

No. 08-1768 CV

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN TORRACO and WILLIAM WINSTANLEY,

Appellants

v.

PORT AUTHORITY OF NEW YORK & NEW JERSEY, *et al.*,

Appellees

[Additional Appellees identified on inside of front cover.]

Appeal from the U.S. District Court
for the Eastern District of New York
No. 05 Civ. 5572 (BMC)

REPLY BRIEF FOR APPELLANTS

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Additional Appellees:

PORT AUTHORITY OF NY & NJ BOARD OF COMMISSIONERS; KENNETH J. RINGLER, JR., Executive Director, Port Authority of NY & NJ; PORT AUTHORITY POLICE DEPARTMENT; SAMUEL J. PLUMERI, JR., Director of Public Safety/Superintendent of Police, Port Authority Police Department; CHRISTOPHER TRUCILLO, Chief, Port Authority Police Department; Port Authority Police SERGEANT GOLDBERG; Port Authority Police Officer ANTHONY ESPINAL (shield # 2134); Port Authority Police Officer PAULSEN (shield # 2306); Port Authority Police Officer, unknown at present (shield #1400); Port Authority Police LIEUTENANT, unknown at present (Lieutenant John Doe IV); Port Authority Police SERGEANT, unknown at present (Jane Doe I); Port Authority Police Officer, unknown at present (John Doe I); Port Authority Police Officer, unknown at present (John Doe II); and Port Authority Police Officer, unknown at present (John Doe III)

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ARGUMENT

I. THE FIREARM OWNERS PROTECTION ACT, 18 U.S.C. § 926A, CREATES A CAUSE OF ACTION UNDER 42 U.S.C. § 1983

The Port Authority argues that no cognizable action for damages exists under 42 U.S.C. § 1983 for a violation of the Firearms Owners' Protection Act ("FOPA"), 18 U.S.C. § 926A. Brief of Defendants-Appellees Port Authority *et al.* (hereafter "Br. PA"), 11. However, they fail to address the declaratory relief and injunction against interference with the right to transport firearms and to travel in compliance with § 926A and federal regulations, which Plaintiffs also sought. A-29.¹

The Port Authority cites cases holding that various preemptive federal statutes do not create an implied right of action. Br. PA 11-14. Yet § 926A, under which "any person" not prohibited by federal law "shall be entitled to transport a firearm" as specified, clearly meets the test in *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002): "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefitted.'" As the district court correctly decided, "the language of § 926A suggests that it is specifically directed at granting rights to beneficiaries, not merely prohibiting or limiting government action." A-53-54.

The Port Authority argues: "Plaintiffs do not address the legislative history of

¹The letter "A-" followed by a number refers to the Joint Appendix.

FOPA, rather they simply state with no supporting authority that Congress intended §926A to create a per se rule protecting travelers with guns.” Br. PA 16. To the contrary, Plaintiffs demonstrated the intent of Congress by reference to the statutory text (Br. for Appellants 17-23), structure (*id.* at 23-25), and Findings (*id.* at 26-28) to create a per se rule. “Since the existence of preemption turns on Congress's intent, we are to ‘begin as we do in any exercise of statutory construction[,] with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.’” *Air Transport Association of America, Inc. v. Cuomo*, 520 F.3d 218, 221 (2nd Cir. 2008) (citation omitted). The Port Authority fails to address the text, structure, or purpose of FOPA.

While the Port Authority cites no legislative history, Plaintiffs quoted the Senate Judiciary Committee Report: “This is intended to prevent local laws, which may ban or restrict firearm ownership, possession or transportation, from being used to harass interstate commerce and travelers.” Report 98-583, 98th Cong., 2d Sess., 27-28 (1984). Section 926A was intended precisely to prevent the kind of harassment that occurred here.

Contrary to the Port Authority, Plaintiffs did not “invoke the Second Amendment of the U.S. Constitution” Br. PA 16. Congress itself invoked it in declaring FOPA’s purpose in part to protect “the rights of citizens – (A) to keep and

bear arms under the second amendment”² Plaintiffs merely argued that § 926A should be read broadly with Congress’ purpose in mind. Br. of Appellants 27.

The Port Authority sees no significance in the terms of § 926A that a “person” is “entitled” to transport a firearm. Br. PA 16. It ignores the language of *Muscarello v. United States*, 524 U.S. 125, 134 (1998), that is germane to this case: “§ 926A specifically ‘entitles’ a person ‘not otherwise prohibited . . . from transporting, shipping, or receiving a firearm’ to ‘transport a firearm . . .’” as specified. (Emphasis added.)

The Port Authority contends that recognition of § 926A by the police would be, in the words of *Blessing*, so “‘vague and amorphous’ that its enforcement would strain judicial competence.” Br. PA 18. It would require “on-the-spot knowledge of the firearm’s laws of all 50 states.” *Id.* Yet the Port Authority fails to conduct any analysis of state law. In actual fact, virtually all states but a tiny handful have the same rule: no permit or license is required for a law-abiding persons merely to possess or transport a firearm.³ If the police kept a list of all states requiring a permit or license to possess a handgun, it may well only include New York.

²§ 1(b), P.L. 99-308, 100 Stat. 449 (1986).

³See Bureau of Alcohol, Tobacco, Firearms & Explosives, *State Laws and Published Ordinances - Firearms* (2006).

Indeed, Port Authority officers have that very information in their possession but ignore it. On one of the several occasions when Plaintiff Winstanley was seeking the reason for denying him the right to check his firearms and board the flight, he asked a female sergeant what basis existed to indicate he need a concealed weapon permit to possess a firearm in Arizona. She produced papers labeled “Gun Laws of the United States” which included a matrix listing each state with a checklist showing “yes” and “no,” but would not allow him to see it. A-185-87. Knowing state possession laws would not be so “vague and amorphous” after all, particularly when almost all of them require no documentation.

The Port Authority is a bi-state agency with police powers in both New York and New Jersey, and Sgt. Goldberg testified that he follows the New Jersey attorney general guidelines, rules and regulations. A-166. The New Jersey Attorney General instructs the police: “If reasonable inquiries lead an officer to conclude that the person's possession is lawful under either New Jersey law or 18 U.S.C.A. 926A, . . . the officer should promptly allow the person to proceed.” A-218. It is unclear why a Port Authority officer in New Jersey could conclude that a person’s possession is lawful under § 926A and promptly allow the person to proceed, but a Port Authority officer in New York would find § 926A too “vague and amorphous.”

Once a firearm is declared and checked in baggage for transport to another

state, New York no longer has any interest in the subject as regulation of firearms in air transportation is administered by the Transportation Security Administration (TSA). In this case, Torraco's baggage was actually placed in the aircraft baggage compartment but then removed under Sgt. Goldberg's demand. A-117. TSA Supervisor Melvin Birch arrived at the scene and advised Goldberg that Torraco "is in compliance with federal law. He's done nothing wrong." A-132. Goldberg would not listen to the federal enforcement officer whose explicit duties included security and air transport of firearms.

The Port Authority argues: "FOPA § 922 (9) [*sic*] does not, as plaintiffs argue, resolve the vagueness problem because that section simply prohibits certain categories of persons from transporting, shipping or receiving firearms." Br. PA 19. However, § 922(g) is highly relevant to the district court's erroneous interpretation that police may presume a passenger to be in violation of § 926A and make an arrest without probable cause to believe the passenger is in violation of any element of § 926A. See A-57 n.6. Section 926A provides that a person is entitled to transport a firearm if the person is not disqualified by § 922(g) by being a felon or other prohibited category, and is transporting it from and to a place where she may lawfully possess it. No more basis exists for presuming that the traveler is going from or to

a place where unlawful to possess than it would be to presume that she is a felon.⁴

Yet the Port Authority rejects the common-sense interpretation that “a police officer may not intervene unless he/she has probable cause to believe that a person is not in compliance with §926A.” Br. PA 19. Given that transport in compliance with § 926A makes the conduct lawful, the Port Authority is arguing that an arrest may be made without any probable cause at all.

Would plaintiffs’ interpretation “prevent police officers from enforcing New York gun laws in New York airports with respect to anyone who was a nonresident and possessed an airline ticket,” Br. PA 19-20? The answer is “yes” *only* as to any nonresident who declares and checks a firearm in baggage in compliance with TSA regulations, 49 C.F.R. § 1540.111(C)(2), and about whom the officer has no probable cause to believe is not in compliance with any element of § 926A.⁵ Indeed, that was

⁴The presumption of illegality flies in the face of the fact that “there is a long tradition of widespread lawful gun ownership by private individuals in this country.” *Staples v. United States*, 511 U.S. 600, 611 (1994). “Roughly 50 percent of American homes contain at least one firearm of some sort” *Id.* at 613-14. Section 926A accommodates Americans who transport firearms for lawful purposes.

⁵The Port Authority argues: “Section 926A is not a criminal statute and therefore a police officer would not in the ordinary course of his/her duties be enforcing it based upon a probable cause standard.” Br. PA 19. Yet since compliance with § 926A negates the applicability of state criminal laws which themselves require probable cause for an arrest, the standard must be that an officer must have probable cause to believe that an element of § 926A is not met in order to make an arrest under state law.

the very purpose of § 926A. By contrast, a person who fails to declare the firearm, who attempts to transport it in carry-on baggage, who is caught with drugs or other contraband, or other legitimate suspect can and should be interrogated, searched, and arrested if appropriate. It is curious that the Port Authority focuses on harassing law-abiding persons, rushing to the scene whenever a passenger complies with TSA regulations by declaring an unloaded firearm in locked, checked baggage, rather than using such resources against real criminals.

Finally, the Port Authority laments that “non-residents would have greater protection than residents.”⁶ Br. PA 20. That is because the legislature of New York, unlike other states, chooses to make it a crime merely to possess a handgun without a license. Since no license may be issued to a non-resident, no lawful manner would exist – absent § 926A – for a traveler to transport a firearm through the state of New York en route to another state. *Bach v. Pataki*, 408 F.3d 75, 77, 82 & n.14 (2nd Cir. 2005). Congress sought to end such barriers to interstate travel by law-abiding gun owners by passage of FOPA.

⁶This is not the only topic on which the Firearms Owners’ Protection Act predicates invocation of a federal rule for firearms possession based on state laws which vary. *E.g.*, *Burrell v. United States*, 384 F.3d 22, 24 (2nd Cir. 2004) (“18 U.S.C. § 921(a)(20) states that predicate convictions under § 922(g)(1) should be ‘determined in accordance with the law of the jurisdiction in which the [prior felony] proceedings were held.’”).

In sum, there is nothing “vague and amorphous” about § 926A. It was passed to prevent law-abiding persons transporting firearms according to federal law from being arrested under the laws of a tiny number of states, such as New York, which criminalize the mere possession of a firearm without a license.

II. GIVEN THAT § 926A PREEMPTS NEW YORK LAW, NO PROBABLE CAUSE EXISTED TO ARREST TORRACO

The Port Authority captions its argument thus: “Sergeant Goldberg and Police Officer Espinal Had Probable Cause To Believe That Plaintiff John Torraco Violated N.Y. Penal Law §265.01.” Br. PA 20. Lacking from this proposition is that federal law, § 926A, completely preempts and trumps New York law.

“The court only looks to the information the officer had at the time of the arrest,” the Port Authority correctly states. Br. PA 21. Here, the officers had no information whatever that Torraco did not comply with § 926A when they arrested him. They had no information that he, to use the language of § 926A, was “prohibited by this chapter from transporting, shipping, or receiving a firearm,” did not have a “lawful purpose,” that he could not “lawfully possess and carry such firearm” at his origin or destination, that the firearm was loaded, or that it was readily or directly “accessible from the passenger compartment of such transporting vehicle.”

Section 926A contains clear statutory language which overrides conflicting state law. That distinguishes this case from *Lawrence v. Police Department of City*

of Syracuse, 81 A.D.2d 1006, 440 N.Y.S.2d 105 (1981), which the Port Authority cites. Br. PA 22. When an officer asked to see the license for a pistol a man was carrying, the latter presented a receipt for payment of a fee to amend his pistol permit. The permit clerk had informed him that the receipt acted as a temporary permit while his application was pending. The court held that probable cause to arrest existed on the following basis: “The receipt given the arresting officer did not meet the statutory requirements for a valid license (Penal Law, § 400.00, subd 7), and there is no evidence that the officer knew of the procedure followed in amending licenses, or had resources available to him through which he could have obtained such information.” *Id.*

Here, by contrast, Torraco met the statutory requirements in § 926A to transport a firearm, and the officers could have learned of the existence of § 926A merely by consulting the U.S. Code. It has been on the books since 1986. They had no interest in learning more about § 926A when Torraco cited it to them, and curtly snubbed the TSA supervisor who was in charge of implementing federal law in the airport and who explained that Torraco was acting lawfully.

The Port Authority proceeds to ignore that the court only looks to the information the officer had at the time of the arrest, and seeks to show that Torraco did not lawfully possess the firearm in New Jersey. Section 926A provides that a

person may transport a firearm “from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm” That first “place” was his New Jersey residence, and it was “from” that residence that he sought to transport the firearm “to” the second “place,” his Florida residence.

As the Port Authority concedes, “In order to fall within the purview of §926A, Mr. Torracco must show that he could lawfully ‘possess and carry’ a handgun in the ‘place’ where he began his trip to LaGuardia Airport.” Br. PA 23. That “place” indisputably was his New Jersey residence which he owned and leased to his father.

Torraco lawfully possessed the handgun at his New Jersey premises. N.J.S. § 2C:39-5b prohibits possession of a handgun without a permit to carry a handgun.⁷ However, § 2C:39-6e explicitly exempts possession of a handgun at one’s premises:

Nothing in subsections b., c. and d. of N.J.S. 2C:39-5 shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm, or from carrying the same, in the manner specified in subsection g. of this section, from any place of purchase to his residence or place of business, between his dwelling and his place of business, between one place of business or residence and another when moving, or between his dwelling or place of business and place where such firearms are repaired, for the purpose of repair.

⁷“Any person who knowingly has in his possession any handgun, including any antique handgun without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4, is guilty of a crime of the third degree.” *Id.*

Torraco was exempt from the permit requirement because he kept the firearm at his “residence, premises or other land owned or possessed by him” See A-103-04. He originally obtained the handgun in Arizona and brought it with his other belongings when he moved to New Jersey. No permit or other requirement existed for him to keep the gun at his New Jersey residence.

In *State v. Cuccio*, 350 N.J. Super. 248, 255, 794 A.2d 880 (2002), *certif. denied*, 174 N.J. 43, 803 A. 2d 638 (2002), the defendant obtained handguns in Florida and moved them to his premises in New Jersey. The court noted that “one can lawfully acquire a handgun in another state and transport it to one's home in New Jersey without being required to obtain a New Jersey permit to purchase, acquire or receive a handgun” *Id.* The court held: “The weapons-permit charges must be dismissed for a lack of any proof by the State of an essential element: that the handguns specified were purchased, acquired or received by defendant in this State. . . . New Jersey may not regulate the acquisition of handguns in other states.” *Id.* at 256.

Torraco’s handgun was stored, without ever being loaded or taken out, in his New Jersey home from 1997 through 2004, when he transported it unloaded in a locked case in a locked car trunk to the airport for shipment on his flight to Florida, at which time the events giving rise to this case occurred. A-105-07. At the time of

Torraco's arrest, he maintained two residences – one in New Jersey and one in Florida - and was domiciled in Florida. A-97.

Given that the “place” “from” which Torraco began to transport his firearm was his New Jersey premises, and he indisputably lawfully possessed it there, his protection under § 926A began at that point and would continue until the end of his journey at the other “place” “to” which he would lawfully possess it, i.e., his Florida residence. Given that fact, the Port Authority's argument that he did not lawfully transport it under New Jersey law is irrelevant.⁸ See Br. PA 24-25.

Yet even ignoring § 926A, Torraco complied with New Jersey law while transporting the firearm. N.J.S. § 2C:39-6e exempts not only the keeping of a firearm at one's premises, but also “carrying the same, in the manner specified in subsection g. of this section, . . . between one place of business or residence and another when moving” He was indisputably moving the article of property in question from his New Jersey residence to his Florida residence and domicile. And he did so in full compliance with N.J.S. § 2C:39-6g, which provides:

⁸The Port Authority seems to suggest that the person must comply with every local law in between the origin and the destination of the trip: “Under Section 18 U.S.C. §926A, gun owners who comply with local gun laws can transport their firearms interstate without incurring criminal liability.” Br. PA 9. To the contrary, § 926A was passed because local laws were too restrictive or even impossible to comply with and thus were preempted.

All weapons being transported under paragraph (2) of subsection b., subsection e., or paragraph (1) or (3) of subsection f. of this section shall be carried, unloaded and contained in a closed and fastened case, gunbox, securely tied package, or locked in the trunk of the automobile in which it is being transported, and in the course of travel shall include only such deviations as are reasonably necessary under the circumstances.

The Port Authority speculates that “Presumably, Mr. Torracco removed the gun from the house he leased to his father and returned to his mother’s house before his mother took him to the airport,” Br. PA 25, but fails to cite to the record. To the contrary, the record reflects only that Torracco's mother drove him and his wife part of the way back to LaGuardia, where they briefly stopped in Queens at the house of a friend, who then drove them the rest of the way to LaGuardia. A-111-12.

This “presumed” fact is fabricated into an actual fact when the Port Authority alleges that “once Mr. Torracco left the house he owned with the gun to take it first, to his mother’s and then, to a friend’s house before going to the airport, he no longer lawfully possessed the weapon under New Jersey Law.” Br. PA 25-26. It seems more likely that Torracco had no car and that his mother picked him up at the house he owned. And it seems ludicrous to claim that New Jersey law was violated in Queens, New York.

Yet even under the Port Authority’s fictitious account, Torracco would have still been “entitled to transport a firearm” under § 926A, which places no limits on the

vehicles, drivers, or pilots in which the transport takes place. He could have been driven to the airport partway by his mother and the rest of the way by a friend, then flown on the airline to Florida, and then taken a taxi to his residence there. He met the requirements of § 926A because he attempted to transport his firearm “from any place where he may lawfully possess and carry such firearm” – his premises in New Jersey – “to any other place where he may lawfully possess and carry such firearm” – his premises in Florida.

The Port Authority concludes: “Torraco brought a handgun into New York from New Jersey without a license for that gun in New Jersey or any other state and without any proof of lawful ownership.” Br. PA 26. Yet he needed no New Jersey license or permit, nor does Florida require any license or permit to possess a firearm.⁹ And no state requires “proof of lawful ownership” – it has never been suggested that the firearm was stolen or that Torraco was required to carry a bill of sale for it or for any other property in his luggage. Section 926A does not require written “documentation.”

Without any discussion of the circumstances of the arrest, the Port Authority then jumps to the conclusion: “Under the circumstances, there was probable cause for

⁹No provision of Florida law is cited for this proposition since no such law exists.

Sergeant Goldberg and Police Officer Espinal to arrest Mr. Torracco for criminal possession of a weapon in the 4th degree.” Br. PA 26. Although they worked at an airport through which passengers from all over the United States traveled daily, they did not even know of the existence of the primary federal statute governing preemption of state law in regard to transportation of firearms. When advised of the statute not only by Torracco but also by the TSA supervisor, they made no attempt to enquire. Espinal declared that “they [the Port Authority] had been arresting everybody who made this declaration” unless they had a New York license. A-123. Goldberg condescendingly told Torracco that “federal law does not apply in the State of New York.” A-131.

United States v. Valentine, 539 F.3d 88, 93 (2nd Cir. 2008), explains that probable cause to arrest requires “sufficient knowledge or reasonably trustworthy information to justify a person of reasonable caution in believing that an offense has been or is being committed by the person to be arrested.” However, “mere suspicion is not enough,” and “no probable cause exists to arrest where a suspect's actions are too ambiguous to raise more than a generalized suspicion of involvement in criminal activity.” *Id.* at 94. Here, the officers did not have *any* suspicion that Torracco did not qualify under § 926A, such as being a felon, and they did not even know of the statute’s existence.

Since “§926A does not preempt the field of firearm regulation,” the Port Authority denies the relevance of *Air Transport Association of America, Inc. v. Cuomo*, 520 F.3d 218, 220 (2nd Cir. 2008), which held that federal law expressly preempted New York law on certain aspects of air transportation. Br. PA 26. Yet § 926A emphatically preempts the field of firearm transportation where its requirements are met. Plaintiffs never suggested that it preempts all “firearm regulation.”

The Port Authority misread *Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 609 (D. N.J. 1990), albeit correctly quoting its wording that § 926A “prohibits the regulation of the interstate transport of firearms.” Br. PA 27. Since New Jersey recognized that § 926A trumped state law, the court found: “For plaintiffs’ predicted irreparable injury to become realized, law enforcement officers throughout New Jersey would have to disregard the federal law in its entirety” *Id.* at 610. That is exactly the Port Authority’s policy and practice.

In sum, § 926A unequivocally and expressly preempts New York law in regard to the transportation of firearms. The defendant officers, who worked in an airport and yet were clueless about the major federal law on point, had no probable cause to arrest Torracco.

III. AIRPORT POLICE OFFICERS LACKING KNOWLEDGE OF THE PRIMARY FEDERAL STATUTE GOVERNING LAWFUL TRANSPORT OF FIREARMS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The Port Authority admitted that it provided no training regarding § 926A. A-213. Not surprisingly, police officers with no knowledge of § 926A routinely arrest travelers transporting firearms when they declare the firearms pursuant to federal regulations. A-123. Yet the Port Authority's argument for qualified immunity is based solely on the alleged lack of a Supreme Court or Second Circuit "case" verifying that the law is the law. Br. PA 29.

The Port Authority argues that "there is no case that supports Mr. Torracco's view that § 926A allowed him to transport a handgun from New Jersey to a New York airport without a permit, license or some documentary proof of lawful ownership." Br. PA 29. Given that Congress mandated a federal law allowing such, it is not required that a court opines that the law exists before it becomes valid. "But general statements of the law are not inherently incapable of giving fair and clear warning" *United States v. Lanier*, 520 U.S. 259, 271 (1997).¹⁰ "[T]he touchstone is whether the statute, *either standing alone or as construed*, made it

¹⁰"The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." *Id.* at 271 (citation omitted).

reasonably clear at the relevant time that the defendant's conduct was criminal.” *Id.* at 267 (emphasis added).

For the Port Authority and its police officers to be so plainly incompetent as to not be aware of the chief federal statute at issue, it is a reach to predicate their ignorance on the lack of a “case” construing the statute of which they are wholly unaware. “Qualified immunity does not protect those who are ‘plainly incompetent or those who knowingly violate the law.’” *Weyant v. Okst*, 101 F.3d 845, 857 (2nd Cir. 1996). An airport officer who is unaware of § 926A is plainly incompetent.

If ignorance of the law is no excuse when applied to defendants in criminal cases, it is unseemly to suggest that ignorance of the law is an excuse when applied to officers whose duty it is to know and uphold the law.¹¹ Given that, year after year, Port Authority officers regularly arrest passengers who declare firearms in checked baggage pursuant to federal regulations, A-123, they should not be awarded for their routine defiance and violation of § 926A.

At any rate Plaintiffs cited several cases recognizing that § 926A means what it plainly states on its face – that state laws are preempted as applied to transport of

¹¹If federal law enforcement agents can be held criminally liable for violation of the federal Gun Control Act, see *United States v. Ramos*, 537 F.3d 439, 457-58 (5th Cir. 2008), surely state and local police can be held civilly liable for violation of the same Act. *Ramos* held that the officers “cannot advance a persuasive textual argument supporting their fair warning claim” *Id.* The same is the case here.

firearms in compliance with § 926A. See Br. for Appellants 20-22.

The Port Authority argues: “Section 926A . . . clearly is intended to protect those traveling through a state, not those who appear to be beginning their journey in a state where gun permits are required. There would be no way for the officers faced with Mr. Torracco’s situation to verify the truth of his claim that he brought the gun from his house.” Br. PA 29-30. As shown above, New Jersey does not require a permit for mere possession of a firearm in the home. Given that the officers had not one shred of evidence that Torracco did not bring the gun from his house, they had no probable cause to believe he was not in compliance with § 926A.

Without further discussion, the Port Authority asserts that even if Officer Paulsen violated Plaintiff Winstanley’s constitutional right to travel, there was no clearly established right under § 926A. Br. PA 30-31 n.4. Once again, this argument is based on the Port Authority’s willful blindness of the existence of § 926A since its passage in 1986.

New York is not the tail which wags the federal dog. One state out of fifty may choose to criminalize the mere unlicensed possession of firearms, but federal law prohibits it from imposing this rule on travelers in transit through New York. The sky will not fall if New York police do not arrest every citizen who transports firearms pursuant to federal regulations, just as the sky has not fallen in the other 49 states

where police are not routinely summoned to harass and detain every passenger who declares and checks a firearm pursuant to federal law.

Firearm owners who comply with federal regulations should not be rewarded by being treated as criminal suspects. Firearms are lawfully transported by air for hunting trips, collecting, self protection,¹² and competitions. Victims of the Port Authority's attempt to nullify federal law range from lawyer Torracco and judicial employee Winstanley to members of the U.S. Olympic shooting team¹³ to who knows how many other innocent victims. This Court should require the Port Authority to obey federal law.

¹²*See District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (“the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”).

¹³“The City that wants to host the Olympic Games,” *Times Union*, Aug. 6, 2008, <http://blogs.timesunion.com/guntalk/?p=87>, notes that “firearms competition is included in both the summer and winter games” and reports:

Three or four weeks ago a young competitor on the National Shooting Team was training and being coached at the Coast Guard Academy. Upon finishing the training program he properly stored the firearms and headed for the airport and his home in the western United States. After declaring his legally transported firearms, at a NYC airport, he was arrested by a New York City Transit Authority Officer. This young American competitor after explaining what he was doing with the firearm and showing his credentials was arrested, handcuffed and spent a number of hours in custody

IV. PLAINTIFF WINSTANLEY STATED A CLAIM UNDER § 1983

The Port Authority rests its denial of Winstanley's claim on the following factually false statement: "Officer Paulsen did not prevent Mr. Winstanley from getting on the plane, he merely refused to let him bring his pistols in his luggage." Br. PA 33. Flatly contradicting that allegation, Paulsen's "Aided" Report stated that Winstanley "had three firearms of which he had a valid NYS full carry permit. Aided was attempting to declare his firearms in order to travel to Arizona. Aided had no documentation for Arizona and *was denied boarding.*" A-212 (emphasis added).

The Port Authority argues that Winstanley "should have come prepared to show he was lawfully transporting the weapons," that passenger screening "can easily take 15-20 minutes or more," and that the length of the encounter was extended because "Winstanley was heatedly arguing with Officer Paulsen." Br. PA 32. In fact, Winstanley's ordeal extended over several hours and several days due solely to the ignorance of the law by Port Authority police.

Winstanley, who was employed by the Unified Court System, Ninth Judicial District (A-175), presented a New York firearm carry permit. After he could not persuade Paulsen that he needed no concealed weapon permit in Arizona and asked to speak with his supervisor, Paulsen responded: "Keep this up, I'll put you under arrest." He then stated "You can't board this aircraft." A-180. The encounter took

15-20 minutes. A-183. Winstanley then gathered up his luggage, got back on the AirTrain, went back to the parking lot, and drove to Building 269, the location of the Port Authority. A-183. He asked an officer there to confirm that he needed no permit to possess a firearm in Arizona. The officer disappeared for a period of time and returned, affirming that Winstanley was correct. A-184.

At some point in this saga, Winstanley sought the basis of the assertion that he needed a concealed weapon permit to possess a firearm in Arizona. A female sergeant consulted papers labeled “Gun Laws of the United States” but would not allow him to see it. A-185-87.

On the second day of his ordeal, an officer with badge 1400 stated that Winstanley could not transport the firearms in the particular case he was using. A-190-91. The case met federal requirements for air transport, in that it was a hard case which was locked, but he bought two new cases anyway. A-191-93; 49 C.F.R. § 1540.111(C)(2). The type of case was not a matter within the authority of the Port Authority.

On the third day in which he attempted to make the flight, he called ahead to try and clear his transport of the firearms with the Port Authority. Sergeant Moran advised that he could transport the firearms to Arizona only if he had a federal firearms license – which is a license to deal in firearms as a business, not a license to

possess¹⁴ – or was participating in a match sanctioned by the National Rifle Association. A-194. Winstanley urged Moran to contact the Bureau of Alcohol, Tobacco and Firearms and the TSA to confirm that no such requirements existed. It took him three phone calls and the passage of several hours for Moran finally to concede that Winstanley was correct. A-194-95. Winstanley then drove to JFK, declared his firearms in the checked baggage, presented his New York permit to the Port Authority officer who responded, and finally was allowed to board his flight. A-195-96.

It is difficult to imagine how the above officers could have been more incompetent or intentionally obstructionist. Like virtually all states except New York, Arizona has no requirement of a permit or license to possess a firearm, and a traveler has no duty to produce documentation of the non-existence of any such requirement. Yet as Paulsen reported, Winstanley “had no documentation for Arizona and was denied boarding.” A-212.

A passenger was “denied boarding” because he sought to exercise a right guaranteed by federal statute. It is difficult to imagine a more egregious violation of § 926A and of the right to travel. In the words of *Saenz v. Roe*, 526 U.S. 489, 499 (1999), Americans are “free to travel throughout the length and breadth of our land

¹⁴See 18 U.S.C. § 923.

uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”

CONCLUSION

This Court should reverse the judgment of the district court and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of F. R. App. P. 32(a)(7)(B) because this brief contains 5837 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using a Word Perfect 12 processing program in 14 point Times New Roman style.

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October 27, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2008, two (2) true and correct copies of the foregoing were served by first class mail, postage prepaid, to:

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