
10 to allow the court to draw the reasonable inference that the defendant is liable for the misconduct
11 alleged. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Court made clear that personal
12 participation in the alleged misconduct is necessary, as “each Government official, his or her title
13 notwithstanding, is only liable for his or her own misconduct.” *Id.* at 677. Thus, “a plaintiff must plead
14 that each Government-official defendant, through the official’s own individual actions, has violated the
15 Constitution.” *Id.* at 676. See also *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997) (“Individual
16 liability under §1983 must be based on personal involvement in the alleged constitutional violation.”)

17
18 The state defendant police officers arrested the Plaintiff, but only after the federal defendants
19 made unconstitutional demands that the Plaintiff abandon his right to engage in information gathering.
20 Moreover, if the federal defendants had refrained from summoning them, no arrest would have been
21 made. There was no basis whatsoever for summoning the state defendants. An unconstitutional
22 demand (and subsequent false statements about Mocek’s behavior) were pretexts for calling the state
23 police and are necessarily linked to the false arrest. The federal defendants are responsible for all the
24 harm that follows.

25
26 As TSA officers, Schreiner, Breedon and Romero were all employed by a different agency than the
27 state defendants. Pursuant to Tenth Circuit law, plaintiff has met his burden by alleging that these
28

1 nonsupervisory defendants committed acts that establish “cause in fact between the conduct
2 complained of and the constitutional deprivation”. *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir.1990),
3 *cert. denied*, 499 U.S. 976 (1991). “The requisite causal connection is satisfied if the defendant set in
4 motion a series of events that the defendant knew or reasonably should have known would cause others
5 to deprive the plaintiff of her constitutional rights.” *Id.* Put another way, the federal defendants did
6 not have the power to arrest Mocek, so they instead set in motion a chain of events designed to cause
7 that harm. See *Wright v. Georgia*, 373 U.S. 284, 291–92, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963) (a
8 person cannot be punished for failing to obey the command of a police officer if that command is itself
9 in violation of the Constitution); *United States v. Dickinson*, 465 F.2d 496, 510 (5th Cir. 1972) (court
10 order prohibiting two reporters from writing about any aspect of evidentiary hearing in open court).

11
12 The Ninth Circuit goes even further, holding in *Bergstralh v. Lowe*, 504 F.2d 1276, 1278 (9th
13 *Cir.1974)* that “all force reasonably necessary” can be used to resist unlawful arrest. (“Bergstralh was
14 entitled to use all force reasonably necessary to resist an unlawful arrest. Thus, in order to conclude
15 that Bergstralh was guilty of resisting arrest, the jury would have had to have concluded that his arrest
16 was legal.”) (citations omitted). In *United States v. Moore*, 483 F.2d 1361, 1364 (9th Cir.1973), the
17 Ninth Circuit assumed that the right remained valid and was available as a defense to a prosecution
18 under 18 U.S.C. § 111. Again, Plaintiff’s complaint alleges that he created no disturbance of any kind.

19
20 *Hodge v. Lynd*, 88 F. Supp. 1232, 1234 (D. N.M. 2000) is the Tenth Circuit case on
21 “unconstitutional orders” by a police officer. *Hodge* came to the same conclusion as in *Wright* and the
22 aforementioned 5th and 9th Circuit cases - “if (the police officer’s) order excluding plaintiff from the
23 fairgrounds was unconstitutional (for wearing his cap backwards in violation of the fairground dress
24 code), (Plaintiff) could not validly be arrested for non-violently disobeying that order”. The complaint
25 alleges more than sufficient facts to comply with the standards for this cause of action for each of the
26 three federal defendants. (See Complaint, paragraphs 20-22, 46-49).

1 If there is any conceivable question about whether that standard is met because the complaint is
2 not always certain what each of the federal defendants said or did (i.e., paragraph 49), in those
3 instances that information is held by the federal defendants themselves. In *Mendocino Environmental*
4 *Center v. Mendocino County*, 14 F.3d 457, 463-464 (9th Cir. 1994), the plaintiffs alleged that they were
5 falsely arrested by state defendant police officers for carrying bombs, based on inaccurate information
6 provided to them by federal defendant FBI officers:
7

8 The reference in...complaint to the FBI Agents' knowledge of the bomb's location, together
9 with representation that his information regarding the bomb came from FBI Agents, suffice to meet
10 our circuit's heightened pleading standard. It's true that the (state defendant police officer's) affidavit
11 attributes information to "F.B.I. Agents" without identifying them by name. But *which* Agents among
12 the four named as defendants told (state defendant police officer) "that the bomb device was on the
13 floor board behind the driver's seat" is a question only the FBI Agents can answer. See [Branch I, 937 F.2d at 1386-87](#) (rejecting D.C. Circuit's requirement that [§ 1983](#) or *Bivens* plaintiff meet heightened
14 pleading standard with *direct*, as opposed to circumstantial, evidence of defendant's intent because
15 such evidence "is largely within the control of the defendant and often can be obtained only through
16 discovery").

14 In this vein, *Northington v. Marin*, 102 F3d 1564 (10th Cir. 1996) is instructive. *Northington*
15 states that in cases of concurrent liability where tortious conduct of more than one person combine to
16 harm plaintiff, the burden shifts to defendant to prove to which the harms resulted from other
17 concurrent causes. In a case of alternate liability, all must be named as defendants to find out who is
18 culpable. The principal focus in an unlawful arrest case is on the objective reasonableness of the
19 officer's probable cause determination. See [Caballero v. City of Concord, 956 F.2d 204, 206 \(9th](#)
20 [Cir.1992\)](#) (" 'An officer's evil intentions will not make a Fourth Amendment violation out of an
21 objectively reasonable [arrest]; nor will an officer's good intentions make an objectively unreasonable
22 [arrest] constitutional.' ") (alterations in original) (quoting [Graham v. Connor, 490 U.S. 386, 397, 109](#)
23 [S.Ct. 1865, 1872, 104 L.Ed.2d 443 \(1989\)](#)). As with the *Mendocino* plaintiffs, the court must apply the
24 traditional 12(b)(6) standard to Mocek's Fourth Amendment claim alleging an unlawful arrest based on
25 an absence of probable cause.
26
27

28 Each federal defendant relied on by the stated defendants provided statements conveying that

1 there was probable cause for Mocek's arrest. These statements, by themselves, cannot provide the
2 "facts and circumstances" necessary to support a finding of probable cause. Whiteley v. Warden, 401
3 U.S. 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971) ("[A]n otherwise illegal arrest cannot be
4 insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the
5 arrest."). Probable cause exists only if the statements made by fellow officers are supported by actual
6 facts that satisfy the probable cause standard. In United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675,
7 83 L.Ed.2d 604 (1985) the court held that the lawfulness of a seizure made in reliance on the
8 statements of fellow officers turns on whether the officers who *issued* the [statements] possessed
9 probable cause to make the arrest.

11 *Mendocino, supra*, at 462-464, held that the federal defendants were liable for their participation in
12 the unlawful arrest and judicial deception created by providing false information to the state defendants
13 that conducted the initial arrest and subsequent searches pursuant to warrant. Another illustrative case
14 is *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989), the defendant police officer argued that he
15 should not be liable for his limited role in an illegal search. The defendant had gone to the door with
16 the officer who actually searched the premises, and stood at the door armed with a gun while the entry
17 took place. The court held that both officers had performed police functions that were integral to the
18 search and that the defendant was a full and active participant, not a mere bystander.

20 The federal defendants' reliance on *Tobey v. Napolitano*, 808 F. Supp. 2d 830, 850 (E.D. Va.
21 2011) is misplaced. The Plaintiff's Complaint is packed with facts suggesting that the federal
22 defendants made assertions and indicated to the police that Plaintiff should be arrested. Unlike the
23 *Tobey* plaintiff, Mocek does not concede that there was any basis to call the police whatsoever. The
24 federal defendants never refused permission for Mocek to board the airplane. They summoned the
25 police when Plaintiff began recording their conduct. Also, unlike *Tobey*, Plaintiff had not yet entered
26 the screening area, nor was he engaged in any disorderly conduct, nor had he entered the screening
27
28

1 area from the public area of the airport. Plaintiff had made certain that he was not in violation of any
2 law or regulation before he commenced recording.

3 The federal defendants also rely on *Green v. Nocciaro*, 676 F.3d 748, 751. (8th Cir. 2012). Unlike
4 the *Green* plaintiff, Plaintiff engaged in no disorderly conduct of any kind. Plaintiff never refused to
5 leave the airport; instead, he was arrested at the airport because the federal defendants summoned the
6 state police who told Plaintiff “comply with the feds’ orders or else”. This happened because the
7 federal defendants falsely told the police that Plaintiff was violating lawful orders and was engaging in
8 disorderly conduct. This situation is more analogous to *Beard v. City of Northglenn*, 24 F.3d 110
9 (10th Cir. 1994) (if claimant proves that officers deliberately submitted false information to obtain a
10 search warrant, there is no qualified immunity).

11
12 **VII. DEFENDANTS VIOLATED A CLEARLY ESTABLISHED RIGHT, AS THE FEDERAL**
13 **DEFENDANTS’ AGENCY’S POLICY WAS THAT RECORDING WAS PERMITTED**

14
15 As discussed in Parts I-III of this brief, the clear rights to engage in information gathering and to
16 resist unconstitutional orders were already established. There are no novel First or Fourth Amendment
17 issues in this case. At the time of the incident, the federal defendants’ policy and belief was clear:
18 recording was permitted. An order to cease doing so, coupled with summoning the police to enforce
19 the order, buttressed with false statements about his behavior - does not create “confusion” in the law.
20

21 The qualified immunity inquiry in unlawful arrest cases is an objective one, focusing on whether “a
22 reasonable officer could have believed that probable cause existed to arrest” the plaintiff. [Hunter v.](#)
23 [Bryant](#), 502 U.S. 224, ----, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991) (per curiam); [Fuller v. M.G.](#)
24 [Jewelry](#), 950 F.2d 1437, 1443 (9th Cir.1991) (“The doctrine of qualified immunity does not require
25 that probable cause to arrest exist.”). The defendant's knowledge is relevant, since the objective
26 analysis is focused on a reasonable officer confronted with the clearly established law and information
27 “readily available” to the officer. *Romero v. Fay*, 42 F.2d 1472, 1476-1477 (10th Cir. 1995), which
28

1 states that the probable cause standard of the Fourth Amendment requires officers to “reasonably
2 interview witnesses *readily available at the scene*, investigate basic evidence, or otherwise inquire if a
3 crime has been committed at all before invoking the power of warrantless arrest and detention.”

4 In this case, the Plaintiff never refused to leave the area, nor was he asked to leave the area. He
5 was asked to stop recording, and he did not stop. He was completely within his rights, as he was
6 violating no law or regulation. It was incompetent for the TSA officers to summon the police and
7 illegally demand that Plaintiff stop filming, which led to his arrest and prosecution. The complaints by
8 the federal defendants that Plaintiff had engaged in disorderly conduct were flat-out false, and form the
9 basis for liability to the extent that the state defendants relied on this information as the basis for arrest.
10

11 At a minimum, the federal defendants should have halted their complaints about recording,
12 completed their determination about whether to let him board the plane, and then have him either
13 allowed him to enter the screened area or asked him to leave the airport. Only if it was determined that
14 he was violating a regulation by recording or by refusing to comply with a requirement to leave the
15 airport was it appropriate to summon the police. Until then, they were asking the police to enforce an
16 unconstitutional demand, and made false statements to effectuate the arrest.
17

18 **VIII. DECLARATORY RELIEF**

19 The Supreme Court has made it clear that no “likelihood of recurrence” need be shown if the
20 injury suffered in the past has “continuing, present adverse effects”. *City of Los Angeles v. Lyons*, 461
21 U.S. 95, 102 (1983); *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974); *Rizzo v. Goode*, 423 U.S. 362, 372
22 (1976).
23

24 The classic constitutional injury with such continuing present effects is injury to one’s First
25 Amendment freedom of expression. Where a plaintiff’s right to free speech has been penalized or
26 infringed in the past, the chilling effect on free speech is deemed to be a sufficient continuing injury to
27 merit standing to enjoin the unconstitutional statute or policy. See *Secretary of State of Maryland v.*
28

1 *Joseph H. Munson Co.*, 467 U.S. 947, 956-957 (1984); *Dombrowski v. Pfister*, 380 U.S. 479, 491
2 (1965).

3 In *Meese v. Keene*, 481 U.S. 465 (1987), the Court described the “chill” required for standing as
4 “‘a claim of specific present objective harm or a threat of specific future harm.’...(T)he government
5 action need not have a direct effect on the exercise of First Amendment rights (but) it must have
6 caused or threaten to cause a direct injury to plaintiffs...The injury must be ‘distinct and palpable’”.
7
8 *Id.* at 472 (quoting *Laird v. Tatum*, 408 U.S. 1, 14 (1972), and *Allen v. Wright*, 468 U.S. 737, 751
9 (1984). The need to take affirmative steps to avoid harm to reputation itself constituted sufficient
10 injury for standing purposes. Thus, where police conduct violates, infringes or deters expressive
11 activity protected by the First Amendment, a “continuing, present adverse effect” is shown for
12 purposes of withstanding a challenge to standing. Plaintiff should not have to demonstrate a likelihood
13 that the unconstitutional conduct will recur so long as the chilling effect of the past violations is
14 justified by the realistic *possibility* that the violations will recur.
15

16 CONCLUSION

17 Plaintiff’s complaint states causes of action against these federal defendants under both the First
18 and Fourth Amendments. The rights violated were clear, and clearly established at the time. Their
19 conduct violated both, and they do not enjoy qualified immunity here. If the court has any concerns
20 about any defendant under either cause of action, Plaintiff respectfully requests the right to amend.
21

22 Dated: June 29, 2012

Respectfully submitted,

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24 _____/S/_____
25 WILLIAM M SIMPICH
26 Attorney for Plaintiff
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