Case No. 14-73502

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN BRENNAN,
Petitioner

v.

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

On Judicial Review of a Final Order of the
U.S. Department of Homeland Security
Administration, Transportation Security Administration

PROPOSED *AMICUS CURIAE* BRIEF OF JONATHAN CORBETT

Submitted by: Jonathan Corbett, *Pro Se*
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CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

Amicus Jonathan Corbett is an individual appearing on behalf of himself and does not represent a corporation. As *Amicus* does not have any personal knowledge of the affairs of the parties to the case and anyone who may be interested in the outcome as it affects those parties, *Amicus* defers to the Certificates of Interested Persons filed by the parties.

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INTRODUCTION

The TSA asks the Court to allow it to directly levy a civil penalty against anyone whom its employees find annoying via unconstitutionally vague limits on the public, in a strict liability fashion, even if First Amendment-protected speech is restricted. To the extent the public was injured on April 17th, 2012, it was not injured by John Brennan removing his clothes, but rather was injured by the TSA and airport police attempting to quash a constitutional right that Americans hold close to our hearts: our right to petition our government for redress. For the foregoing reasons, the Court should decline to allow the TSA to become a discount legislator, police officer, prosecutor, judge, and jury, and accordingly **set aside** the order levying a fine against John Brennan.

ARGUMENT

I. The Context and Plain Language of 49 C.F.R. § 1540.109 Require More Than Incidental "Distraction"

Brennan was fined under a federal regulation providing that "[n]o person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter." 49 C.F.R. § 1540.109; *see also* Brief of DHS/TSA, p. 4. TSA argues that any action that causes "distraction" of TSA employees at the checkpoint from their duties, as well as a "refusal to obey" any command of a TSA screener, shall qualify as sanctionable § 1540.109 "interference." Brief of DHS/TSA, pp. 13, 14.

In support of their argument, the TSA directs the Court to the preamble to the rule, which it immediately misconstrues. Brief of DHS/TSA, pp. 4, 5. The sentence that states "abusive, distracting behavior, and attempts to prevent screeners from performing required screening, are subject to civil penalties" is read by the TSA to prohibit: 1) abusive behavior, 2) distracting behavior, and 3) attempts to prevent screeners from performing required screening. But, the more reasonable reading based on the positioning of the commas in that sentence is that the rule prohibits: 1) behavior that is both abusive and distracting, and 2) attempts to prevent screeners from performing required screening. *Arguendo*, even if Brennan's First Amendment-

protected conduct "distracted" the TSA, it was far from "abusive," and therefore Brennan is not liable.

II. The U.S. Supreme Court Has Rejected "Contempt of Cop" Laws, and Would Similarly Reject "Contempt of TSA"

When a law "is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Booker*, 543 U.S. 220, 286 (2005) *(internal citations omitted).* To define "interfere" as either "distracting" or "failing to obey" would result in a regulation that was unconstitutionally vague.

First, if the duty of TSA screeners is to search and clear the public for access to their flight, Brennan can hardly be said to have "distracted" them from that mission. The government concedes that the TSA screener working to search Brennan paid careful attention to continuing his review of Brennan after he disrobed. Accepting the government's version of the facts as true, at no point did any screener stop doing his or her job. Brennan didn't set off a fire alarm, causing the screeners to stop working and leave the checkpoint. He didn't play loud music that broke the screeners' concentration. Instead, at all times discernable from Respondents' brief, Brennan was actively requesting that the TSA screeners continue their screening of him.

To the extent that Respondent wishes the Court to find that Brennan's state of dress was such that the screeners were unable to properly focus on their mission, we can quickly see that this would create an entirely unworkable standard. Consider:

1. If a woman with large breasts walks through the checkpoint, resulting in male screeners paying less attention to their jobs, is she liable?
2. If a person is entirely compliant with TSA requests but simply wears a t-shirt that reads, "F-ck the TSA," resulting in offending, amusing, or otherwise catching the attention of screeners and/or the public, is that person liable? *See* *Cohen v. California*, 403 U.S. 15 (1971) (rejecting law written in same vague manner as 49 C.F.R. § 1540.109, applied to similar t-shirt, as both unconstitutionally vague and afoul of the First Amendment).
3. If a Muslim says a prayer near the checkpoint, catching the eye of a TSA screener who stops what he is doing to keep an eye on the man, is this person liable?
4. A grandmother brings her fresh-baked cookies, made from her secret family recipe, to the checkpoint and offers them to every screener she encounters; no TSA screener objects until a manager watches the camera later. Is grandma liable?
5. What about the traveler who inadvertently carries a 500 mL bottle of water (five times the TSA's allowed "liquid limit") in her bag, requiring a screener's time to throw out the water?

Obviously, these scenarios, despite fitting Respondent's tortured interpretation of "distraction," cannot create liability. But, where is the line? How do we objectively distinguish Brennan's conduct from the example of the "well-endowed but clothed" woman? Is it the TSA moral offense to Brennan's conduct? Is it the TSA's reaction to Brennan by shutting down the checkpoint, but not so for the woman? Is it the TSA screener's (and their counsel's) puritan concern that children might be traumatized by seeing a penis that makes the difference[1]?

Clearly none of these distinctions are workable. Brennan's liability cannot be upheld on the basis of how the TSA felt about, or chose to deal with, the situation. The TSA's reaction and subjective feelings, mood, delicate sensibilities, and temperament are not in Brennan's control and *nothing stopped the TSA* from rolling their eyes at Brennan, telling him he could not pass until he re-dressed and continued to secondary screening, and continuing to screen other passengers as normal until he did so or left the checkpoint[2]. The TSA *chose* to be distracted.

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[1] Given that Brennan could clearly have conducted his naked protest lawfully, under state *and* federal law, 50 feet before the checkpoint, exposing his body in front of any children present – who assuredly would have laughed rather than been traumatized – it is shocking that this is an argument seriously presented by the TSA's counsel.

[2] Nothing stopped the TSA from looking at Brennan's naked body, seeing that he had no prohibited items, and allowing him on his way. Respondents' contention, unsupported by evidence, that TSA policies require a passenger to put on clothes to be patted down is not just patently absurd, but also incorrect. Corbett Decl., ¶¶ 18 – 20. The policies, instead, *exempt* bare skin from being patted down because a pat-down of such areas is entirely unnecessary.

In fact, a standard of "whether the TSA simply could have ignored the distraction" is quite workable. If a traveler at the checkpoint is belligerently yelling such that the screeners are not able to communicate above the noise, he has *interfered* with the TSA via the creation of a distraction that *actually* prevents the TSA from continuing their mission. But when the TSA could have continued about their mission, *but voluntarily chose not to*, it would be absurd to create liability for one on the basis of "distraction."

Amicus therefore submits that "interference" predicated on "distraction" must be "a distraction that the TSA cannot ignore."

Second, let us review the "failure to obey" alternative suggested by the TSA. Any discussion of a law requiring the public to obey the commands of government officials can obtain clarity by looking to *Chicago v. Morales*, 527 U.S. 41 (1999). In *Morales*, the U.S. Supreme Court considered a local law that allowed police to order individuals to leave public places if the officer felt that they were gang members loitering for no apparent purpose. The high court explains that "imprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep. Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be

impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id*. at 52 *(internal quotation marks and citations omitted)*.

Here, the rule the TSA relies on to penalize Brennan for his otherwise First Amendment-protected speech is just as "imprecise" as *Morales*, if not moreso, as *Morales* didn't purport to ban mere "distracting" conduct as the TSA contents its rule does. And, the law is likely to – and did – result in the infringement of fundamental constitutional rights, such as the right to free speech, the right to petition one's government for redress, the right to travel, and freedom of movement, just as the law in *Morales* did.

The TSA's interpretation of the rule has even more similarities to *Morales*. The Supreme Court took issue that the Chicago ordinance was "not an ordinance that 'simply regulates business behavior and contains a scienter requirement.' It is a criminal law that contains no *mens rea* requirement and infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack." *Morales* at 55 *(internal quotation marks and citations omitted)*. Here, we are also left with a requirement that the TSA wants interpreted in a way that would impose strict liability: Brennan obviously had no "intent to distract." We are also left with a law that infringes on fundamental, constitutionally protected rights. And, while the TSA's rule is technically a "civil penalty," a fine paid to the government makes the

rule substantially similar to – and requiring the same treatment as – the minor criminal penalty created by Chicago's unconstitutional ordinance.

As a result, if the Court concludes that "interfere" in the context of this regulation is inclusive of Brennan's conduct, it must also conclude that the rule is facially unconstitutional.

Finally, *Amicus* wishes to point out that the TSA's golden case for alleging that "interfere" can mean "failure to obey," in addition to being a 2-1 panel opinion that perhaps should be re-thought, is distinguishable from the instant case. Brief of DHS/TSA, p. 13, *citing United States v. Willfong*, 274 F.3d 1297, 1301 (9th Cir. 2001). In *Willfong*, the case "involved a logger who was convicted of 'interfering with' a forestry official after refusing to follow the official's order to stop logging." Brief of DHS/TSA, p. 13.

A forestry official's job is literally to stop people from doing things such as illegally cutting down trees. In the instant case, Brennan failed to obey a TSA screener's request to put his clothes back on, and the TSA's job is not literally, or in any way related to, keeping people clothed. It is to ensure that prohibited items do not pass the checkpoint. If Brennan had attempted to ignore the TSA screener and walk to his gate without permission, *that* would be akin to the *Willfong* case. The scenario at hand is not.

III. The Public's First Amendment Rights Would Be Injured, and Not a Single Terrorist Would Be Thwarted

The government would have the Court believe that a citizen protest may result in a terrorist sneaking through a TSA checkpoint. This argument is specious. At the outset, Respondent has presented zero evidence that terrorists have ever accomplished, or have ever even *planned* to accomplish, an attack by means of distracting airport security in order to smuggle weapons onto an airplane. Without evidence, this danger is mere conjecture.

The checkpoint is a busy environment that, on a good day, has plenty of yelling, hurried travelers, and unique situations. Luckily, the TSA controls the pace of the checkpoint. Corbett Decl., ¶¶ 14 – 17. There should never be a situation where the TSA cannot keep pace with the passengers, however distracting, because the TSA has complete control of the pace.

Respondent concedes that it was capable of handling "distraction" in this case by shutting down the checkpoint. If, for some reason, the TSA feels overwhelmed with the happenings in the checkpoint, they may halt operations completely until they are ready. With this in mind, it is clear that the TSA is simply trying to punish Mr. Brennan *for slowing their operations*, not for creating a security breach.

On the other hand, the First Amendment rights of anyone near a TSA checkpoint will be significantly abridged if the TSA is permitted to fine individuals by merely

labeling them "distracting." *Amicus* Jonathan Corbett has detailed in his attached declaration that on three occasions, doing no more than calmly refusing to consent to the touching of his genitals was sufficient to garner the attention of many TSA employees and even airport police. Corbett Decl., ¶¶ 4 – 13. As a political statement regarding the TSA's search procedures, this implicates his right to free speech. *Id*. Further, merely possessing litigation documents was enough to "distract" 4 TSA screeners, a manager, airport police, a representative from TSA's Federal Security Director's Office, and federal law enforcement, who collectively detained Corbett for about an hour – implicating his right to petition his government and infringing on litigation privileges. *Id*. Corbett's actions, and the consequence of requiring the extended time of several TSA employees, are not appreciably distinguishable from Brennan's.

The restriction on free speech promoted here by the TSA can be reasonably argued to be more than a mere "time, place, & manner" restriction because only speech that the TSA does not like will ever be prohibited. A TSA screener or supervisor would obviously not be referring for investigation, *e.g.*, a passenger who wishes to spend a few minutes praising their work. Further, such a prohibition cannot be considered a legitimate time, place, and manner restriction because it restricts *the only* time, place, and manner during which a protester's message can be effectively communicated. Brennan's message would have lost its context, meaning, and impact if he would have,

for example, taken off his clothes in the airport parking lot to protest the absurdity of the TSA's screening procedures.

But, even content neutral, true time/place/manner restrictions are subject to overbreadth challenges using intermediate scrutiny. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). The TSA's restriction on speech proposed here is unnecessary because there is a simpler means of accomplishing its goal of preventing distractions at the checkpoint: if a passenger is distracting or refusing to obey instructions, it could simply ask the passenger to leave the checkpoint, and then issue penalties only against passengers who are warned that they must leave but fail to do so. In fact, the TSA regularly does eject passengers from their checkpoints. Corbett Decl., ¶ 5. A regulation that allows for a civil penalty against those who refuse to leave voluntarily would avoid levying a penalty against an individual for their message, rather than their conduct, and would still allow the TSA a means of preserving decorum at their checkpoints.

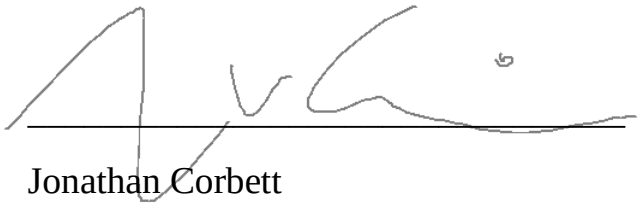
CONCLUSION

The TSA wishes to have greater latitude than actual law enforcement in requiring anyone they encounter to obey their commands under penalty of law. This proposed unchecked authority would not further any legitimate government interest and would significantly injure the public's constitutional rights of due process and free speech.

Amicus therefore implores the Court to declare the TSA's prohibition on "interference" to either be unconstitutionally vague or to interpret is as inapplicable to mere "distracting" or "disobedient" behavior and **set aside** the TSA's order to fine John Brennan.

Dated: San Francisco, CA
April 11th, 2017

Respectfully submitted,



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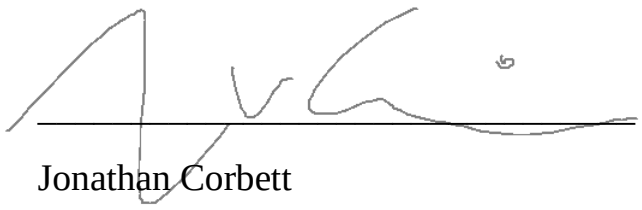
CERTIFICATE OF COMPLIANCE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that that this brief complies with Fed. R. App. P. 32(a) because it contains approximately 2,597 words using a proportionally-spaced, 14-point font.

Dated: San Francisco, CA
April 11th, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that I have served this **Proposed *Amicus* Brief** and **Motion for Leave** to file the same on April 11th, 2017, via FedEx upon:

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Creighton & Rose, PC
65 SW Yamhill Street, Suite 300
Portland, OR 97204

William Ernest Havemann (for Respondent)
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Suite # 7515
Washington, DC 20530

Dated: San Francisco, CA
April 11th, 2017

Respectfully submitted,

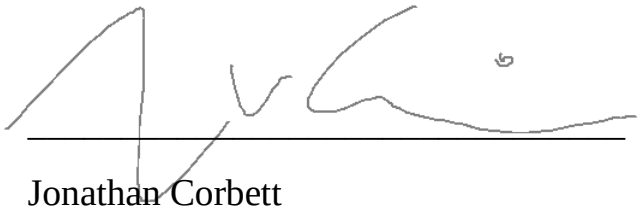

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EXHIBIT A – DECLARATION OF JONATHAN CORBETT

I, Jonathan Corbett, affirm that the foregoing is true to the best of my knowledge under penalty of perjury:

1. My name is Jonathan Corbett and I am a U.S. Citizen above the age of 21 years old.
2. I am a civil rights advocate specializing in privacy and travel rights, and in that capacity I have studied aviation security since 2010.
3. My advocacy has consisted of litigation, protests, journalism, and other activities.
4. In protest of the TSA's policy of touching the genitals of travelers during its pat-down procedure, and to raise awareness thereof, I have on 3 occasions verbally told a screener who was about to pat me down that I consented to the same *except* to any touching of my genitals.
5. On all 3 occasions I was ejected from the checkpoint and not allowed to board.
6. On 2 of those occasions, airport police were called.
7. On 1 of those occasions, I was threatened by a TSA manager with arrest, fines, and forcible search for my "non-compliance."
8. On an additional occasion, I was detained for nearly an hour because the TSA found a document in my bag that was labeled "Sensitive Security Information."

9. I was lawfully in possession of this document, which was sent to me by the U.S. Department of Justice as part of the administrative record relating to litigation to which I am a party.

10. Notwithstanding, this attracted the attention of 4 TSA screeners, a Transportation Security Manager, 2 airport police, a representative from the Federal Security Director's Office, and federal law enforcement (a Transportation Security Inspector), who collectively detained me for about an hour to ask me questions.

11. I refused to answer most of their questions as I considered the information to be privileged.

12. I am certain the Court can appreciate that when one sues the government, it would create quite a problem if agents of the government could find the party in an airport and force him to answer questions about his litigation.

13. Should Brennan's civil penalty be upheld, it will have significant impact on my work, as I fear in any of the situations described above, my conduct would have met the "distracting" or "failure to obey" standards espoused by the TSA.

14. From my study of TSA procedures, including passing through checkpoints at least 250 times over the past 7 years, interviewing TSA employees, reading agency and court documents, and other studies, I am personally familiar with how the TSA controls the flow of traffic at their checkpoints.

15. The TSA has two "choke points" where they can cut off traffic to the checkpoint: one at the start of the checkpoint where the traveler's identification documents are checked, and a second at the screening equipment (metal detector or body scanner).

16. If at any time the TSA has a situation it needs to deal with, it can simply direct the TSA screener at either or both of those checkpoints to hold traffic.

17. I have observed the TSA doing this on several occasions.

18. I am also familiar with the TSA's policies for patting down bare skin.

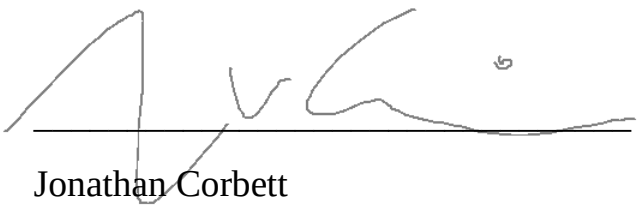
19. These policies direct the TSA to skip over any skin that is exposed, because obviously that area is not concealing a weapon.

20. Upon information and belief, there is no TSA policy that requires a passenger to put on clothing in order to be searched, and I believe that TSA counsel's assertion to the contrary is a misunderstanding of TSA policies and procedure.

21. I was made aware of the pendency of oral arguments relating to issues in which I have interest – those in this case – earlier this year, and drafted and filed this *amicus* brief as shortly thereafter as practicable.

Dated: San Francisco, CA
April 11th, 2017

Respectfully submitted,



Jonathan Corbett