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

Respondents.

ON PETITION FOR REVIEW OF THE FINAL ORDER OF THE TRANSPORTATION SECURITY ADMINISTRATION IN NO. 12-TSA-0092

BRIEF FOR THE RESPONDENTS

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JURISDICTIONAL STATEMENT

Brennan petitions for review of a final order of the Transportation Security Administration (TSA) imposing a civil penalty against him for interfering with TSA screening officers in the performance of their screening duties. TSA issued its final order on September 18, 2014. Brennan petitioned for review on November 13, 2014. This Court has jurisdiction under 49 U.S.C. § 46110.

STATEMENT OF ISSUES

TSA fined Brennan $500 after he stripped naked while undergoing security screening at a TSA checkpoint and refused to comply with repeated requests to get dressed. The questions presented are:

1. Whether substantial evidence supported the agency's conclusion that Brennan interfered with TSA screening officers.
2. Whether TSA's prohibition of interference with screening officers in the performance of their screening duties is unconstitutionally vague.
3. Whether TSA's imposition of a fine on Brennan for interference with TSA screening officers violated the First Amendment.

STATEMENT OF THE CASE

After triggering an alarm while undergoing security screening at a TSA checkpoint in a Portland airport, petitioner John Brennan removed all of his clothing and refused to comply with repeated requests by TSA officers to get dressed. His actions prevented the TSA officers who were screening him from completing their

required screening procedures; distracted those officers and others from their screening duties; created a potential security vulnerability; and required temporary closure of the checkpoint. TSA subsequently fined Brennan under a regulation that prohibits passengers from "interfer[ing] with" TSA screening personnel in the performance of their screening duties. *See* 49 C.F.R. § 1540.109.

Brennan contested the fine in an administrative proceeding, *see* 49 C.F.R. § 1503.427, arguing that the TSA regulation was unconstitutionally vague and overbroad; that he did not in fact interfere with TSA screening personnel; and that the fine violated the First and Fourth Amendments. After a hearing, an ALJ rejected Brennan's arguments and imposed a $500 fine. Brennan appealed, *see* 49 C.F.R. § 1503.657, and the TSA final decision maker upheld the ALJ's initial decision in all respects. Brennan now petitions this Court for review of TSA's final decision.

STATEMENT OF FACTS

I. Statutory and Regulatory Scheme.

Federal law requires "the screening of all passengers and property" to ensure that "a dangerous weapon, explosive, or other destructive substance" is not unlawfully carried onto an aircraft. 49 U.S.C. §§ 44901(a), 44902(a). Congress has charged the TSA with enforcing this law and with overall responsibility for aviation security. 49 U.S.C. § 114(d). As relevant here, the Administrator is authorized to "prescribe regulations to protect passengers and property on an aircraft . . . against an act of criminal violence or aircraft piracy." 49 U.S.C. § 44903(b).

TSA regulations provide that "[n]o individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property." 49 C.F.R. § 1540.107. All airline passengers, their accessible property, and their checked baggage must be screened for prohibited items, including weapons, explosives, and incendiaries. *See id.* §§ 1544.201(a)-(b), 1544.203(c).

The TSA screening process may involve the use of "advanced imaging technology" (AIT) machines. *See* Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,289 (Mar. 26, 2013) (notice of proposed rulemaking). Current AIT machines scan passengers with millimeter-length radio waves in order to detect both metallic and nonmetallic prohibited items. *Id.* at 18,290 n.9; ER–5. Passengers who do not wish to be scanned using AIT may instead choose to be screened by means of a manual pat-down. *See* 78 Fed. Reg. at 18,296; ER–5. TSA screening procedures prohibit TSA officers from conducting a pat-down on bare skin. *See* ER–38 ("It is TSA's policy not to touch bare skin during . . . a pat-down"); ER–7 ("It is TSA policy not to touch passengers' bare skin, but only to pat them down through clothing.").[1]

[1] The policy documents that set out TSA screening procedures are Sensitive Security Information (SSI) that cannot be publicly disclosed. 49 C.F.R. § 1520.5(b)(9)(i) (designating as SSI "[a]ny procedures . . . instructions, and implementing guidance" for screening persons and accessible property); *id.* § 1520.9 (prohibiting the public disclosure of SSI). TSA therefore relies on the administrative decisions to establish the screening procedures relevant to this case, which Brennan does not dispute.

The TSA screening process may also involve the use of "explosive trace detection" (ETD) machines, which detect elements that may indicate the presence of an explosive. *See* 78 Fed. Reg. at 18,301; ER–6. If a passenger alarms an ETD machine, TSA procedures require a secondary screening process that includes a manual pat-down of the passenger and manual screening of his accessible property. *See* ER–7. The secondary screening procedures to resolve an ETD machine alarm also require that the gloves used for the post-alarm pat-down be subjected to another ETD test to ensure that the passenger's clothing does not bear elements that may indicate an explosive. *See* SER–26.

To ensure that TSA screeners can perform their duties without disruption, a TSA regulation provides that "[n]o person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter." 49 C.F.R. § 1540.109. The rule is intended to "protect[] screeners from undue distractions or attempts to intimidate." Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002). As the preamble to the rule explains:

> A screener encountering such a situation must turn away from his or her normal duties to deal with the disruptive individual, which may affect the screening of other individuals. The disruptive individual may be attempting to discourage the screener from being as thorough as required. The screener may also need to summon a checkpoint screening supervisor and law enforcement officer, taking them away from other duties. . . .
>
> This rule does not prevent good-faith questions from individuals seeking to understand the screening of their persons or their property. But

> abusive, distracting behavior, and attempts to prevent screeners from performing required screening, are subject to civil penalties . . . .

Id.

TSA investigates possible violations of the regulation, *see* 49 C.F.R. §§ 1503.1, 1503.3, and if it concludes that a violation occurred, sends the alleged violator a notice of a proposed civil penalty, *see id.* § 1503.413(a); *see also* 49 U.S.C. § 46301(a)(4) (authorizing civil penalties up to $10,000). The alleged violator may challenge the proposed penalty by requesting a formal hearing before an ALJ, who issues an initial decision. *See* 49 C.F.R. §§ 1503.427(a), 1503.655(a). The ALJ's decision may be appealed to the TSA decision maker. *Id.* § 1503.657. TSA's final decision is subject to review in the court of appeals under 49 U.S.C. § 46110.

II. Factual And Procedural Background.

A. In April 2012, John Brennan arrived at the Portland International Airport to take a flight. ER–5. He presented himself for screening at the TSA checkpoint at about 5:30 p.m. *Id.* The checkpoint had eight lanes and employed AIT scanners as the primary method of screening passengers. *Id.*

Brennan opted out of the AIT scan in favor of a manual pat-down. ER–5. He was referred to Transportation Security Officer (TSO) Steven Van Gordon, who explained the pat-down procedure to Brennan and offered him the option to undergo the pat-down in a private location. ER–6. Brennan declined the offer of privacy. *Id.* As Van Gordon conducted the pat-down, Brennan began to narrate each step of the

procedure. For example, Brennan announced "he's now touching my collar. He's now touching my right arm. He's now touching my left arm." SER–7. Brennan testified that he does this every time he receives a pat-down because it provides him "a degree of comfort." ER–6 (quotation marks omitted). Van Gordon found the narration unusual, but continued to perform the pat-down in accordance with TSA procedures.

After completing the pat-down, Van Gordon conducted an ETD screening on the gloves he wore while performing the pat-down. This screening resulted in an alarm. Accordingly, pursuant to TSA screening procedures, Van Gordon called for his supervisor, Jerry Nichols. Nichols told Brennan that the gloves had triggered an alarm indicating the presence of nitrates and that he would need to be screened again to ensure that he was not in possession of explosives. ER–6.

Rather than cooperate with Nichols's request to undergo a secondary explosives screening, Brennan stated "I guess I have to show you I'm not hiding anything." ER–6. He then proceeded to remove all of his clothing, including his underwear, and to drop his clothing on the floor. *Id.* Brennan testified that he removed his clothing to show that he "wasn't carrying explosives." SER–42. Although he at times asserted during the later ALJ hearing that his nudity was both an attempt to speed his screening along *and* a form of protest, *see* SER–43, he reiterated that his main purpose in removing his clothes was to "get[] my screening over with" by showing that he had nothing to hide. SER–42.

TSA personnel directed Brennan to put his clothes back on at least three times, but Brennan refused. SER–43. He told them that he was not required to put his clothes on because nudity was not illegal under Oregon law. ER–7. Confronted with a naked man who refused to get dressed, Nichols called for the primary supervisor on duty that day, Jonathan David. David, in turn, called airport police and notified his own TSA supervisors of a "possible security violation." SER–24.

In light of Brennan's refusal to put his clothes on, David closed the TSA checkpoint. ER–7. As he later explained, he closed the checkpoint because "if everyone is looking at the man with no clothes," then security might be compromised "and someone may try to slip through or introduce a prohibited item into the secure area." SER–24. He therefore "stop[ped] the screening process" in order to "control the access into the sterile area." SER–24-25.

David also directed TSA officers to cease their screening duties and stack luggage bins to block Brennan from public view. SER–25. The public could see Brennan "clearly," and many passengers had stopped to "see what was going on" and to take pictures. SER–9-11. David wanted to hide Brennan's nudity from any children present. SER–25. And indeed, numerous children were in fact on hand during the incident. SER–19-20.

When the police arrived, they twice asked Brennan to get dressed. SER–44. Brennan again refused. ER–7. The police then arrested Brennan and removed him from the screening checkpoint. *Id.* The checkpoint reopened soon thereafter. SER–

25. In all, about 50 passengers were delayed due to the closure. *Id.* More than 20 TSA officers were involved in responding to the incident. *Id.* TSA was never able to conduct Brennan's required secondary screening. ER–8.

B. TSA subsequently sent Brennan a notice of proposed civil penalty for interfering with screening personnel in the performance of their screening duties. Brennan requested a hearing and contested the penalty. He asserted that the TSA regulation is unconstitutionally vague and overbroad; that he did not in fact interfere with the screening process; and that his conduct was protected by the First and Fourth Amendments.

After conducting a hearing at which Brennan and the TSA officers involved in the incident testified, the ALJ issued an Initial Decision rejecting Brennan's claims and upholding the penalty. The ALJ recognized that Brennan's constitutional claims were "beyond the scope of an administrative law hearing." ER–9; *see also* 49 C.F.R. § 1503.607(b) (an ALJ may not "[d]ecide issues involving the validity of a TSA regulation, order, or other requirement under the U.S. Constitution"). The ALJ nevertheless considered Brennan's constitutional vagueness and overbroadness claims to the extent necessary to conclude that Brennan's actions "in stripping and dropping his clothes on the floor and refusing to comply with TSO Nichols and TSO Van Gordon's directions" qualified as "interference" under the TSA regulation. ER–17. The ALJ also considered Brennan's First Amendment claim in order to "create an adequate record for review and give any reviewing court the benefit of the agency's

reasoning." ER–10. The ALJ concluded that Brennan's interference with the screening process was "not protected speech," and that any interest he had in protesting TSA's screening procedures was outweighed by the government's interest in "ensuring . . . smooth and efficient functioning of the screening process, which is designed to prevent weapons or explosives that could result in harm to the passengers and aircraft from entering the sterile area." ER–24.

Brennan appealed the ALJ's initial decision. In a Final Decision and Order, the Deputy Administrator of TSA upheld the ALJ's decision on all counts. ER–43. The Deputy Administrator concluded that Brennan's actions "interfered with the screening process" by preventing TSA officers from conducting a secondary screening of Brennan and by preventing TSA from screening other passengers at the checkpoint. ER–41-43.

SUMMARY OF ARGUMENT

I. Substantial evidence supports the agency's determination that Brennan interfered with TSA screeners in the performance of their screening duties when he removed all of his clothing during a security screening and refused repeated requests to get dressed. This Court has defined "interfere" to mean "hinder" or "prevent." Brennan's actions plainly "prevented" TSA officers Van Gordon and Nichols from conducting the secondary pat-down screening required by TSA security procedures. Brennan's actions also "hindered" other TSA officers and supervisors in a number of respects. His prolonged nudity necessitated closure of the entire checkpoint to ensure

that TSA officers were not distracted as they screened other passengers and to prevent anyone from attempting to exploit the disruption by passing through the checkpoint with a prohibited item. Brennan's nudity also prompted TSA officers and supervisors to suspend their screening duties to shield Brennan's exposed genitals from the view of bystanders, including children. A distraction of this type at a TSA screening checkpoint is squarely prohibited by the plain terms of the TSA regulation. Neither the fact that nudity is legal under Oregon state law in certain contexts, nor the fact that Brennan's act of stripping may have revealed that he was not carrying a bomb on his body, diminishes the magnitude of Brennan's interference with the TSA screening.

II. TSA's prohibition of "interfere[nce] with" screeners in the performance of their duties is not unconstitutionally vague. This Court has concluded that the term to "interfere" is "unambiguous," *see United States v. Bucher*, 375 F.3d 929, 932 (9th Cir. 2004), and has a "clear, specific and well-known meaning," *United States v. Gwyther*, 431 F.2d 1142, 1144 n.2 (9th Cir. 1970). Every court to address a vagueness challenge to a prohibition of "interference"—including this Court and the Supreme Court—has rejected the challenge. Indeed, the Sixth Circuit has rejected a vagueness challenge to the very TSA regulation Brennan challenges in this petition. *See Rendon v. TSA*, 424 F.3d 475, 480 (6th Cir. 2005). This Court should do the same.

III. TSA's imposition of a civil fine on Brennan for his disruptive conduct does not violate the First Amendment.

Brennan's act of removing his clothing was not constitutionally protected expressive conduct. The First Amendment protects only conduct that is intended to convey a particularized message and that is likely to be understood as communicating that message. *See Spence v. Washington*, 418 U.S. 405, 410 (1974) (per curiam). Here, the record reveals that Brennan did not intend to convey a protest message by stripping naked. Rather, as Brennan testified, he "was interested in getting to the gate and getting back to work," and he removed his clothes in an attempt to show "that [he] wasn't carrying explosives." SER–42. Moreover, even if the Court credits Brennan's post hoc explanation of his conduct—that he did not merely wish to show that he was not hiding prohibited items and actually intended to express some message of protest—his act of removing his clothing was unlikely to be understood as expressing that message. Rather, observers were likely to take Brennan at his word that he wished to speed along the screening process by showing that he had nothing to hide, or to conclude that Brennan's conduct was nothing more than "bizarre behavior." *See Spence*, 418 U.S. at 410.

Moreover, even assuming that Brennan's conduct was somehow expressive, TSA's incidental restriction of that conduct was reasonable under the circumstances and therefore satisfies constitutional scrutiny. Airport terminals are nonpublic forums in which the regulation of expression is permissible if it is viewpoint neutral and reasonable. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992). Here, TSA's regulation is concededly viewpoint neutral, and the application of

this regulation to Brennan's conduct was eminently reasonable. The government has an overwhelming interest in safeguarding commercial air travel. Prohibiting passengers from interfering with the TSA officers tasked with screening functions is reasonable, as is imposing a $500 fine on a passenger who interferes with the screening process by stripping naked and refusing to get dressed.

STANDARD OF REVIEW

This Court reviews TSA's factual findings for substantial evidence and TSA's resolution of legal questions de novo. 49 U.S.C. § 46110(c); *MacLean v. DHS*, 543 F.3d 1145, 1149 (9th Cir. 2008) (per curiam). This Court reviews de novo whether a regulation is unconstitutionally vague, *United States v. Ninety-Five Firearms*, 28 F.3d 940, 941 (9th Cir. 1994), and whether a regulation violates the First Amendment, *Roulette v. City of Seattle*, 97 F.3d 300, 302 (9th Cir. 1996).

ARGUMENT

I. Brennan's Act Of Stripping Naked While Undergoing A Security Screening At A TSA Checkpoint And Refusing To Comply With TSA Orders Plainly Interfered With Screening Personnel.

Brennan asserts that TSA lacked sufficient evidence to conclude that his actions interfered with TSA screeners in the performance of their screening duties. Brennan is wrong. Substantial evidence supports the conclusion that he interfered with TSA screening personnel by stripping naked while undergoing a security screening and repeatedly refusing to comply with orders to get dressed.

A. To determine whether Brennan's conduct qualified as "interference," this Court begins with the term's "ordinary, contemporary, common meaning." *United States v. Kilbride*, 584 F.3d 1240, 1257 (9th Cir. 2009) (quotation marks omitted); *see also Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). This Court has defined to "interfere" as to "oppose, intervene, hinder, or prevent." *United States v. Willfong*, 274 F.3d 1297, 1301 (9th Cir. 2001) (quoting *Webster's New World Dictionary* 704 (3d coll. ed. 1998)). Similarly, the term "interference" means "[a]n obstruction or hindrance." *United States v. Bucher*, 375 F.3d 929, 932 (9th Cir. 2004) (quoting *Black's Law Dictionary* 818 (7th ed. 1999)). Interpreting the same regulation at issue here, the Sixth Circuit concluded that the prohibition of interference with TSA personnel barred "conduct which poses an actual hindrance to the accomplishment of a specified task." *Rendon v. TSA*, 424 F.3d 475, 480 (6th Cir. 2005) (quotation marks omitted).

This Court has specifically held that "the failure to obey a [government] officer's order" qualifies as "interference," inasmuch as refusing to obey the order "clearly hinder[s] [the officer's] ability to perform his official duty." *Willfong*, 274 F.3d at 1301. *Willfong* involved a logger who was convicted of "interfering with" a forestry official after refusing to follow the official's order to stop logging. This Court rejected the logger's argument that his mere passive refusal to obey an official order could not constitute interference under the regulation. The Court reasoned that it was "self-evident" that the logger interfered with the officer "in refusing to stop what he and his crew were doing." *Id.* at 1301-02.

In addition to construing the plain meaning of the term "to interfere," this Court also interprets the term in light of the purpose of the regulation in which it appears. *See United States v. Thompson*, 728 F.3d 1011, 1015 (9th Cir. 2013) (in construing a term, the purpose of the enactment "guides our analysis"); *see also Bucher*, 375 F.3d at 932 (evaluating whether a hiker "interfered with" a park ranger by construing the goal of the regulation at issue, which was "to protect and enable government functions and to protect the employees who perform them"). Here, the preamble to the TSA regulation emphasizes that the regulation is intended to "protect[] screeners from undue distractions." Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002). The preamble explains how a screener faced with such a distraction may be forced to "turn away from his or her normal duties to deal with the disruptive individual," who "may be attempting to discourage the screener from being as thorough as required." *Id.* Further, the screener may "need to summon a checkpoint screening supervisor and law enforcement officer, taking them away from other duties." *Id.* Because "[c]heckpoint disruptions potentially can be dangerous in these situations," *id.*, the regulation advances TSA's goal of preventing distractions that undermine the safety of commercial air travel. *See generally Hearing Before the Subcomm. on Transp. Sec. & Infrastructure Prot. of the H. Comm. on Homeland Sec.*, 111th Cong. 59 (2009) (response of TSA Acting Administrator) (explaining that fully "attentive" and "[e]ngaged TSOs present a far more formidable opponent to those with harmful intent than technology and process can offer alone").

B. Brennan's act of removing his clothing while undergoing security screening at a TSA checkpoint and refusing to comply with orders to get dressed plainly interfered with TSA officers' ability to carry out their screening duties.

By removing all of his clothes and dropping them to the floor, Brennan made it impossible for TSA screeners to conduct the secondary screening process required to resolve an ETD alarm. This process involves a pat-down that may not be conducted on bare skin. *See* ER–38 ("It is TSA's policy not to touch bare skin during either a pat-down or EDT screening."); ER–7. Given this rule, TSA officers had no way of completing the required secondary pat-down screening. Brennan's refusal to get dressed also left the TSA officers unable to appropriately screen his clothing as part of the pat-down. Indeed, no such screening was ever conducted. *See* ER–8.

Brennan's actions also required TSA officers and supervisors to divert their attention from their screening duties to respond to the spectacle of a naked man in the middle of the checkpoint. As the ALJ explained, Brennan's actions created a "distraction" that required TSA officers "to shut down the checkpoint and divert other [officers] to this incident." ER–17. Brennan protracted this distraction by repeatedly refusing to comply with requests that he get dressed—requests first given by TSA officers and then by airport police. ER–7. During the disruption, TSA officers were prevented from screening other passengers and were less attuned to potential threats at the checkpoint. As TSA supervisor David explained, Brennan's actions were potentially dangerous because "if everyone is looking at the man with no

clothes," then "someone may try to slip through or introduce a prohibited item into the secure area" beyond the checkpoint. SER–24.

Accordingly, Brennan's conduct prevented TSA screeners from screening Brennan himself, and hindered TSA officers from performing their difficult and critically important duty of ensuring that no person passes through a TSA checkpoint without a thorough screening. His actions therefore qualified as "interference" pursuant to the plain meaning of the term. *See Willfong*, 274 F.3d at 1301 (defining to "interfere" as to "hinder" or "prevent"). Moreover, Brennan caused the precise problems the TSA regulation is targeted to deter—"distractions" which compel a screener to "turn away from his or her normal duties" and "summon a checkpoint screening supervisor and law enforcement officer." *See* 67 Fed. Reg. at 8344. Substantial evidence supports the agency's conclusion that Brennan's activities interfered with TSA screeners in the performance of their duties.

C. Brennan's various arguments to the contrary lack merit.

Brennan first contends that the interpretive canon of *noscitur a sociis* compels a narrow interpretation of the term "to interfere." Brennan Br. 15. According to Brennan, because the TSA regulation's prohibition of "interfere[nce]" appears in a list of terms that includes to "'assault, threaten, or intimidate,'" the prohibition of interference should be similarly construed to require either physical contact or "willful aggressiveness." *Id.* And because Brennan only passively resisted orders and was

assertedly "polite and courteous throughout," Brennan Br. 7, he claims that his conduct does not qualify as interference under that narrow definition.

This Court, however, has already rejected the very limitation that Brennan now asks it to impose. In *Willfong*, the Court explained that "force or threatened force is not an essential ingredient of interference." 274 F.3d at 1302. The regulation at issue in *Willfong*, like the regulation here, prohibited "[t]hreatening," "resisting," and "intimidating," in addition to "interfering with" an officer. *Id.* at 1299 (quoting 36 C.F.R. § 261.3(a)). But the Court concluded that the defendant's passive refusal to follow the officer's order to cease logging "self-evident[ly]" constituted interference. *Id.* at 1301-02. This was true even though, as the dissent pointed out, the defendant was "compliant throughout" and behaved like "a perfect gentleman." *Id.* at 1305 (Noonan, J., dissenting).

Similarly, in *Bucher*, 375 F.3d at 932, this Court rejected a statutory-construction argument nearly identical to the one Brennan advances here. The regulation at issue in *Bucher* prohibited "[t]hreatening, resisting, intimidating, or intentionally interfering with a government employee." *Id.* (emphasis omitted) (quoting 36 C.F.R. § 2.32(a)(1)). Much like Brennan, the appellant in *Bucher* argued that the canon of *noscitur a sociis* necessitated a limiting construction of the term "interference." But the Court disagreed, explaining that the canon "do[es] not apply since 'interfering' is unambiguous, and because 'threatening, resisting intimidating, or intentionally

interfering' are stated disjunctively so that proof of any one of the acts alone constitutes an offense." *Id.* at 933.

The same reasoning applies here. Just as the logger in *Willfong* interfered with the forestry officer by refusing to cease logging, Brennan interfered with the TSA screeners by removing his clothes and refusing to comply with requests to put them back on. And, as the *Bucher* court made clear, nothing about the canon of *noscitur a sociis* dictates to the contrary.

Brennan next implies that his nudity cannot have interfered with TSA screeners because public nudity is legal in Oregon in certain contexts. Brennan Br. 22. He accordingly argues that there "was no particular need for anyone other than the screener who was already engaged with Brennan to be in any way distracted or disrupted" by his nudity. Brennan Br. 18. But prolonged public nudity undeniably may cause a distraction regardless of whether it is prohibited under state law. *See Rendon*, 424 F.3d at 480 (actions not subject to criminal sanctions nevertheless may cause a disruption). Brennan removed all of his clothing in a public location in the Portland Airport. Passersby stopped, stared, and took pictures of Brennan as he stood naked in full view of the traveling public. TSA supervisors reasonably concluded that the presence of a naked man in a screening lane at a TSA checkpoint might distract from the screening of other passengers. They therefore closed the checkpoint until the distraction was over. This closure obviously prevented TSA officers from performing their screening duties. Brennan's conduct thus interfered

with TSA officers and supervisors—regardless of Oregon law's treatment of public nudity.

Furthermore, the record refutes Brennan's suggestion that TSA officers were motivated by their own "tender sensibilities" or their disapproval of his nudity. Brennan Br. 20. Rather, TSA officers acted to eliminate the distraction caused by Brennan's conduct. *See* SER–24 (explaining that the "primary concern" was ending the distraction to ensure effective screening of all passengers). To the extent that TSA officers also sought to shield Brennan's nudity from the public, they were motivated by reasonable concerns that his genitals were exposed to children. *See* SER–19-20. As the Supreme Court has recognized, the government has a legitimate interest in shielding children from nudity. *See, e.g., FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012) (Roberts, C.J., concurring in the denial of cert.) (recognizing that the FCC's "policy against broadcasting . . . nudity . . . during the hours when children are most likely to watch television" protects "impressionable children").

Brennan finally asserts that removing his clothes cannot have interfered with the TSA screening because "it entirely obviated the need" for any further search. Brennan Br. 17. But, after a passenger triggers an ETD machine alarm, TSA procedures both require a manual pat-down and also prohibit screeners from patting down bare skin. *See* ER–7; SER–9; SER–20; SER–26. Accordingly, the TSA screeners confronted with Brennan's nudity had no way to comply with their duty to complete a secondary screening. And while Brennan may believe that a visual

inspection of his naked body may substitute for a manual pat-down, TSA has sound reasons, grounded in its expertise, to require a pat-down following an EDT machine alarm. For example, some areas of a passenger's body are not easily viewed when the passenger is standing—even without clothes on—and attempting to screen discarded garments in a pile on the floor can be less effective than patting them against the passenger's body. TSA's judgments about the procedures best adapted to detect threats to the traveling public are entitled to deference. *See Ruskai v. Pistole*, 775 F.3d 61, 77 (1st Cir. 2014) (describing the deference owed to "TSA's expertise regarding the nature of evolving threats" to air travel). Individual passengers may not flout those procedures because they believe they have found a preferable alternative.[2]

II. TSA's Prohibition Of Interference With TSA Screeners Is Not Unconstitutionally Vague.

Brennan's argument that the TSA regulation is unconstitutionally vague lacks merit. As a matter of due process, an enactment is void for vagueness only if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," *United States v. Harriss*, 347 U.S. 612, 617 (1954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. City of*

[2] Brennan also suggests that the doctrine of constitutional avoidance requires narrowly construing the term "to interfere" in order to avoid a construction of the term that would violate the First Amendment. *See* Brennan Br. 27. But because the regulation plainly complies with the First Amendment, *see infra* pp. 27-33, the constitutional avoidance doctrine does not apply.

Jacksonville, 405 U.S. 156, 162 (1972). *See generally U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 578 (1973).

In resolving vagueness challenges, the Supreme Court has "expressed greater tolerance for enactments"—like the regulation at issue in this case—that impose civil rather than criminal penalties. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *see also United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989) ("A statute providing for civil sanctions is reviewed for vagueness with somewhat 'greater tolerance' than one involving criminal penalties."). Assuming the enactment does not impinge constitutionally protected conduct, a complainant challenging a civil enactment must demonstrate that the enactment is "impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 494-95.

Brennan contends that the TSA regulation's prohibition of "interfere[nce] with" TSA screeners is unconstitutionally vague because it "is less than clear." Brennan Br. 11. But Brennan himself concedes that "it cannot be said that [the regulation] is vague in all of its possible applications." Brennan Br. 9 n.3. This concession is fatal to Brennan's vagueness claim.

In any event, decisions of this Court and the Supreme Court foreclose Brennan's vagueness challenge. This Court has already determined that the term "to interfere" is not vague. Indeed, this Court has noted that the term "is *unambiguous*." *Bucher*, 375 F.3d at 932 (emphasis added). The Court has similarly concluded that "to interfere" "has such a *clear, specific and well-known meaning* as not to require more than

the use of the word[] [itself] in a criminal statute." *United States v. Gwyther*, 431 F.2d 1142, 1144 n.2 (9th Cir. 1970) (emphasis added). In light of the "unambiguous" and "clear" meaning of "interfere"—even in the context of a criminal statute—Brennan necessarily had fair notice that his contemplated conduct was forbidden.

The Supreme Court, this Court, and numerous other courts of appeals have all rejected vagueness challenges to laws prohibiting "interference" or similar terms. In *Cameron v. Johnson*, 390 U.S. 611 (1968), the Supreme Court rejected a claim that an anti-picketing law was unconstitutionally vague, explaining that the terms to "obstruct" and to "unreasonably interfere" "plainly require no guessing at their meaning." *Id.* at 616 (alterations and quotation marks omitted). Similarly, in *United States v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987), this Court rejected a vagueness challenge to a provision of the Fair Housing Act that prohibits injuring, intimidating, or "interfer[ing] with" a person because he is participating in certain housing programs. *Id.* at 1530. The Court easily concluded that the statute "g[a]ve fair notice to those who might violate it." *Id.* And the Sixth Circuit has rejected a vagueness challenge to the very TSA regulation at issue here, explaining that the meaning of "to interfere" was sufficiently specific and clear to survive vagueness review. *Rendon*, 424 F.3d at 480. Every other appellate court to confront a vagueness challenge to the term "to interfere" has ruled likewise. *See United States v. Balint*, 201 F.3d 928, 935 (7th Cir. 2000) ("The language [to interfere with] is not vague in the least."); *Terry v. Reno*, 101 F.3d 1412, 1421 (D.C. Cir. 1996) (rejecting vagueness challenge to statute

preventing "interference with" persons obtaining reproductive health services); *United States v. Dinwiddie*, 76 F.3d 913, 924 (8th Cir. 1996) (rejecting vagueness challenge because the meaning of the term to "interfere with" is "quite clear"); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 653 (4th Cir. 1995) (same).

Furthermore, Brennan's argument that the term "to interfere" is unconstitutionally vague could, if accepted by this Court, have significant consequences for the U.S. Criminal Code, which routinely uses the term "interfere" in prescribing criminal penalties.[3] This Court should decisively reject his vagueness arguments.

III. TSA's Prohibition Of Interference With TSA Screeners Does Not Violate The First Amendment.

A. Brennan's First Amendment challenge fails at the threshold because his act of disrobing at a TSA checkpoint was not protected expression. It is the burden "of the person desiring to engage in assertedly expressive conduct to demonstrate that the

[3] *See, e.g.*, 18 U.S.C. § 111(a)(1) (anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or *interferes with*" an officer of the U.S. shall be fined or imprisoned); *id.* § 245(b) (anyone who "willfully injures, intimidates or *interferes with*" a person attempting to engage in certain federally protected activities shall be fined or imprisoned); *id.* § 593 (any officer of the U.S. Armed Forces who "*interferes in any manner with* an election officer's discharge of his duties" shall be fined or imprisoned); *id.* 1992(a)(6) (whoever "*interferes with*, disables, or incapacitates any dispatcher, driver, captain, locomotive engineer, railroad conductor, or other person" shall be fined or imprisoned); 49 U.S.C. § 46503 (anyone who, by assaulting an airport security employee, "*interferes with* the performance of the duties of the employee or lessens the ability of the employee to perform those duties," shall be fined or imprisoned) (all emphases added).

First Amendment even applies." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). On its face, the TSA regulation targets disruptive conduct rather than speech. This Court has explained that such "generally applicable regulations of conduct implicate the First Amendment only if they (1) impose a disproportionate burden on those engaged in First Amendment activities; or (2) constitute governmental regulation of conduct with an expressive element." *Nunez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir. 1997); *O'Connor v. City & Cnty. of Denver*, 894 F.2d 1210, 1217 (10th Cir. 1990) (a regulation targeting "unlawful conduct having nothing to do with movies or other expressive conduct" does not implicate the First Amendment).

It is uncontested that TSA's regulation does not single out or disproportionately burden expressive conduct or any particular viewpoint. But Brennan alleges that the fine imposed pursuant to the regulation nevertheless implicates the First Amendment because his act of disrobing constituted conduct with an expressive element. *See* Brennan Br. 24-25. For conduct to qualify as expressive, it must satisfy two criteria: it must be "intended to be communicative," and it must "reasonably be understood by the viewer to be communicative" in light of the surrounding circumstances. *Clark*, 468 U.S. at 294 (citing *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam)); *see also Hilton v. Hallmark Cards*, 599 F.3d 894, 904 (9th Cir. 2009) (same). Applying this standard, the Supreme Court has "extended First

Amendment protection only to conduct that is inherently expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 66 (2006).

Spence, for example, involved a defendant prosecuted for publicly displaying an upside-down American flag on which he had fashioned a peace symbol. 418 U.S. at 406. The defendant intended the display as a protest against the American invasion of Cambodia and the killing of anti-war demonstrators at Kent State University during the Vietnam War. The Supreme Court held that this display constituted protected expressive conduct because the defendant both subjectively intended to convey an anti-war message and because this message was "likely to be understood" in context—whereas in a different context it "might be interpreted as nothing more than bizarre behavior." *Id.* at 410, 415.

By contrast, in *FAIR*, the Supreme Court held that a decision by certain law schools to exclude military recruiters from their campuses was not "inherently expressive" conduct protected by the First Amendment. 547 U.S. at 66. By excluding military recruiters, the law schools wished to convey their disapproval of the military's exclusion of homosexuals. But this message was not readily apparent: "An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* Rather, the law

schools' actions "were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.*

Like the law school recruitment policy at issue in *FAIR*, and unlike the American flag display in *Spence*, Brennan's act of disrobing does not qualify as expressive and is therefore not protected by the First Amendment. First, substantial evidence supports the conclusion that Brennan did not subjectively intend to "convey a particularized message." *See Spence*, 418 U.S. at 409-11. Instead, Brennan testified that he removed his clothes in an attempt to "get[] [his] screening over with" in the "quickest way" possible by showing "that [he] wasn't carrying explosives." SER–42. And at the time at the time he removed his clothing, he explained that he did so merely "to show you I'm not hiding anything." ER–6. Brennan's subsequent assertion that he removed his clothing as a form of protest thus appears to be a post-hoc rationalization of disruptive behavior. And even if Brennan was additionally motivated by some general intent to express himself, his desire to express "a lot of complex feelings that I've had for a long time," SER–42, was insufficiently "particularized" to constitute protected expression under *Spence*.[4]

[4] Brennan variously explained that he wished to express the "absurdity of the accusation"; his "non-bashfulness and [his] knowledge of Oregon law"; his "feel[ing] that the inflexibility in the system is difficult"; his "feel[ing] that the assumption of guilt until proven innocent by going through screening is inappropriate and a huge waste of my tax dollars"; and his feeling that his "right to privacy from TSOs and inappropriate search" was being offended. SER–42. Further belying the coherence

Finally, even if Brennan subjectively intended his conduct to convey a particularized message of protest, there was no "likelihood" that the message would be understood by those witnessing the conduct. *See Spence*, 418 U.S. at 409-10; *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Brennan is certainly correct that nudity can be expressive. But nudity alone is not expressive. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) (recognizing that the government may properly ban public nudity to "reflect moral disapproval of people appearing in the nude among strangers in public places"). As one district court noted in a comparable case, "nudity alone conveys no specific content to whatever message is communicated." *Craft v. Hodel*, 683 F. Supp. 289, 292 (D. Ma. 1988). "The medium of nudity is not a particular message, the medium is simply the medium." *Id.*

Brennan makes no showing—and fails even to argue—that observers were likely to understand his conduct as a protest, let alone as a protest with a particular message. Rather, as in *FAIR*, 547 U.S. at 66, observers had "no way of knowing" the basis for Brennan's actions: they may have credited his assertion that he removed his clothing in an attempt to show screeners that he had nothing to hide; or they may have believed Brennan was an exhibitionist; or they may have simply concluded that

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of his purported expression, Brennan now argues that he also intended to covey "irony" as a part of his message. *See* Brennan Br. 25-26.

Brennan's actions were "nothing more than bizarre behavior," *see Spence*, 418 U.S. at 410. Indeed, Brennan's lengthy description of why his public nudity qualifies as an act of expression, *see* Brennan Br. 20-28, only underscores that this conduct, standing alone, was unlikely to be so understood. *See FAIR*, 547 U.S. at 66 ("The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection.").

B. Even if this Court deems Brennan's conduct expressive, the First Amendment did not prohibit TSA from regulating it. The government may impose reasonable, viewpoint-neutral restrictions on expression in nonpublic forums. Prohibiting passengers from stripping naked and refusing to get dressed while undergoing security screening at TSA checkpoints is self-evidently reasonable.

As the Supreme Court has explained, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Instead, the First Amendment contemplates "a 'forum based' approach for assessing restrictions that the government seeks to place" on areas under its control. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Under this approach, government regulation of expression is scrutinized in light of the nature of the forum in which the regulation operates. Regulations of speech in traditional public forums

are subject to the "highest scrutiny." *Id.* By contrast, regulations of speech in nonpublic forums "must survive only a much more limited review." *Id.* at 679.

It is well settled that airport terminals are nonpublic forums. *See Krishna Consciousness*, 505 U.S. at 680; *Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A.*, 764 F.3d 1044 (9th Cir. 2014) (LAX airport terminal is not a public forum). Regulation of expression in such a nonpublic forum need only be "viewpoint neutral" and "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806. A restriction is "reasonable" where it is "consistent with the [government's] legitimate interest in preserving the property" for its specified use. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1983) (alterations and quotation marks omitted). The restriction need not be the *most* reasonable limitation; rather it "need only be *reasonable*." *Cornelius*, 473 U.S. at 808.

In *Krishna Consciousness*, 505 U.S. at 685, the Supreme Court upheld as reasonable a total ban on solicitation within an airport terminal. The Court recognized solicitation as "a form of speech protected under the First Amendment." *Id.* at 677. Indeed, the solicitation ban at issue in that case interfered with the plaintiffs' religious exercise by rendering unlawful their "ritual" of "going into public places, disseminating religious literature and soliciting funds to support the religion." *Id.* at 674-75 (quotation marks omitted). But the Court nevertheless concluded that this ban of protected expression satisfied the "requirement of reasonableness,"

because the government may reasonably impose a viewpoint-neutral ban of solicitation to forestall the "disruptive effect" of solicitations in airports. *Id.* at 683-84.

Given that the government may ban all solicitation in public airport terminals, there can be no doubt that the government may also prohibit passengers from interfering with TSA screenings. Brennan does not argue that the restriction was viewpoint discriminatory, *see* Brennan Br. 26 & n.11, nor could he. *See Oberwetter v. Hilliard*, 639 F.3d 545, 553 (D.C. Cir. 2011) (regulations prohibiting picketing and speechmaking at the Jefferson Memorial "plainly do not discriminate on the basis of viewpoint"). Moreover, the restriction on interfering with TSA screening officers is manifestly reasonable. "It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft" given the "potential damage and destruction from air terrorism." *United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005). Safeguarding the effectiveness of the TSA screening process is vital to that compelling government interest. Accordingly, the government may reasonably prohibit passengers from interfering with the screening process—even if the prohibition incidentally burdens some expressive conduct. *See O'Brien*, 391 U.S. at 376 (explaining that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

C. Brennan's reliance on the Fourth Circuit's decision in *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013), is unavailing. Brennan Br. 28. *Tobey* involved a passenger who removed his shirt and sweatpants (while still wearing running shorts and socks) at a TSA checkpoint to reveal the text of the Fourth Amendment written on his chest. Airport police arrested the passenger and detained him for an hour, after which he brought a *Bivens* suit alleging violations of his First Amendment rights. The Fourth Circuit concluded that the passenger alleged a plausible constitutional violation sufficient to survive a motion to dismiss. The court emphasized that it was required to "view the facts in the light most favorable to Mr. Tobey." *Id.* at 388. The court then noted that "[w]hether Mr. Tobey was in fact 'disruptive' is a disputed question" of fact, especially given that Tobey apparently "was never asked to put his clothes back on." *Id.*

Tobey can accordingly be distinguished from this case on numerous grounds. First, whereas the Fourth Circuit was bound to accept as true Tobey's allegation that he did not cause a disruption, Brennan petitions this Court after a full administrative process, in which TSA found that Brennan's actions were indeed disruptive and caused interference. ER –41-43. Because substantial evidence supports the agency's determination, this Court must uphold it. Second, whereas Tobey alleged that he was not asked to put his clothes back on, Brennan ignored no fewer than five requests to get dressed. *See* SER–44-45. Third, in this case, unlike in *Tobey*, Brennan's actions caused a closure of the entire TSA checkpoint and prevented TSA from performing a

necessary secondary screening procedure on Brennan himself. SER–24-26. Fourth, whereas Tobey kept his shorts and socks on, Brennan removed *all* of his clothing, exposing his genitals to the view of the traveling public, including children. SER–19-20. And finally, while Tobey had written the Fourth Amendment on his chest and assertedly "wished to express his view that TSA's enhanced screening procedures were unconstitutional," *Tobey*, 706 F.3d at 384, Brennan's nudity was not expressive and therefore did not implicate the First Amendment at all. In the government's view, *Tobey* was wrongly decided, but, in any event, the grounds upon which the Fourth Circuit ruled in Tobey's favor are absent here.

Brennan finally attempts to support his First Amendment argument with a conclusory assertion that the TSA regulation fails to advance a "substantial" government interest and "is greater than is necessary" to achieve any interest it does advance. Brennan Br. 27. *See O'Brien*, 391 U.S. at 376-77 (explaining that a regulation of expressive conduct satisfies the First Amendment if it is within the constitutional power of the government, furthers an "important or substantial" interest, is unrelated to the suppression of free expression, and is "no greater than is essential" to further that interest).

This argument fails for at least two reasons. For starters, Brennan relies on the wrong legal standard. Although *O'Brien* articulates the general framework for analyzing the constitutionality of laws regulating expressive conduct, *see OSU Student Alliance v. Ray*, 699 F.3d 1053, 1073-74 (9th Cir. 2012), it does not provide the proper

standard for evaluating the regulation of expression in nonpublic forums. That standard is supplied by *Perry* and its progeny, which require only that the regulation of expression in nonpublic forums be viewpoint neutral and reasonable. *See Perry*, 460 U.S. at 44, 50-51; *Cornelius*, 473 U.S. at 808; *Krishna Consciousness*, 505 U.S. at 683-84.

In any event, TSA's actions here would readily satisfy the *O'Brien* standard if it applied. As the Sixth Circuit has explained, the TSA regulation "serves a substantial government interest" because it seeks to "prevent individuals from interfering with screeners in the performance of their duties"—duties which include "ensur[ing] that those screened are not potentially carrying weapons" and "conduct[ing] the screening of passengers as efficiently as possible." *Rendon*, 424 F.3d at 479. The court further noted that the TSA regulation "directly and effectively advances" that interest by "ensuring that screeners are not interfered with in the performance of their screening duties." *Id.* And the court reasoned that "the regulation is narrowly tailored, as it does not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 479-80. The Sixth Circuit was correct, and nothing about Brennan's conclusory assertions suggests otherwise.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for TSA is not aware of any related cases in this Court.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,037 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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