No. 15-3047

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NADINE PELLEGRINO and HARRY WALDMAN,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA TRANSPORTATION SECURITY ADMINISTRATION, Div. of Dep't of Homeland Security; TSA TSO NUYRIAH ABDUL-MALIK, in her individual capacity; TSA STSO LAURA LABBEE, in her individual capacity; TSA TSO DENICE KISSINGER, in her individual capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 3:09-cv-5505
Hon. J. Curtis Joyner, District Judge

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August 27, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
CIRCUIT RULE 35.1 STATEMENT vi
INTRODUCTION 1
ARGUMENT 2
I. The majority opinion disregards the Supreme Court's repeated admonitions to apply the FTCA's plain language and not to read in limitations 6
II. The majority opinion conflicts with decisions of sister circuits, which do not add a "criminal" limitation into § 2680(h) 11
III. This appeal presents a question of exceptional importance concerning the availability of a remedy for those intentionally harmed by Transportation Security Officers 13
CONCLUSION 17
CERTIFICATE OF COMPLIANCE 19
CERTIFICATE OF SERVICE 20
EXHIBIT A, PANEL OPINION
EXHIBIT B, PANEL JUDGMENT

TABLE OF AUTHORITIES

Page(s)

Cases

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 3

Boyle v. United States,
556 U.S. 938 (2009) 3

Bunch v. United States,
880 F.3d 938 (7th Cir. 2018) 4, 11, 12

CNA v. United States,
535 F.3d 132 (3d Cir. 2008) 16

Colautti v. Franklin,
439 U.S. 379 (1979) 7

Corley v. United States,
556 U.S. 303 (2009) 8

Dolan v. U.S. Postal Serv.,
377 F.3d 285 (3d Cir. 2004) 10

Dolan v. U.S. Postal Serv.,
546 U.S. 481 (2006) 9, 10

In re Electronic Surveillance,
49 F.3d 1188 (6th Cir. 1995) 13

In re Grand Jury Proceedings,
841 F.2d 1048 (11th Cir. 1988) 13

Hernandez v. Lattimore,
612 F.2d 61 (2d Cir. 1979) 12

Hibbs v. Winn,
542 U.S. 88 (2004) 9

Inhabitants of Montclair Twp. v. Ramsdell,
107 U.S. 147 (1883) 8

Meese v. Keene,
481 U.S. 465 (1987) 7

Millbrook v. United States,
569 U.S. 50 (2013) 7, 9

Stenberg v. Carhart,
530 U.S. 914 (2000) 7

Terry v. Ohio,
392 U.S. 1 (1968) 5, 14

United States v. Aukai,
497 F.3d 955 (9th Cir. 2007) 4

United States v. Hartwell,
436 F.3d 174 (3d Cir. 2006) 4, 5

United States v. Menasche,
348 U.S. 528 (1955) 7

Vanderklok v. United States,
868 F.3d 189 (3d Cir. 2017) 14, 17

White-Squire v. U.S. Postal Serv.,
592 F.3d 453 (3d Cir. 2010) 16

Constitutional Provisions

U.S. Const. amend. IV 5

Statutes

18 U.S.C. § 2510(7) 12, 13

18 U.S.C. § 2517(1) 13

18 U.S.C. § 3050 12

28 U.S.C. § 2680(b) 10

28 U.S.C. § 2680(h) ..... *passim*

49 U.S.C. § 44901(a) 4, 14

49 U.S.C. § 44901(g)(5) 4, 14

49 U.S.C. § 44935(f)(1)(B) 4

Rules and Regulations

49 C.F.R. § 1540.107(a) 4, 14

3d Cir. L.A.R. 35.2(a) 1

Legislative Materials

S. Rep. No. 93-588 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789 16

Stop TSA's Reach in Policy Act, H.R. 3608, 112th Cong. (2011) 4

The Transp. Sec. Admin.'s Airline Passenger and Baggage Screening, Hearing before the Comm. on Commerce, Sci., and Transp., 109th Cong. 7 (2006) 3

Other Authorities

Brian Maass, *TSA Screeners at DIA Manipulated System to Grope Men's Genitals*, CBS4 (Apr. 13, 2015) 14

Claims Data 2015, Transp. Sec. Admin. (Feb. 9, 2016) 15

Fredrick Kunckle, *TSA Agents Cannot Be Sued over Allegations of Abuse, Federal Court Rules*, WASH. POST (July 11, 2018) 13

Officer, BLACK'S LAW DICTIONARY (4th ed. rev. 1968) 3

Security Screening, Transp. Sec. Admin., https://www.tsa.gov/travel/security-screening (last visited Aug. 27, 2018) 5

TSA Agent Accused of Sexually Assaulting a Woman in LaGuardia Airport Bathroom, CBS NEW YORK (Aug. 28, 2015) 15

TSA Releases 2015 Statistics, Transp. Sec. Admin. (Jan. 21, 2016) 15

TSA Year in Review: Record Number of Firearms Discovered in 2017, Transp. Sec. Admin. (Jan. 29, 2018) 14

United States Br., *Bunch v. United States*, No. 16-3775 (7th Cir. May 3, 2017), ECF No. 24 11

United States Supp. Br., *Bunch v. United States*, No. 16-3775 (7th Cir. Sept. 20, 2017), ECF No. 41 11

CIRCUIT RULE 35.1 STATEMENT

Under the Federal Tort Claims Act ("FTCA"), the United States waives sovereign immunity for intentional torts committed by "investigative or law enforcement officers," defined as "*any* officer of the United States who is empowered by law *to execute searches* . . . ." 28 U.S.C. § 2680(h) (emphasis added). In this case, a divided panel held that this provision of the FTCA does not apply to Transportation Security Officers authorized to conduct searches at the nation's airports because such searches are not "criminal law" searches, even though the statute contains no such qualification or limitation.

I express a belief, based on a reasoned and studied professional judgment, of the following:

1. The panel majority decision is contrary to the decision of the Supreme Court of the United States in *Millbrook v. United States*, 569 U.S. 50 (2013). Consideration by the full court is therefore necessary to secure and maintain uniformity of this Court's decisions.

2. By limiting 28 U.S.C. § 2680(h) to only those officials exercising criminal law enforcement powers, the majority's opinion conflicts with the reasoning of other United States Courts of Appeal.

3. This appeal involves the following question of exceptional importance: whether the Federal Tort Claims Act provides a remedy to persons injured by the intentional torts of Transportation Security Officers because Transportation Security Officers are "officers . . . empowered by law to execute searches." 28 U.S.C. § 2680(h).

/s/ *Paul M. Thompson*
Paul M. Thompson

INTRODUCTION[1]

After a harrowing ordeal orchestrated by Transportation Security Officers, Nadine Pellegrino was arrested,[2] jailed, cited for ten criminal violations, including aggravated assault on law enforcement officials, and prosecuted for eight. She successfully defended against those charges and thereafter brought this suit seeking a remedy for the intentional misconduct of the Transportation Security Officers. Specifically, her claims include false arrest, false imprisonment, and malicious prosecution under the FTCA.

Under the FTCA, the United States waives sovereign immunity for these intentional torts when committed by an "investigative or law enforcement officer[]" defined as "any officer of the United States who is empowered by law to execute searches . . . ." 28 U.S.C. § 2680(h). Because Transportation Security Officers are federal officers empowered by law to execute searches, the United States has waived sovereign immunity, and Ms. Pellegrino's FTCA claims should proceed.

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[1] Pursuant to 3d Cir. L.A.R. 35.2(a), copies of the panel's opinion and judgment are attached hereto as Exhibits A and B, respectively.

[2] Ms. Pellegrino maintains that the Transportation Security Administration defendants initiated malicious actions against her in retaliation and out of self-preservation and did so without probable cause.

A divided panel of this Court, however, deviated from the plain language of the FTCA's so-called "law enforcement proviso," holding that the proviso applies only when the relevant federal official has *criminal* law enforcement powers. The majority's addition of an amorphous (and atextual) "criminal law" test contravenes the Supreme Court's repeated admonition to apply the FTCA's plain language, renders language in the proviso superfluous, conflicts with the approach taken by other circuits, and leaves those intentionally and maliciously harmed by federal officers without the remedy provided by Congress. For these reasons, this Court should vacate the panel's opinion and rehear this case en banc.

ARGUMENT

Under the FTCA, the federal government retains sovereign immunity for most intentional torts, but it has waived sovereign immunity for six intentional torts if committed by "investigative or law enforcement officers." *See* 28 U.S.C. § 2680(h). Section 2680(h) includes a unique definition of "investigative or law enforcement officer"—that operates for purposes of § 2680(h) only—and that is at issue in this case. Specifically, § 2680(h) provides:

> For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h) (the so-called "law-enforcement proviso").

First, Transportation Security Officers qualify as "*any* officer of the United States." 28 U.S.C. § 2680(h) (emphasis added). "The term 'any' ensures that [a] definition has a wide reach[.]" *Boyle v. United States*, 556 U.S. 938, 944 (2009); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers *of whatever kind*." (emphasis added)); *Officer*, BLACK'S LAW DICTIONARY (4th ed. rev. 1968) (defining "officer" as "[o]ne who is charged by a superior power (and particularly by government) with the power and duty of exercising certain functions"). Further, the TSA itself in 2005 "reclassified the agency's 43,000 screeners as Transportation Security *Officers*" to "acknowledge[] the judgment and skills required and the standards to which [the TSA] holds its workforce." *The Transp. Sec. Admin.'s Airline Passenger and Baggage Screening, Hearing before the Comm. on Commerce, Sci., and Transp.*, 109th Cong. 7 (2006) (statement of Edmund "Kip" Hawley, TSA Administrator) (emphasis

added). Indeed, Congress recognizes Transportation Security Officers' classification as "officers," as evidenced by a 2011 bill introduced to prohibit Transportation Security Officers "from using the title of 'officer' and from wearing uniforms and carrying badges resembling those of law enforcement officers." *See* Stop TSA's Reach in Policy ("STRIP") Act, H.R. 3608, 112th Cong. (2011). Congress chose not to pass the bill, and Transportation Security Officers remain "officers."

Second, Transportation Security Officers are "empowered by law to execute searches." 28 U.S.C. § 2680(h).[3] The Aviation and Transportation Security Act specifically empowers Transportation Security Officers to perform searches. *See* 49 U.S.C. § 44901(a), (g)(5); *id.* § 44935(f)(1)(B); 49 C.F.R. § 1540.107(a); *United States v. Aukai*, 497 F.3d 955, 960 n.3 (9th Cir. 2007) (en banc) ("Airport screening searches are mandated by a federal law."). And, in *United States v. Hartwell*, this Court "h[eld] that the [TSA checkpoint] search was permissible

[3] Section 2680(h)'s functional test is written in the disjunctive and asks whether the relevant official has the power to execute searches, seize evidence, *or* make arrests for violations of federal law. 28 U.S.C. § 2680(h). Accordingly, the relevant official need only possess one of those powers, *e.g.*, *Bunch v. United States*, 880 F.3d 938, 944 (7th Cir. 2018)—which the majority does not appear to dispute.

under the administrative search doctrine" of the Fourth Amendment. 436 F.3d 174, 177 (3d Cir. 2006).

Further, Transportation Security Officers' searches may include patdowns, which TSA's website describes as "inspection of . . . sensitive areas such as breasts, groin, and the buttocks." *See Security Screening*, Transp. Sec. Admin., https://www.tsa.gov/travel/security-screening (last visited Aug. 27, 2018). Such invasive inspections are searches. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search[.]' "). Accordingly, Transportation Security Officers are "empowered by law to execute searches" within the meaning of § 2680(h).

Nevertheless, despite the plain language of § 2680(h), the majority opinion holds that § 2680(h) limits itself to those performing only *criminal* law enforcement powers or functions. *E.g.*, Maj. Op. 18.[4]

[4] The majority opinion provides various formulations of the way in which the "criminal" limitation attaches to the language of the statute. *E.g.*, Maj. Op. 18 ("[T]he phrase 'investigative or law enforcement officers' is limited in scope and refers only to officers with criminal law enforcement powers."); *id.* at 19 ("[W]e conclude that the law

There are three reasons, however, that this Court should vacate the panel's opinion and rehear this case en banc.

I. The majority opinion disregards the Supreme Court's repeated admonitions to apply the FTCA's plain language and not to read in limitations

First, the majority opinion reads the word "criminal" into the proviso. *E.g.*, Maj. Op. 18 ("officers with criminal law enforcement powers"); *id.* at 19 ("only criminal law enforcement officers"); *id.* at 21 ("officers who perform criminal law enforcement functions"); *id.* at 24 n.14 (has "criminal law connotations"); *id.* at 35 ("participates in criminal law enforcement"); *id.* at 36 (has a "criminal law component"); *id.* at 37 ("federal officers who are involved in criminal law enforcement").

Congress, however, did not include the word "criminal" in § 2680(h). *Cf.* 28 U.S.C. § 2680(h). Accordingly, the majority's

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enforcement proviso covers only criminal law enforcement officers."); *id.* at 21 ("[T]he term 'investigative or law enforcement officer' therefore means those officers who perform criminal law enforcement functions."); *id.* at 35 ("Each of those individuals participates in criminal law enforcement."); *id.* at 36 ("[T]he proviso does not cover positions that lack a criminal law component."); *id.* at 37 ("[T]he proviso . . . include[s] federal officers who are involved in criminal law enforcement."); *id.* ("[T]he phrase 'investigative or law enforcement officer' refers only to *criminal* law enforcement officers . . . .").

limitation to "criminal law enforcement powers" contravenes the Supreme Court's teachings. *See Millbrook v. United States*, 569 U.S. 50, 55–56 (2013); *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); *Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term."); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) ("As a rule, '[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.' " (alterations in original)).

Second, the majority opinion reads "investigative . . . officer" out of the statute. The law enforcement proviso applies to "investigative *or* law enforcement officers." 28 U.S.C. § 2680(h) (emphasis added). But the majority clearly held that "the law enforcement proviso is designed to cover only criminal law enforcement officers." *See* Maj. Op. 23. This reading, however, violates a basic canon of statutory construction: that this Court must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)

(quoting *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)).

Third, the majority opinion renders the disjunctive list of functions in § 2680(h) superfluous. As written, § 2680(h) applies to "any officer . . . empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). If the proviso is limited to those with just "criminal law enforcement powers," however, then Congress had no need to use the list, much less a disjunctive one. Those with "criminal law enforcement powers," Maj. Op. 19, already have the three powers: to search, to seize evidence, and to make arrests. But when it wrote the proviso, Congress did not require the "investigative or law enforcement officer" to have all three. The use of the disjunctive list showed that any one would do. By limiting § 2680(h) to just those with "criminal law enforcement powers," the majority rendered the list superfluous, something that it cannot do. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (recognizing "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will

be inoperative or superfluous, void or insignificant . . .' " (alterations in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))).

To make matters worse, the Supreme Court has twice rejected this Court's attempt to read limitations into the FTCA. *See Millbrook*, 569 U.S. 50 (reversing this Court's decision that § 2680(h) was limited to intentional torts committed during the course of a search, seizure, or arrest); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006) (reversing this Court's decision that the government had not waived sovereign immunity for negligent placement of mail).

In *Millbrook*, 569 U.S. 50, for instance, the Supreme Court squarely rejected this Court's attempt to limit § 2680(h) in a way that was contrary to the plain language of the statute. This Court had held that the proviso only applied to tortious conduct occurring in the course of executing a search, seizing evidence, or making an arrest. *Id.* at 53–54. But the Supreme Court rejected such a limitation, specifically observing: "A number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso. . . . None of these interpretations finds any support in the text of the statute." *Id.* at 55–56.

And in *Dolan*, 546 U.S. 481, the Supreme Court squarely rejected this Court's attempt to limit the scope of the FTCA's immunity waiver for postal-service negligence. In that case, this Court had held that the U.S. Postal Service could not be sued for negligently placing mail on the plaintiff's front step because, under the FTCA, the government was immune from suit for the "negligent transmission of mail." *See Dolan v. U.S. Postal Serv.*, 377 F.3d 285, 287–88 (3d Cir. 2004), *rev'd*, 546 U.S. 481; *see also* 28 U.S.C. § 2680(b). In reaching this decision, this Court expressed concern about the potential disruption to the Postal Service if such suits were allowed to proceed. *Dolan*, 377 F.3d at 287–88.

The Supreme Court, however, reversed this Court's attempt to limit lawsuits under the FTCA. *Dolan*, 546 U.S. at 492. Even though the Postal Service delivered more than 660 million letters a day to 142 million points of contact, *id*. at 483, the Supreme Court rejected concerns about the "specter of frivolous slip-and-fall claims inundating the Postal Service," *id*. at 491. Instead, the *Dolan* Court held that "ordinary protections against frivolous litigation must suffice." *Id.*

Once again, this majority opinion has sought to limit the reach of the FTCA by adding limitations that are contrary to the clear language

of the statute. To correct this error and bring this Court's FTCA jurisprudence in line with Supreme Court precedent, this Court should vacate the majority opinion and rehear this case en banc.

II. The majority opinion conflicts with decisions of sister circuits, which do not add a "criminal" limitation into § 2680(h)

Second, this Court should grant rehearing because no other Court of Appeals imposes a "criminal" limitation on § 2680(h)'s plain language. Instead, sister circuits apply the proviso as written: by asking whether the particular federal official has one of the three identified powers—the power to execute searches, to seize evidence, *or* to make arrests for violations of federal law.

Indeed, in *Bunch v. United States*, the United States made the same argument about the reach of § 2680(h) that it did to the panel in this case. In particular, it claimed that the proviso does not cover those "who are not given traditional law enforcement powers" and, therefore, would not extend to an ATF chemist. United States Supp. Br. at 11, *Bunch*, No. 16-3775 (7th Cir. Sept. 20, 2017), ECF No. 41; *see also* United States Br. at 22, 30, *Bunch*, No. 16-3775 (7th Cir. May 3, 2017), ECF No. 24.

But the Seventh Circuit rejected this reading of the statute, refusing to limit its holding to only those officials with "traditional" or "criminal" law enforcement powers. *See generally Bunch v. United States*, 880 F.3d 938 (7th Cir. 2018). The Court wrote: "[S]ection 2680(h) refers to both investigative *and* law-enforcement officers, and it defines both types of officer as a person with legal authority to 'execute searches, to seize evidence, *or* to make arrests.' Any one of those three powers will do." *Id.* at 944 (quoting 28 U.S.C. § 2680(h)). "It is undisputed that [the chemist] acted within the scope of his employment when he tested the forensic samples and drafted the reports stating his conclusions. *This leaves only the question* whether [the chemist] was 'empowered by law' to search, seize evidence, or arrest." *Id.* at 941 (emphasis added); *see also Hernandez v. Lattimore*, 612 F.2d 61, 64 n.7 (2d Cir. 1979) ("The defendants fall within the definition of 'investigative or law enforcement officers' by virtue of 18 U.S.C. s 3050, which empowers officers or employees of the Bureau of Prisons of the Department of Justice to make arrests.").

In addition, the majority's opinion conflicts with the decisions of other circuits that have interpreted 18 U.S.C. § 2510(7), a statute that

also defines " '[i]nvestigative or law enforcement officer.' "[5] Indeed, the Sixth Circuit in *In re Electronic Surveillance*, 49 F.3d 1188, 1192 (6th Cir. 1995), recognized that "by referring to investigative *or* law enforcement officers, section 2510(7) expresses Congress' clear intent that the phrase is *not* limited to those who enforce criminal law." *Id.* (internal quotation marks omitted); *see also In re Grand Jury Proceedings*, 841 F.2d 1048, 1054 (11th Cir. 1988) (holding that a House of Representatives committee "falls within the definition of 'investigative officer' contained within 18 U.S.C. § 2517(1)").

Because the majority opinion created a new "criminal law enforcement" limitation—one not adopted by any other circuit—this Court should vacate the panel opinion and rehear this case en banc.

III. This appeal presents a question of exceptional importance concerning the availability of a remedy for those intentionally harmed by Transportation Security Officers

Finally, this case presents a case of exceptional national importance, as the media coverage evidences. *E.g.*, Fredrick Kunckle,

[5] 18 U.S.C. § 2510(7) defines " '[i]nvestigative or law enforcement officer' " differently from § 2680(h)—as "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses[.]" § 2510(7).

TSA Agents Cannot Be Sued over Allegations of Abuse, Federal Court Rules, WASH. POST (July 11, 2018).

More than 770 million people a year go through Transportation Security screening. *See TSA Year in Review: Record Number of Firearms Discovered in 2017*, Transp. Sec. Admin. (Jan. 29, 2018), https://www.tsa.gov/blog/2018/01/29/tsa-year-review-record-amount-firearms-discovered-2017. As this Court has observed, Transportation Security Officers play an important role in national security. *See Vanderklok v. United States*, 868 F.3d 189, 206 (3d Cir. 2017). And these Officers have the power to search your bags and your person, 49 U.S.C. § 44901(a), (g)(5); 49 C.F.R. § 1540.107(a), and to escalate the level of personal intrusion, *see Security Screening*, *supra*; *see also Terry*, 392 U.S. at 16.

Although most encounters with TSA are uneventful, a small but dramatic number of them involve serious abuse. *See* Dissent at 55–56; Brian Maass, *TSA Screeners at DIA Manipulated System to Grope Men's Genitals*, CBS4 (Apr. 13, 2015), http://denver.cbslocal.com/2015/04/13/cbs4-investigation-tsa-screeners-at-dia-manipulated-system-to-grope-mens-genitals (detailing a scheme wherein a Transportation

Security Officer would input "female" to the scanning machine causing an alert in a male passenger's genital area to allow another Officer to grope the male passenger); *TSA Agent Accused of Sexually Assaulting a Woman in LaGuardia Airport Bathroom*, CBS NEW YORK (Aug. 28, 2015), http://newyork.cbslocal.com/2015/08/28/tsa-agent-sex-assault laguardia-airport (detailing a male Transportation Security Officer's instructing a passenger that she needed additional screening, directing her to a bathroom, and sexually assaulting her).

One reason given by the majority opinion to justify a "criminal law component" in § 2680(h) was fear that any other reading would result in "an unprincipled expansion of the Government's waiver of sovereign immunity." Maj. Op. 26. With more than 770 million passengers being screened by TSA officers each year, the concern is facially plausible. *See TSA Year in Review*, *supra*. But it is misplaced. In fact, in 2015, of the 708 million passengers TSA screened, TSA received only *122* personal injury claims. *See* TSA Releases 2015 Statistics, Transp. Sec. Admin. (Jan. 21, 2016), https://www.tsa.gov/news/releases/2016/01/ 21/tsa-releases-2015-statistics; Claims Data 2015, Transp. Sec. Admin. (Feb. 9, 2016), https://www.dhs.gov/tsa-claims-data. Further, to state a

valid FTCA claim, the plaintiff must proceed through the complete administrative process, *White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 457 (3d Cir. 2010), and show that the federal official was acting in the scope of his or her employment, *CNA v. United States*, 535 F.3d 132, 140 (3d Cir. 2008). And even then, a number of state-law defenses to intentional torts exist. This case, then, will not greatly expand the government's liability or result in a flood of litigation. Instead, reading § 2680(h) as written will allow victims like Ms. Pellegrino to sue the United States for the most egregious cases of intentional misconduct.

Unfortunately, in an effort to protect the United States from suit, the majority's opinion throws the baby out with the bathwater. And it does so in a way that conflicts with the fundamental purpose of § 2680(h): to "submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants," S. Rep. No. 93-588, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791. Under § 2680(h), Congress provided a remedy against the United States when its agents—upon whom Congress *conferred* search powers—use those search powers in an intentionally abusive manner. Because

Transportation Security Officers exercise precisely those search powers, this Court should apply § 2680(h) as written and allow this case to proceed.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing en banc, vacate the panel opinion, and rehear this appeal en banc.[6]

[6] Ms. Pellegrino respectfully submits that should the Court grant rehearing en banc, the Court should also rehear her related *Bivens* and other claims. The majority opinion affirmed the district court's judgment rejecting Ms. Pellegrino's *Bivens* claims in light of this Court's opinion in *Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017). *See* Maj. Op. 50–52. National security concerns do not counsel against a remedy in this case.

August 27, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to 3d Cir. L.A.R. 46.1 that the attorney whose name appear on Appellants' Petition for Rehearing En Banc was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit on September 24, 2003, and is presently a member in good standing of the Bar of this Court.

I certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point New Century Schoolbook LT Std, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,616 words, excluding the parts of the brief exempted under Rule 32(f) and this Court's local rules, according to the count of Microsoft Word.

I certify pursuant to 3d Cir. L.A.R. 35.2(a) that no paper copies of this electronic brief need be filed unless directed by the Clerk.

I certify pursuant to 3d Cir. L.A.R. 31.0(c) that this electronic brief has been scanned for viruses using Carbon Black Defense (version 3.2) and found to be virus free.

/s/ *Paul M. Thompson*
Paul M. Thompson

CERTIFICATE OF SERVICE

I certify that on August 27, 2018, I electronically filed this brief with the Clerk of this Court using the appellate CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

/s/ *Paul M. Thompson*
Paul M. Thompson