

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)

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)

PRELIMINARY STATEMENT

Pursuant to Local Rule 28(2), the judge who rendered the decision appealed from is the Honorable Brian M. Cogan. The judge's supporting opinion is reported at 539 F. Supp. 2d 632.

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JURISDICTIONAL STATEMENT

Jurisdiction in the district court was founded on 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, and under 28 U.S.C. § 1343(3) in that this action seeks to redress the deprivation, under color of the laws, statute, ordinances, regulations, customs and usages of the State of New York, of rights, privileges or immunities secured by the United States Constitution and by Acts of Congress. The complaint alleges that defendants unlawfully searched, arrested, detained, or interfered with the travel of plaintiffs contrary with their entitlement, notwithstanding any State law to the contrary, to travel and transport firearms in compliance with 18 U.S.C. § 926A. This action seeks damages together with declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court granted defendants' motion for summary judgment on March 17, 2008 (A-41),¹ and final judgment ordering dismissal was entered on March 19, 2008. (A-73). Plaintiffs filed a timely notice of appeal on April 14, 2008. (A-74). This appeal is from a final order by the United States district court that disposes of all claims with respect to the parties.

¹“A-” followed by a number refers to the page reference in the Joint Appendix.

STATEMENT OF ISSUES

18 U.S.C. § 926A provides that, notwithstanding any state law to the contrary, a person who may possess firearms under Federal law is entitled to travel from a place where such possession is lawful to another place where such possession is lawful. While so traveling, plaintiffs sought to transport their firearms in checked baggage pursuant to Federal regulations through LaGuardia and JFK airports. Pursuant to policies of the Port Authority of New York and New Jersey, police officers arrested one plaintiff and interfered with the other plaintiff's travel.

The issues on appeal are whether defendants unlawfully searched, arrested, detained, or interfered with the travel of plaintiffs contrary to their entitlement to transport firearms under 18 U.S.C. § 926A.

STATUTE

18 U.S.C. § 926A provides:

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose 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, if during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or directly accessible from the passenger compartment of such transporting vehicle: *Provided*, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other

than the glove compartment or console.

STATEMENT OF THE CASE

This is an action for a declaratory judgment that defendants' policies and actions violate the entitlement of plaintiffs to transport firearms under 18 U.S.C. § 926A and for injunctive relief against such policies and practices. Plaintiffs also seek damages pursuant to 42 U.S.C. § 1983 for violation of their statutory rights under § 926A and their constitutional rights not to be subject to unreasonable search and seizure and to travel.

Defendants include the Port Authority and related entities which mandated the policies at issue, and individual police officers who detained, searched, arrested, or denied boarding to plaintiffs.

The complaint was filed on December 12, 2005. On November 26, 2007, defendants filed a motion for summary judgment. On March 18, 2008, the court issued a Memorandum Decision and Order granting the motion for summary judgment. (A-41). On March 24, 2008, final judgment was entered dismissing the case. (A-73). This appeal followed.

STATEMENT OF FACTS

This case involves two airline passengers who sought to transport unloaded firearms in checked baggage pursuant to Transportation Safety Administration (TSA)

procedures and in reliance on 18 U.S.C. § 926A. The Port Authority has acknowledged that the Port Authority did not “specifically train to this statute [18 U.S.C. § 926A],”² and that there was no informal training, superintendent bulletin, standard operating procedure or any other form of communications to Port Authority officers regarding § 926A. (A-213, A-215, A-216).

A. John Torraco

Plaintiff John Torraco, who is domiciled in Florida, is an attorney licensed there and in the District of Columbia. He owns an Astra pistol. (A-79, A-85, A-95, A-97). There came a time when he researched how lawfully to transport an unloaded firearm in checked baggage on an airline, and in doing so reviewed TSA regulations and 18 U.S.C. § 926A. (A-122-23, A-219). He was further advised of the legal requirements in telephone calls with the Bureau of Alcohol, Tobacco, Firearms and

²The following exchange between plaintiff’s counsel and defendants’ counsel appears in the deposition of Port Authority Police Department Inspector Honig:

Mr. Zayas: As I stated earlier, I represent the plaintiffs in this lawsuit and you are here subject to a Federal Notice of Deposition, a 30(b)(6) notice, which means that you have been designated by Port Authority to answer certain questions in this lawsuit. In particular, the training of police officers and the performance of their duties and responsibilities and also who implements policies or rules and regulations for the Port Authority Police Department.

Ms. Miller: I just want to say on the record, with respect to this particular statute, 18 U.S.C. 926(A), the Port Authority has responded in writing that we don’t specifically train to this statute. (A-213)

Explosives (ATF) and the Federal Aviation Administration (FAA). (A-131a)

On October 15, 2004, Torraco and his wife flew from Florida to LaGuardia Airport. From there they went to stay with his mother in Franklin Lakes, New Jersey. (A-101-02). He owns a second residence in Franklin Lakes, which he leases to his father and where he stored his disassembled pistol. (A-96-97, A-102-03). On October 17, 2004, Torraco'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). At all times, the unloaded, disassembled pistol was transported during the trip from New Jersey to LaGuardia in a locked carrying case packed in Torraco's suitcase, packed in the car trunk, inaccessible to all passengers pursuant to New Jersey law and in compliance with § 926A. (A-106-07, A-114, A-217-18).

At the airport, Torraco proceeded directly to the Delta ticket counter and declared to the ticket agent that "I need to make a declaration of an unloaded firearm that I'll be transporting, that I'll be checking into the cargo of the plane." (A-113-14). The airline ticket agent produced an orange firearm declaration tag which Torraco signed and she initialed, the tag was placed into the locked case for TSA inspection, and then the case was checked in for carriage in the baggage compartment. (A-115-17). The baggage was transferred onto the aircraft. (A-118)

The ticket agent advised Torraco that the Port Authority requires that they be notified every time a passenger makes a firearm declaration, which she did. (A-118).

Defendant Police Officer Anthony Espinal arrived at the scene and inquired as to whether Torraco had a New York license for the firearm. (A-121). Torraco responded that federal law, specifically 18 U.S.C. § 926A, preempted local licensing requirements and allowed him to transport the firearm.³ (A-122-23). Espinal was unfamiliar with the statute and declared that “they [the Port Authority] had been arresting everybody who made this declaration unless they had some sort of a New York City license.” (A-123). He therefore called his superior, defendant Sgt. Lawrence Goldberg. (A-126).

Goldberg testified that upon arriving on scene, he found Torraco and his wife being held for investigation. He learned that police discovered that a firearm was being transported because Torraco “declared it at the counter. . . . It’s not suspicious at all. You are informing that you have a weapon.” (A-157, Trans. 63-64A) Goldberg testified that he asked Torraco and his wife which of them possessed the gun, but that neither of them responded immediately, which he claimed to be evasive, even though Torraco had voluntarily disclosed his weapon to the ticket agent. (A-158

³New York licenses are available only to persons who reside or are employed in New York. N.Y. Penal Law § 400.00(3)(a); *Bach v. Pataki*, 408 F.3d 75, 81 (2nd Cir. 2005).

(Trans. 65), A-170). He stated that if one of them did not acknowledge possession, he would take them both in for investigation. (A-158 (Trans. 65)). According to Goldberg, Torracco then acknowledged that the firearm was his. However, Torracco testified that Sgt. Goldberg's first question was "Where is your New York license?" (A-158 (Trans. 65), A-128). Goldberg testified that he asked if Torracco had a New York permit, to which Torracco explained that under 18 U.S.C. § 926A, he did not need one. (A-158 (Trans. 66), A-128-29).

Torraco urged Goldberg to call the state prosecutor or other person who would know about § 926A. Goldberg "told me federal law does not apply in the State of New York. He told me very condescendingly that he ain't calling nobody and that I was in his jurisdiction." (A-131)

Goldberg testified that he asked whether Torracco had any documentation showing that he was lawfully in possession of the gun. (A-158 (Trans. 66), A-129). Torracco continued to assert that federal law enabled him to transport the weapon through New York by reciting 18 U.S.C. § 926A, while Goldberg continued to assert that "section 18, did not apply in this case." (A-129, A-159 (Trans. 72)).

TSA Supervisor Melvin Birch arrived at the scene and advised Goldberg: "He is in compliance with federal law. He's done nothing wrong." (A-132) Goldberg understood the agent to be saying that the weapon was properly packaged in

accordance with federal regulations, but that was irrelevant to him. (A-159 (Trans. 69), A-159 (Trans. 70)). Goldberg stated that unless Torraco could establish legal possession, the federal statute did not override New York State law prohibiting the carrying of firearms. (A-159 (Trans. 72)) Despite Birch's advice, Goldberg and Espinal arrested Torraco and his wife for a violation of New York Penal Law § 265.01(1), Possession of a Firearm in the Fourth Degree: "A person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e possesses any firearm." (A-157 (Trans. 61), A-163 (Trans. 95), A-134). Goldberg testified that the arrest was made because "Torraco had a weapon within [the] confines of the State of New York" and that "he could not produce any kind of documentation, ownership, possession, bill of sale, any kind of licensing permits, anything else." (A-157 (Trans. 61))

Torraco remained in custody until the next day, when he was arraigned in Queens County Criminal Court and released. (A-142, 144). Following several court appearances, his attorney moved to dismiss on the ground of federal preemption under § 926A. (A-222) The motion was carried to April 6, 2005. The District Attorney failed to respond to the motion but cross-moved to dismiss in the interests of justice, acknowledging that "the defendant did everything that is suppose[d] to be done and had to do." (A-221, A-223-24). The Court denied the District Attorney's

motion and granted Torracco's motion, finding that the failure to respond to Torracco's motion was a concession on the merits. (A-224).

B. William Winstanley

Plaintiff William Winstanley resides in Westchester County, New York. (A-174 (Trans. 4)). He owns three firearms for which he has New York permits. On April 1, 2005, he went to JFK Airport to board a flight for Phoenix, Arizona. (A-178 (Trans. 54)). He declared the unloaded firearms to the ticket agent and filled out an orange firearms declaration card to transport the firearms in checked baggage. The ticket agent called Port Authority Police. (A-179 (Trans. 60-61)).

Defendant Officer Robert Paulsen arrived at the scene and requested, and was shown, Winstanley's permits for the firearms and driver's license. (A-180 (Trans. 63-64)). He asked Winstanley if he had an Arizona permit. (A-180 (Trans. 64-65)). Winstanley responded that he did not need a permit to carry a weapon openly in Arizona, but that he did have a Florida permit, which permitted him to carry a concealed weapon in Arizona. Paulsen disagreed, although he later testified that he was only trained in New York and New Jersey state law. Winstanley asked to speak to Paulsen's supervisor. (A-180 (Trans. 65), A-200). Paulsen told Winstanley that if he persisted in asking to speak to a supervisor, he would place him under arrest. (A-

180 (Trans. 65), A-183 (Trans. 76)). Paulsen also stated that Winstanley was not permitted to transport a firearm on the airline. (A-180 (Trans. 65), A-202).

The delay forced Winstanley to change his flight to the next day. (A-188 (Trans. 92-93), A-189 (Trans. 95)). He then went to the Port Authority Police Headquarters at JFK and spoke to an unidentified lieutenant. (A-183 (Trans. 77), A-184). After some discussion and delay, the lieutenant agreed with Winstanley that he did not need a permit in Arizona. (A-184)

The next day, Winstanley returned to the airport to try to get another flight. (A-189 (Trans. 97)). He was told by an unidentified officer that he had the wrong type of carrying case, although he had used it for years and it complied with the TSA regulations. (A-191 (Trans. 102), A-191 (Trans. 106), A-219). He bought another gun case but his flight was cancelled. (A-192 (Trans. 110, 113)). Two days later, after making some unsuccessful telephone calls to the Port Authority police at JFK to try to pre-clear his transport of the firearms, he returned to JFK, and was permitted to board the flight to Arizona, checking through his pistols upon producing his New York permit and driver's license. (A-193-94 (Trans. 124-26), A-195 (Trans. 131, 133), A-196 (Trans. 134-136)).

SUMMARY OF ARGUMENT

18 U.S.C. § 926A provides that, notwithstanding any state law, a person who is not prohibited by federal law from having a firearm is “entitled” to transport an unloaded, inaccessible firearm for a lawful purpose from and to places where he may lawfully possess a firearm. This entitlement constitutes a right such that the person who does so commits no violation of law. The right is not a mere affirmative defense to a criminal charge after arrest, but immunizes one from arrest. An officer may make an arrest only if probable cause exists that one or more elements of § 926A are not met.

The structure of § 926A precludes any presumption that a person’s transport of a firearm is unlawful. Surely a police officer may not presume that a person is prohibited by federal law from having a firearm, such as by being a felon or mentally incompetent. Nor does an officer who has no evidence of such have probable cause to believe a person has an unlawful purpose or is traveling from or to a place where he may not lawfully possess or carry a firearm.

The mere transportation by a person of an unloaded firearm in locked baggage where the person declares the firearm and checks the baggage with the airline pursuant to federal regulations surely would not give a police officer probable cause

to arrest the passenger under the theory that the passenger has not demonstrated to the officer that every element of § 926A has been met.

Here, the district court adopted a per se rule that police have probable cause to arrest an airport traveler under New York law and could presume that the travel with the firearm was not lawful under § 926A. To the contrary, Congress intended a per se rule that such travel is lawful under § 926A unless probable cause exists to believe that the person is ineligible to possess a firearm under federal law, that an unlawful purpose exists, or such person's possession is not lawful in the place from which or the place to which the firearm is transported.

Section 926A originated as part of the Firearms Owners' Protection Act of 1986. Congress intended that it would prevent harassment of interstate travelers. FOPA includes Findings recognizing the rights of citizens "to keep and bear arms under the second amendment to the United States Constitution" and "to security against illegal and unreasonable searches and seizures under the fourth amendment" This Court should read § 926A consistent with these Findings that the people have a right to possess firearms and that they may lawfully transport them without fear of search, seizure, and arrest by local police under an unjustified presumption that some unknown aspect of the transport might be unlawful.

It is reasonable for airport police to be informed that passengers may lawfully transport firearms pursuant to § 926A and to Transportation Security Administration (TSA) regulations providing for declaring and transporting unloaded firearms in checked baggage. When passengers declare unloaded firearms in baggage they are checking and fill out the applicable form, no reason exists to require the airline to notify the Port Authority and for the police to respond and detain, interrogate, search, and arrest the passenger.

In the case of John Torracco, it is unreasonable for an airport officer not to know of the existence of § 926A and to arrest him as if the federal law did not exist. In the case of William Winstanley, it is unreasonable for an airport officer to presume that the passenger's possession of a firearm in the destination state would not be lawful when the officer had no basis for believing that such possession would be unlawful.

In virtually every airport in the United States, passengers routinely transport firearms pursuant to § 926A and TSA regulations without any involvement by local police. As the lack of caselaw on the subject suggests, only a tiny handful of airports nationwide, such as those here, have a policy wherein airport police presume that passengers transporting firearms pursuant to preemptive federal law are nonetheless violating state law. It is unreasonable for police assigned to an airport not to be

trained to know that federal law preempts state law regarding the transport of firearms.

Summary judgment was erroneous under the record here in that a rational trier of fact could conclude that the defendants violated plaintiffs' rights under 18 U.S.C. § 926A and the Constitution and were not protected by qualified immunity. Because § 926A protects a personal right to transport firearms, violation thereof provides a private action and damages remedy under the Civil Rights Act, 42 U.S.C. § 1983.

The district court thought that § 926A requires knowledge of the firearm laws of all fifty states, and thus its enforcement would strain judicial competence. To the contrary, it is lawful to possess and carry a firearm in virtually every state without any special license or permit. New York is the only (or virtually the only) state nationwide to require a license merely to possess a handgun. Moreover, the lower court turned the normal presumptions upside down. Absent reason to believe unlawfulness, an officer has no business detaining, interrogating, and arresting passengers.

The district court erroneously assumes that every passenger who declares and checks firearms pursuant to federal regulations has the burden of proving to the officer that he or she qualifies under every element of § 926A and is not otherwise subject to arrest, even if the officer does not have probable cause to believe the

passenger is in violation of one of those specific elements. To the contrary, the passenger should not be considered a suspect and be detained or arrested where the officer has no knowledge that the passenger lacks compliance with the elements of § 926A.

“If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Police officers at large airports drawing travelers from all over the United States should know federal law governing transportation of firearms, and those who do not are not protected by qualified immunity.

The text of § 926A plainly states that a person is “entitled” to transport a firearm unless the person or defined circumstances have an element of unlawfulness, and it preempts state law absent probable cause of such unlawfulness. The absence of numerous precedents suggests that police at airports nationwide, except a tiny number, recognize the plain language of § 926A and abide by it.

In this case, violation of the plaintiffs’ entitlement to transport firearms under § 926A led to unlawful search, detention, arrest, and interference with the right to travel. The violation of these rights by the police officers here cannot be viewed in isolation. They were part and parcel of the Port Authority’s policy to nullify this

entitlement established by federal law and to cause the harassment and arrest of countless passengers who in good faith act pursuant to their rights under federal law. This Court should put an end to this interference with interstate travel and restore the supremacy of federal law.

ARGUMENT

Standard of Review

Gilles v. Repicky, 511 F.3d 239, 243 (2nd Cir. 2007) (citations omitted), states the standard of review applicable here:

“We review a grant of summary judgment *de novo*, construing the record in the light most favorable to the non-moving party.” . . . We accept [plaintiff’s] evidence as true and draw all reasonable inferences in her favor. . . . We will affirm a grant of summary judgment where there is no genuine issue as to any material fact, and where the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, we will affirm the district court only if no rational trier of fact could conclude that the facts established that [defendant] violated [plaintiff’s] constitutional rights and was unprotected by qualified immunity.

**I. A PERSON IS “ENTITLED” TO TRANSPORT A
FIREARM UNDER § 926A, PRECLUDING ARREST WITHOUT
PROBABLE CAUSE TO BELIEVE EXISTENCE OF A FEDERAL
DISABILITY OR VIOLATION OF THE LAWS OF THE PLACES
FROM AND TO WHICH THE FIREARM IS TRANSPORTED**

A. The Text of § 926A Clearly States an Entitlement

Any person who is legally entitled to possess firearms under federal law is entitled to transport a firearm from one place where she may legally possess the firearm to another such place. The Firearms Owners’ Protection Act of 1986 (“FOPA”) enacted 18 U.S.C. § 926A, which provides:

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose 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, if during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or directly accessible from the passenger compartment of such transporting vehicle: *Provided*, That in the case of a vehicle without a compartment separate from the driver’s compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

“§ 926A *specifically ‘entitles’* a person ‘not otherwise prohibited . . . from transporting, shipping, or receiving a firearm’ to ‘transport a firearm . . . from any place where he may lawfully possess and carry’ it to ‘any other place’ where he may do so.” *Muscarello v. United States*, 524 U.S. 125, 134 (1998) (emphasis added).

Section 926A “describ[es] when and how a person may travel in a vehicle that contains his firearm *without violating the law . . .*” *Id.* at 146-47 (Ginsburg, J., dissenting) (emphasis added). Obviously, where one is “entitled” by federal law to do an act which thereby does not “violate the law,” an officer should not make an arrest.

“Although New York generally ‘does not recognize or give effect to licenses to carry firearms issued by . . . other state[s],’ 1997 N.Y. Op. Atty. Gen. 14, federal law grants a limited *right* to transport unloaded firearms through the State.” *Bach v. Pataki*, 408 F.3d 75, 81-82 & n.14 (2nd Cir. 2005), quoting 18 U.S.C. § 926A (emphasis added).

“Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right.” *Estate of Cowert v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992), citing *Board of Regents of State Colleges v. Roth*, 408

U.S. 564, 577 (1972),⁴ and *Black's Law Dictionary* 532 (6th ed. 1990) (defining “entitle” as “To qualify for; to furnish with proper grounds for seeking or claiming”).

The term “entitle” is also defined in part as “to give a right or legal title to; qualify (a person) to something.” *Webster's New World Dictionary* (1991), 453. The directive that a person “shall be entitled to transport a firearm” is incompatible with the Port Authority’s policy here to “arrest them all and let the courts sort it out.”

“The entitlement is *an immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). As stated in another firearm law context, “This provision of the Code does not merely provide a defense to a criminal charge; rather, it ‘specifically prevents the arrest or prosecution’ of anyone to whom it applies.” *Stein v. United States*, 532 A.2d 641, 644 (D.C. 1987) (firearm surrender provision), *cert denied*, 485 U.S. 1010 (1988). “Although it is too late to prevent Stein’s arrest, his right to avoid prosecution (if he has such a right) cannot be ‘vindicated by an acquittal at trial or on appeal,’ as the government asserts.” *Id.*

⁴Referring to “‘property’ interests protected by procedural due process,” *Roth* stated on the page cited: “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it.”

The entitlement in § 926A exists “Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof” “Express preemption arises when ‘a federal statute expressly directs that state law be ousted.’” *Air Transport Association of America, Inc. v. Cuomo*, 520 F.3d 218, 220 (2nd Cir. 2008) (New York State Passenger Bill of Rights preempted by Airline Deregulation Act of 1978) (citation omitted). This Court did not rule in that case, as did the district court here, that New York authorities could enforce the state law against the airlines, which could raise federal preemption only as an affirmative defense after being charged with violations.

In *Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 609 (D. N.J. 1990), plaintiffs argued that “they may be arrested for transporting firearms through New Jersey, even though they have complied with the federal statute [§ 926A].” They cited a police chief’s statement that, while he was aware of the federal law allowing transport of firearms, “that would not make them any less subject to arrest in New Jersey,” and “[i]f the federal law provides them some sort of defense, that is up to the prosecutor and/or judge in the court in which they are arraigned.” *Id.* at 609-10 n.15.

The defendant Attorney General responded that, while the New Jersey firearm law at issue had no express provision recognizing that it “is subject to preemption by

federal law, no such requirement is needed, as the Constitution’s Supremacy Clause provides such a guarantee.” *Id.* at 609. The court agreed, stating: “For plaintiffs’ predicted irreparable injury to become realized, law enforcement officers throughout New Jersey would have to disregard the federal law in its entirety. The threat of such arguably random and unauthorized acts is speculative at best” *Id.* at 610. But the court added: “Based on the police chief’s affidavit, plaintiffs arguably could seek a preliminary injunction against him.” *Id.* at 610 n.15.

The rule the Port Authority defendants seek here, with which the lower court agreed, is to allow police officers at airports “to disregard the federal law in its entirety” by committing “random and unauthorized acts” – detaining and arresting travelers who are in compliance with § 926A.

Where an officer has no probable cause to believe that a traveler is not in compliance with § 926A, the officer may not make an arrest under state law.⁵ Put

⁵*See also City of Camden v. Beretta U.S.A. Corp.*, 81 F. Supp. 2d 541, 549 (D. N.J. 2000) (“this section does provide that conflicting state provisions affecting the transportation of firearms will be preempted”); *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163, 165 & n.2 (1993) (“the ordinance, in prohibiting the transportation of certain weapons through the city by virtue of prohibiting possession of those weapons, conflicted with Section 926A, Title 18, U.S. Code and, therefore, violated the Supremacy Clause”); *Cincinnati v. Baskin*, 112 Ohio St.3d 279, 296, 859 N.E.2d 514, 530 (2006) (O’Connor, J., concurring) (“this statute makes it legal to transport a firearm through a place where possession alone would otherwise be illegal, and that federal statute expressly preempts anything in direct conflict with it”).

otherwise, no law has been violated and no crime has been committed where a person is within the safe harbor of the federal law, and thus no arrest may be made. *See Bieder v. United States*, 662 A.2d 185, 189 (D.C. App. 1995) (“The exclusion from the trial of any reference to Bieder’s rights under the FOPA made it appear that Bieder had acted unlawfully by entering the District of Columbia with a pistol *when in fact he had not then violated the law at all.*”).

Only when police have probable cause to believe a person is not in compliance with 926A may they intervene. *See Matter of Two Seized Firearms*, 127 N.J. 84, 602 A.2d 728, 731 (1992) (“no federally-protected right” under § 926A where firearms were loaded and accessible).

In language similar to § 926A, 18 U.S.C. § 926B preempts state law on behalf of qualified law enforcement officers transporting firearms. An officer indicted for Criminal Possession of a Weapon in the Second Degree was found to be “exempt from prosecution under New York State Law” under § 926B. *People v. Booth*, 2008 WL 2247068, *3 (N.Y. Co. Ct. 2008). It is noteworthy that the provision creates an exemption from prosecution and not simply an affirmative defense.

Section 926A created a broad federal right to transport firearms notwithstanding State law to the contrary. The right is not a mere defense to a criminal charge after arrest and during prosecution, but is an entitlement immunizing

one from arrest. An officer may make an arrest only if probable cause exists that one or more elements of § 926A are not met.

B. The Structure of § 926A Precludes Presumptions of Illegality

The structure of § 926A precludes any presumption that a person's transport of a firearm is unlawful. Section 926A refers to lawfulness in four places: "any person [1] who is not prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm [2] for any lawful purpose [3] from any place where he may lawfully possess and carry such firearm [4] to any other place where he may lawfully possess and carry such firearm" A police officer may not just assume that one or more of these conditions of lawfulness is not met.

Regarding a person "who is not prohibited by this chapter [Chapter 44 of Title 18 U.S.C.] from transporting, shipping, or receiving a firearm," the Gun Control Act prohibits certain categories of persons from transporting, shipping, and receiving a firearm – felons, mental incompetents, unlawful aliens, and others. 18 U.S.C. § 922(g). The mere transportation by a person of an unloaded firearm in an airport in which the person declares and checks the firearm with the airline pursuant to federal regulations surely would not give a police officer probable cause to arrest the passenger as a felon, mental incompetent, or other prohibited person. Before

arresting Torraco, Goldberg had no evidence that Torraco fit into any of the unlawful categories or that his possession of a firearm in Florida or elsewhere was unlawful, and made no attempt to investigate. (A-167)

The Gun Control Act requires that a person who receives a firearm from a federal firearms licensee must first be found not ineligible by the National Instant Criminal Background Check System (NICS). 18 U.S.C. § 922(t). No NICS check is required for a person who is merely possessing or transporting a firearm. Obviously, no presumption exists that a person is in unlawful possession of a firearm unless probable cause exists to believe otherwise.

The condition that a person is “entitled to transport a firearm for any lawful purpose” could not give rise to probable cause to arrest where an officer is unaware of the lawful purpose. By the same token, no reasonable officer could believe that probable cause exists to arrest the passenger under the presumption, without more, that such person’s possession at the place “from” which the firearm is transported or at the place “to” which the firearm is transported would be unlawful. Goldberg knew of no legal requirement for such, but arrested Torraco in part because: “He didn’t have a bill of sale.” (A-167-68, Trans. 192-93).

The “entitle[ment] to transport a firearm” notwithstanding state law constitutes a right to engage in certain conduct. This does not merely state that it is an

“affirmative defense” to what would otherwise be a crime. An officer should not make an arrest where he lacks probable cause that the circumstances of the transportation are not in accord with § 926A.

Finally, a passenger who declares her firearm as unloaded and checks it in locked baggage with airline personnel would clearly be in compliance with the requirement in § 926A that “during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or directly accessible from the passenger compartment of such transporting vehicle” An officer with no cause to believe the firearm was loaded or readily accessible could not assume such and arrest the person on the basis that § 926A did not apply.

Here, the district court adopted a per se rule that police have probable cause to arrest an airport traveler under New York law and could presume that the travel with the firearm was not lawful under § 926A. To the contrary, Congress intended a per se rule that such travel is lawful under § 926A unless probable cause exists to believe that the person is ineligible to possess a firearm under federal law, that an unlawful purpose exists, or such person’s possession is not lawful in the place from which or the place to which the firearm is transported.

C. The Purpose of the Firearms Owners' Protection Act is Inconsistent with a Presumption of Unlawfulness

Section 926A originated as part of the Firearms Owners' Protection Act ("FOPA"), P.L. 99-308, 100 Stat. 449, 460 (1986). The Senate Judiciary Committee explained about § 926A: "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).⁶ Before FOPA's effective date, § 926A was amended to its current version by the Interstate Transportation of Firearms Act, P.L. 99-360, 100 Stat. 766 (1986).

FOPA enacted Findings indicating Congress' understanding that law-abiding citizens have a constitutional right to keep and bear arms and that the firearms laws should eschew unlawful searches and seizures. Section 926A should be interpreted with these purposes in mind. Specifically, FOPA declared as follows:

CONGRESSIONAL FINDINGS--The Congress finds that--

(1) the rights of citizens--

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

⁶"There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that “it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-biding citizens for lawful purposes.”

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

This Court should read § 926A consistent with Congress’ Findings that the people have a right to possess firearms and that they may lawfully transport them without fear of search, seizure, and arrest by local police under an unjustified presumption that some unknown aspect of the transport might be unlawful.⁷ A person transporting firearms pursuant to federal regulations should be presumed, without

⁷The Supreme Court recently held that the Second Amendment recognizes an individual right to keep and bear arms. *District of Columbia v. Heller*, 2008 WL 2520816 (U.S. 2008) (invalidating handgun ban). That issue was not raised in this case. See *Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) (“As the parties did not raise this [Second Amendment] argument, however, we need not consider it here.”). This Court should, however, defer to Congress’ intent to enforce what it perceived to be Second Amendment rights by enacting provisions such as § 926A.

concrete evidence of unlawfulness to the contrary, to be exercising what Congress deemed to be a constitutional right.

**D. It is Reasonable for Airport Police to Know and Apply
Federal Laws on Transportation of Firearms**

It is reasonable for airport police to be informed that passengers may lawfully transport firearms pursuant to § 926A and to Transportation Security Administration (TSA) regulations providing for unloaded firearms in checked baggage. When passengers declare unloaded firearms in baggage they are checking and fill out the applicable form, no reason exists to require the airline to notify the Port Authority and for the police to respond and interrogate the passenger. It is unreasonable to presume that a person who takes care to follow federal law would violate state law of the places of origin or destination, or that such person would declare a firearm if it was contraband.

The TSA procedure for transporting an unloaded firearm in checked baggage is provided in 49 C.F.R. § 1540.111(C)(2) as follows:

- (I) The passenger declares to the aircraft operator, either orally or in writing before checking the baggage that any firearm carried in the baggage is unloaded;
- (ii) The firearm is carried in a hard-sided container;
- (iii) The container in which it is carried is locked, and only the individual checking the baggage retains the key or combination; and

(iv) The checked baggage containing the firearm is carried in an area that is inaccessible to passengers, and is not carried in the flightcrew compartment.⁸

The above procedures were originally adopted by the Federal Aviation Administration (FAA) and have been in existence for many years.⁹ In addition to finding it expressly preempted by federal law, this Circuit held the New York State Passenger Bill of Rights to “be impliedly preempted by the FAA and regulations promulgated thereunder. The FAA was enacted to create a ‘uniform and exclusive system of federal regulation’ in the field of air safety.” *Air Transport Association of America*, 520 F.3d at 224. The same is true of the uniform federal rules for lawful transport of firearms consistent with air safety.¹⁰

In the case of *Torraco*, it is unreasonable for an airport officer not to know of the existence of § 926A and to arrest him as if the federal law did not exist. In the

⁸See also TSA, “Traveling with Special Items: Firearms & Ammunition,” http://www.tsa.gov/travelers/airtravel/assistant/editorial_1666.shtm.

⁹See S. Halbrook, “Firearms, the Fourth Amendment, & Air Carrier Security,” 53 *Journal of Air Law & Commerce* 585, 650-52 (1987), reprinted in Serial No. 91, House Judiciary Committee, 100th Cong., 1st Sess., 174, 240-42 (1987); http://www.stephenhalbrook.com/law_review_articles/firearms.htm.

¹⁰“If New York’s view regarding the scope of its regulatory authority carried the day, another state could be free to enact a law prohibiting the service of soda on flights departing from its airports, while another could require allergen-free food options on its outbound flights, unraveling the centralized federal framework for air travel.” *Id.* at 225. Similar chaos would exist if every state adopted different rules on transportation of firearms in interstate commerce.

case of Winstanley, it is unreasonable for an airport officer to presume that the passenger's possession in the destination of another state (Arizona) would not be lawful when the officer had no basis for believing such possession would be unlawful.

Nor would airport police have probable cause to arrest a passenger for not having a bill of sale or other documentation that the firearm is not stolen, as occurred here. No presumption exists that a firearm is stolen any more than such presumption exists for any other article of property.

In virtually every airport in the United States, passengers routinely transport firearms pursuant to § 926A and TSA regulations without any involvement by local police. As the lack of caselaw on the subject suggests, only a tiny handful of airports nationwide, such as those here, have a policy wherein airport police presume that passengers transporting firearms pursuant to TSA regulations are violating the law.

Disregarding the unreasonableness of detaining and interrogating every passenger who declares an unloaded firearm in checked baggage, it is reasonable to require an officer in the airport context to know that mere firearm possession, without more, is lawful in virtually every state. Out of the fifty states, New York is apparently

the only (or virtually the only) state to require a license merely to possess a handgun.¹¹

It is not too much to ask that airport police know and are able to apply federal guidelines for the transport of firearms by persons traveling to and from other states, any more than it is to ask that traffic officers be able to check car tags and driver's licenses from all fifty states.¹² A traffic officer would not be acting reasonably to speculate, based on lack of proper training, that some problem he cannot identify exists with an out-of-state license and to arrest the driver.

It is unreasonable for police assigned to an airport not to know that federal law preempts state law regarding the transport of firearms. “[A] municipality acts with deliberate indifference when, ‘in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights,’ that the deficiency exhibits

¹¹See Bureau of Alcohol, Tobacco, Firearms & Explosives, *State Laws and Published Ordinances - Firearms* (2006).

¹²FOPA requires something analogous on the part of federal firearm licensees. 18 U.S.C. 922(b)(3) authorizes such licensee to sell a rifle or shotgun to a resident of another state if “the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States)”

deliberate indifference on the part of municipal policymakers.” *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007), quoting *City of Canton v. Harris*, 489 U.S. 378, 391 (1989). “Alternatively, we may find deliberate indifference when a repeated pattern of constitutional violations makes ‘the need for further training . . . plainly obvious to the city policymakers.’” *Id.*, quoting citing *City of Canton*, 489 U.S. at 390 n.10.

As noted, Officer Espinal was unfamiliar with § 926A but admitted that “they [the Port Authority] had been arresting everybody who made this declaration unless they had some sort of a New York City license.” (A-123). Sgt. Goldberg testified that of the hundred firearm arrests he personally participated in or supervised at the airport in a given year, fifty of the individuals had “declared the firearm at the airport, whether with the TSA, at the ticket counter or with some other agency.” (A-161-62, Trans. 80-82). These facts are clearly within the rule stated in *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 409 (1997), as follows:

[A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens’ rights could justify a finding that policymakers’ decision not to train the officer reflected “deliberate indifference” to the obvious consequence of the policymakers’ choice--namely, a violation of a specific constitutional or statutory right.

In sum, airport police officers should know, and the Port Authority should train them to know, that § 926A entitles passengers to transport firearms without regard to state law. An officer may make an arrest or detain a passenger for violation of state law only if probable cause exists that an element of § 926A is not met.

**II. A RATIONAL TRIER OF FACT COULD CONCLUDE THAT
DEFENDANTS VIOLATED PLAINTIFFS’ CONSTITUTIONAL
AND STATUTORY RIGHTS AND WERE NOT PROTECTED
BY QUALIFIED IMMUNITY**

Summary judgment was erroneous under the record here in that a rational trier of fact could conclude that the defendants violated plaintiffs’ rights under 18 U.S.C. § 926A and the Constitution and were not protected by qualified immunity. See *Gilles v. Repicky*, 511 F.3d at 243. “A court required to rule upon the qualified immunity issue must consider . . . this threshold question: *Taken in the light most favorable to the party asserting the injury*, do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (emphasis added). That showing has been made here.

A. § 926A Benefits Individual Travelers and is not “Vague and Amorphous”

The Civil Rights Act, 42 U.S.C. § 1983, recognizes an action for violation of the “rights, privileges, or immunities secured by the Constitution and laws” of the United States. Whether violation of a law provides a private action and damages depends on the intent of Congress. *Gonzaga University v. Doe*, 536 U.S. 273, 283-84

(2002) (contrasting right of a “person” not to be subjected to discrimination from a prohibition on federal funding of non-compliant educational institutions). “For a statute to create such private rights, its text must be ‘phrased in terms of the persons benefitted.’” *Id.* at 284 (citation omitted). Section 926A specifies the persons benefitted.

Gonzaga University reaffirmed the factors to be considered as stated in *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997):

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

“As the language of the statute [§ 1983] plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights. We have repeatedly held that the coverage of the statute must be broadly construed.” *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (recognizing a § 1983 damages action for violation of the National Labor Relations Act, which preempted any state action to affect the outcome of labor strikes). Congress intended to protect individuals from government interference rather than simply to enforce a uniform, national policy.

This Circuit has applied the above precedents in various contexts. *NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49, 52 (2d Cir. 2008) (telecommunications provision limited state and local governments rather than benefitted “an identified class of putative plaintiffs”); *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 150 (2d Cir. 2006) (prohibition on a state or municipality enacting certain laws on motor carriers was not “phrased in terms of the persons benefitted”); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005) (National Bank Act preemption was to effectuate national banking policy, not to benefit each national bank).

Applying the above principles, the district court here correctly decided:

the language of § 926A suggests that it is specifically directed at granting rights to beneficiaries, not merely prohibiting or limiting government action. It uses the term “entitled,” and the subject of the sentence is “any person,” not a governmental authority. Indeed, the reference to prohibiting government interference, buried as a limiter under the word “notwithstanding,” merely emphasizes the right being granted, and is practically superfluous; even without the “notwithstanding” clause, the Supremacy Clause might itself prohibit local interference. (A-53-54)

However, the district court found entitlement to transport firearms “for any lawful purpose 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,” to be “so ‘vague and amorphous’ that its enforcement would strain judicial competence.” (A-

55, quoting *Blessing*, 520 U.S. at 340-41). While § 926A prevents “conviction under local gun laws for citizens who legally transport firearms between two states (and it in fact accomplished that goal with regard to Mr. Torracco),” its application “to permit real-time transfer of legal firearms interstate in the fast-moving context of trains, planes, and automobiles, without judicial involvement, has . . . severe practical difficulties.” (A-55).

The Port Authority police would have to know about not only § 926A, according to the district court, but also about the firearms laws of all fifty states (A-56). Yet the court turned the presumptions upside down. It is not too much to ask that police at a heavily-traveled national airport know that federal law entitles passengers to transport firearms without regard to local law.¹³ Further, where a passenger follows federal procedures to declare and check firearms, the passenger is presumed to be acting lawfully unless an officer has probable cause to believe otherwise. Absent reason to believe unlawfulness, an officer has no business detaining, interrogating, and arresting passengers.

Federal law and regulations contemplate that TSA is the enforcement agency in the first instance regarding passengers who declare and check firearms in locked

¹³“Expediency, convenience, or ease of administration or enforcement do not justify constitutional infringement of privileges and immunities.” *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 99 (2nd Cir. 2003).

baggage. If an unlawful act is detected at that point, TSA would handle the matter or may call in the local police. That is the practice in airports throughout the United States, a tiny handful excepted. Local police at an airport have little occasion to need to know the laws of the other states.

In the occasions when it may be necessary to do so, the issue may be easily resolved in that possession of a firearm, without more, is lawful in almost all states. New York is the only (or one of only a handful) state requiring a license to possess a handgun.¹⁴ Contrary to the district court, variations in state laws regarding permits to purchase and other matters are irrelevant, in that § 926A requires only that the person may possess or carry a firearm in a given state. Moreover, while local ordinances may regulate sales and use of firearms, the district court cited no instance in which a local ordinance requires a license for mere possession. State laws in this regard are relatively static and would not, as the district court suggests, require “endless training.”¹⁵ (A-56).

¹⁴See See Bureau of Alcohol, Tobacco, Firearms & Explosives, *State Laws and Published Ordinances - Firearms* (2006).

¹⁵The district court also worried that local police would be required to know the laws of Australia and other countries (A-57 n. 5). Yet it must be exceedingly rare for foreigners to be transporting firearms into the United States, the legalities of which are enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives. 18 U.S.C. § 925(c).

The district court erroneously assumes that every passenger who declares and checks firearms pursuant to federal regulations has the burden of proving to the officer that he or she qualifies under every element of § 926A and is not otherwise subject to arrest, even if the officer does not have probable cause to believe the passenger is in violation of one of those specific elements. “‘I haven’t done anything wrong’ accompanied by a facially plausible explanation,” does not suffice to overcome the presumption of guilt – “Sgt. Goldberg testified that he makes about 50 firearms arrests a year at LaGuardia, and in about half of those, the suspects assert some claim of legal entitlement” (A-57). Despite the officer not having evidence of lack of legal entitlement, the court states: “The statute would make no sense at all if it required an officer to simply accept the oral representation of *the suspect* without having the legal knowledge base to evaluate the assertion.” (A-57). Why is the passenger considered a “suspect” where the officer has no knowledge that the passenger lacks compliance with the elements of § 926A?

“Probable cause to arrest exists when the officers have knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.” *Zellner v. Summerlin*, 494 F.3d 344, 368 (2nd Cir. 2007) (finding lack of probable cause and rejecting qualified immunity).

“‘Arguable’ probable cause should not be misunderstood to mean ‘almost’ probable cause.” *Gilles v. Repicky*, 511 F.3d 239, 246-47 (2nd Cir. 2007). Here, *no* cause existed to believe plaintiffs were not in compliance with § 926A.

This is well illustrated by the very first element in § 926A related to lawfulness, i.e., that “any person who is not prohibited by this chapter from transporting, shipping, or receiving a firearm” is entitled to transport a firearm. Such prohibited persons include felons and others listed in 18 U.S.C. § 922(g). The district court’s following comment indicates how it has turned normal presumptions upside down: “Even as to the disqualified categories, the statute does not advise how the officer is supposed to determine their status when the passenger is about to board a plane, other than taking their word for it.” (A-57 n.6). Without any suspicion that a person is a felon or other disqualified person, an officer has no business detaining such person. No presumption exists that a person is a felon and must prove otherwise, and that the officer need not take the person’s word for it.

The district court correctly notes that “the issue is whether Sgt. Goldberg had probable cause to think that Mr. Torracco had violated the law, not whether he actually violated it.” (A-58 n.8).¹⁶ But in concluding that Goldberg had no way to verify that

¹⁶However, the court questioned whether Torracco’s brief stop at a friend’s house in Queens on the way to LaGuardia was inconsistent with § 926A. Given that the friend transported him to the airport, this was among those “‘necessary’ interim

Torraco was in compliance with the law, the court finds it reasonable that he not know about § 926A and that, even if he did, he had no way to verify the lawfulness of Torraco's purpose and his possession at the origin and destination of his transportation.¹⁷ Again, the invalid premise for this conclusion is that an officer may presume that each such aspect is unlawful, rather than presume that each such aspect is lawful. On that incorrect basis the court held that the phrase "for any lawful purpose 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" is "vague and amorphous" and so excludes a § 1983 damages remedy.

Whether Goldberg violated Torraco's rights against unreasonable search and seizure and unlawful arrest depends on whether probable cause existed to believe that a crime had been committed. As the district court notes, Goldberg knew that Torraco declared his gun to the ticket agent and that it was packed according to TSA regulations, "Torraco could produce no documentation showing his lawful ownership of the gun," Torraco explained the lawfulness of his possession of the firearm under _____ stops in transporting a firearm to its ultimate destination" (A-58 n.8).

¹⁷Goldberg failed to do a warrant check, trace the firearm, or otherwise make any enquiry concerning whether Torraco was a disqualified person. (A-172, Trans. 212).

federal law (specifically citing § 926A) and state law, and TSA Agent Birch agreed with that explanation (A-61-62). That did not amount to probable cause.

The court decided that it was reasonable that Goldberg failed to recognize § 926A because of its “narrowly targeted scope,” limited caselaw thereunder despite twenty years in existence, and the difficulty of its application in the field (A-62 & n.10). However, as an airport officer, Goldberg should have known about laws related to transportation. The lack of much precedent on the issue suggests that § 926A is respected at most airports, and is no excuse for ignorance of the law.

The court stated that “only if a particular set of facts exist will the federal statute come into play at all” and that laws such as N.Y. Penal L. § 265.01(1) “will in most circumstances be the only relevant authority upon which a local officer needs to be informed in determining whether to make a gun arrest.” (A-62-63). Yet an airport frequented by interstate travelers is a far cry from a local neighborhood. On every occasion in which an airport passenger declares and checks a firearm under TSA regulations, § 926A comes into play and overrides state or local law unless an officer has probable cause to believe the passenger may not lawfully possess a firearm under federal law, has an unlawful purpose, or may not lawfully possess the firearm in the place of origin or the destination.

The court suggests that “a police officer who finds someone carrying a gun in New York City, with no documentation, is not legally obligated to simply take the suspect’s word that his possession is legal” (A-64). Torraco was not “carrying a gun” in the City, had been traveling with the unloaded, inaccessible firearm in locked baggage in compliance with § 926A, and had checked it with the airline under TSA sanction for carriage in the baggage compartment. The court concludes: “If the suspect can offer nothing to confirm his defense to what appears to be a clear violation of New York law, the officer is entitled to make the arrest and allow a judge or jury to determine the sufficiency of the suspect’s story.” (A-64). Unless the officer has probable cause that an element of § 926A is not met, the passenger should not be considered a “suspect.” Saying that an officer is “entitled” to arrest every passenger checking a firearm nullifies § 926A’s command that a person is “entitled” to transport a firearm unless an element of § 926A is known to be absent.

This case is unlike those cited by the court. In *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 128 (2d Cir.1997), an officer arrested one of the participants in a fight based on the word of another participant who had a bloodied face and who thus appeared to have been assaulted. In *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989), an officer saw what appeared to be a stolen traffic sign and arrested its

possessor, disregarding the latter's explanation that he got it from a friend. In both of these cases, officers saw evidence suggesting probable cause of a violation of law.

Ignoring that this case involves a passenger who painstakingly complied with § 926A and TSA regulations by declaring and checking an unloaded, inaccessible firearm in a locked case for transport with stowed baggage, the court states: "A gun in the possession of someone who is about to get on a plane presents a potentially much more serious situation than one involving a potentially purloined traffic sign." (A-66). The court states that § 926A "requires confirmation of a particular set of facts, which a police officer is not obligated to accept from the mouth of the suspect." (A-66). To the contrary, an officer has no cause to arrest without probable cause that one of the conditions of § 926A is not met.

B. Rights Under the Plain Text of § 926A Are Clearly Established and Defendants are not Entitled to Qualified Immunity

"If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Police officers at large airports drawing travelers from all over the United States should know federal law governing transportation of firearms.

Even if Torracco's constitutional rights were violated, the district court held, such rights were not clearly established and the officer's arrest is protected by

qualified immunity. The right was not clearly established because “there is no reported decision holding a police officer liable for failing to properly apply the statute” Yet the text of § 926A provides that a person is “entitled” to transport a firearm unless the person or defined circumstances have an element of unlawfulness, and it preempts state law absent probable cause of such unlawfulness. The absence of precedents suggests that police at airports nationwide, except a tiny number, recognize the plain language of § 926A and abide by it.

“[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful’” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citation omitted).¹⁸ “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Id.* at 741.

“[B]ecause they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them [police] to have some knowledge of it.” *Glasson v.*

¹⁸“Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.” *Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

Louisville, 518 F.2d 899, 910 (6th Cir. 1975). “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).¹⁹ An airport officer who is unaware of § 926A is plainly incompetent. Moreover, Goldberg knowingly violated federal law, which he claimed was superceded by state law.

As in *Gilles*, 511 F.3d at 247, “As the law was clearly established that [Torraco] had a constitutional right to be free from arrest without probable cause, as well as a constitutional right to be free from unreasonably prolonged or intrusive investigative detention, and [the officer] has not demonstrated that it was objectively reasonable for him to believe that his conduct did not violate these rights, he is not entitled to the protection of qualified immunity at summary judgment.”

That Goldberg disagreed with TSA Agent Birch does not suggest that “reasonable officers could disagree” over the meaning of the statute (A-68). Goldberg’s insistence that a passenger have “documentation” to corroborate his lawfulness was not reasonable in that § 926A requires no documentation that a person is not prohibited from firearm possession under federal law, that the person has a

¹⁹“If the good faith defense was merely a subjective standard, this would essentially create an ‘ignorance of the law’ defense, which is widely disapproved.” *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1117 n.17 (C.D. Cal. 2006).

lawful purpose, and that the person may lawfully possess a firearm in the places of origin or destination.

The court held that Officer Paulsen's denial of Winstanley's attempt to board an aircraft to travel interstate and to transport his firearm under TSA regulations did not violate his constitutional right to travel. The right to travel is "virtually unqualified." *Karpova v. Snow*, 497 F.3d 262, 272 (2d Cir. 2007).²⁰ While "interference with as well as prohibition of travel may be actionable," the court asserted that "refusal to allow the transport of a firearm is not sufficiently material to infringe upon that right." (A-70). Yet an officer has no right to decide that a person may not travel with any particular kind of lawful property, which is buttressed in the case of firearms by § 926A. "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz v. Roe*, 526 U.S. 489, 499 (1999).

²⁰While *Bach v. Pataki*, 408 F.3d 75, 87 (2d Cir.2005), held that the denial of a firearm license to a non-resident did not violate the right to travel, travel through New York under § 926A was not an issue. At any rate, Winstanley is a New York resident and had a New York firearms license.

The court concluded that the individual defendants did not violate plaintiffs' rights and thus the Port Authority had no liability (A-70). Further, since no rights were violated, no entitlement to declaratory and injunctive relief existed (A-71). To the contrary, violation of the plaintiffs' entitlement to transport firearms under § 926A led to unlawful search, detention, arrest, and interference with the right to travel by the individual police officers, for which the Port Authority is responsible.

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 11,217 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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July 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2008, two (2) true and correct copies of the foregoing were served by first class mail, postage prepaid, to:

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