No. 14-73502

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN BRENNAN,

Petitioner

v.

U.S. DEPARTMENT OF HOMELAND SECURITY and TRANSPORTATION SECURITY ADMINISTRATION,

Respondent

ON JUDICIAL REVIEW OF A FINAL ORDER
OF THE U.S. DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY ADMINISTRATION

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. SUPPLEMENTAL ARGUMENT IN REPLY

There has not been much by way of judicial illumination of exactly what, if anything, needs to be proved by way of scienter under 49 CFR §1540.109. The court in *Zoltanski v. FAA*, 372 F.3d 1195 (10th Cir., 2004), did, however, consider the question as it arose under the similarly worded 14 CFR §107.20, now recodified at 49 CFR §1540.107.[1] In that case, a fine had been administratively imposed on the petitioner for having entered a secure ("sterile") area of the Denver airport without first having submitted to the required screening procedures.

> "[O]n the face of the regulation and penalty provision, it appears that an airport patron could be fined even if she had no idea that she was violating airport security procedures, or even if a reasonable person in her circumstances would not have known that she was doing so. Nevertheless, *we assume without deciding that a person is subject to a fine for improperly entering a sterile area only if she did not reasonably believe that she had complied with required security screening*."

372 F.3d at 1199-1200 (emphasis added).

That same analysis should be applied in this case: petitioner herein may be subjected to a fine for interfering with screening personnel in the performance of their screening duties only if he did not reasonably believe that he had done something to interfere. Put another way, petitioner may not be subjected to a fine if

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[1] Compare 49 CFR §1540.107(a) ("No individual may enter a sterile area. . .") with 49 CFR §1540.109 ("No person may interfere with. . . screening personnel[.]"). The similarity of the language strongly suggests a similar meaning, especially given the fact that the two regulations were simultaneously repromulgated as part of the Civil Aviation Security Rules in 2002, following the creation of the Department of Homeland Security and the Transportation Security Administration. 67 FR 8353-4 (2/22/2002); *see Zoltanski*, *id*. at 1197.

a reasonable person in his circumstances would not have known that his conduct constituted "interference" with the screening process or if he reasonably believed he was not interfering.

While the court in *Zoltanski* did not elaborate on the basis of its assumption, it would appear to have had its roots in the Due Process clause of the Fifth Amendment.[2] It is axiomatic that, since the law is based on the assumption that because "man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), *quoting Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). From that basic proposition can be derived the conclusion of the court in *Zoltanski*: a fine may be imposed for violation of the regulation only if a reasonable person in petitioner's circumstances would have known that his conduct constituted "interference."

As was discussed in petitioner's opening Brief, a reasonable person would not have known that. Petitioner reasonably believed that the act of taking off his clothing as an incident of his political protest was protected activity under Article I, section 8, of the Oregon Constitution (*City of Portland v. Gatewood*, 76 Or. App. 74, 708 P2d 615 (1985), *rev denied*, 300 Or. 477 (1986)), and was not contrary to

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[2] Amendment Five, U. S. Constitution: "No person shall be. . . .deprived of life, liberty, or property, without due process of law[.]"

any local law. *Id*. ORS 163.465.[3] SER - 42 (Tr. 162); SER – 43 (Tr. 166-8). As the state trial court found, petitioner's belief was accurate. ER - 92-3.

In his act of protest, petitioner neither intended nor anticipated that he would have been interfering with anything. Other than, perhaps, his own offended sensibilities, there was no need for STSO David's unexpected decision to shut down all of the screening lines. ER - 67-8, 70, 75. Petitioner, for his part, did not think that his being naked would distract TSA screeners. ER - 95. Thus, it was not petitioner's actions but David's decision-making that caused whatever interference there was, and David's response could hardly have been expected by any reasonable person.

Even petitioner's refusal to put his clothing back on cannot be said to have interfered with anything: it was not necessary for him to have done so to complete the screening process, which, at that point, was wanting merely a final screening of his property (ER - 53, 62), since he, obviously, had nothing worrisome on his person. ER - 58, 61, 66. He did nothing to impede that process. ER - 54, 63-4, 66.[4] Any actual interference with the screening duties of the TSOs who were screening petitioner himself was occasioned not by petitioner's actions but by the intervention of the Port of Portland police officers who were dispatched to the

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[3]No Federal law prohibiting public nudity, in or outside of airports, has been cited. Nudity certainly does not appear to be conduct specifically prohibited or even mentioned in 49 CFR Part 1540.

[4] As noted by Judge Noonan, dissenting in *United States v. Willfong*, 274 F.3d 1297 (9th Cir. 2001), to equate "to interfere" with "to fail to obey an officer" was contrary to the plain meaning of "interfere." *Id*., at 1304-5.

location of Petitioner's resolution search at the behest of TSA officers, and, who, upon arrival, took possession of Petitioner's clothing and other property from the TSA screeners, stopping the process cold. ER - 57, 61, 64-5.[5] In any event, those TSOs were already engaged in the process of screening petitioner – which is what they were assigned to do – and requiring them to their do their jobs cannot be considered to be interference. *See United States v. Walli, et al.*, Nos. 14-5220/5221/5222, slip at 6-7, 2015 U.S. App. LEXIS 7620, at 14-16, 2015 FED App. 0086P (6th Cir. 2015).

Putting all that together, it is doubtful that what petitioner did was "interference." It is undoubted that petitioner neither intended nor knew that his act of protest – lawful under state law – would interfere with TSA screening duties or might otherwise be unlawful (ER – 89-92), and, in the circumstances, neither would any reasonable person.

II. CONCLUSION

For all of the above reasons, as well as for the reasons set forth in petitioner's opening Brief, the Agency's Final Order should be reversed.

Dated 15 June, 2015

/s/ Michael E. Rose, OSB #753221
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[5]The mere calling of the Port Police may have suspended the screening process, and his putting his clothes back on would, insofar as the process was concerned, have had no effect at all. *See* Petitioner's Brief at 6, n 2.

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Date: 15 June, 2015

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15 June, 2015, I electronically filed the foregoing Plaintiff-Appellant's Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and to be served upon the following counsel through the CM/ECF system:

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