No. 15-3047

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NADINE PELLEGRINO; HARRY WALDMAN,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA TRANSPORTATION SECURITY ADMINISTRATION; TSA TSO NUYRIAH ABDUL-MALIK, in her individual capacity; TSA TSO LAURA LABBEE, in her individual capacity; TSA TSO DENICE KISSINGER, in her individual capacity,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, CATO INSTITUTE, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLANTS AND IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2-09-cv-05505

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STATEMENT OF AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENTS OF INTEREST OF *AMICI CURIAE*

American Civil Liberties Union and American Civil Liberties Union of Pennsylvania

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over two million members, activists, and supporters dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The American Civil Liberties Union of Pennsylvania is a state affiliate of the national ACLU. Government accountability and the protection of individual liberty against unwarranted government intrusion are issues of special concern to the ACLU and its affiliates, which have been at the forefront of numerous state and federal cases addressing individual rights and liberties since the ACLU was founded in 1920.

Cato Institute

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement. Toward these ends, Cato publishes books and studies, conducts conferences, issues the annual Cato Supreme Court Review, and files *amicus* briefs with courts across the nation.

The Rutherford Institute

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed numerous *amicus curiae* briefs in the federal Courts of Appeals and Supreme Court. The Rutherford Institute works to protect citizens against the abuse of authority by the government and its agents and to ensure that the courts are open to citizens to obtain redress for such abuse.

INTRODUCTION

In *Pellegrino v. U.S. Transportation Security Administration*, 896 F.3d 207 (3d Cir. 2018), a panel of this Court held that Transportation Security Officers ("TSOs") are not "investigative or law enforcement officers" for the purpose of assessing liability for intentional torts under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(h). The consequences of the decision are far-reaching. TSOs execute airport screening searches, and have the power to detain people during the searches. The decision leaves victims of intentional misconduct by TSOs without any remedy in tort and, combined with this Court's decision in *Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017), no legal remedy at all.

Rehearing *en banc* is warranted because the panel majority's decision rests on errors of law and raises questions of exceptional importance regarding the accountability of TSOs and the civil liberties of the millions of travelers they search each day. As explained below, the majority wrongly interpreted the plain language of the FTCA's law enforcement proviso, disregarding the Supreme Court's admonitions against inserting limitations into a statute that do not appear on its face. The holding conflicts with Supreme Court and Third Circuit decisions regarding the proviso's scope and TSOs' role. It also leaves travelers without recourse for intentional misconduct arising from the sensitive and at times invasive physical searches that TSOs perform. *Amici* respectfully request that the Court

reconsider the decision *en banc*.

ARGUMENT

I. THE MAJORITY WRONGLY INTERPRETED THE PLAIN LANGUAGE OF THE FTCA'S LAW ENFORCEMENT PROVISO.

In construing the proviso, the majority concluded that the phrase "investigative or law enforcement officers" is "limited in scope and refers only to officers with criminal law enforcement powers." *Pellegrino*, 896 F.3d at 216. No such limitation appears on the face of the statute. *See* 28 U.S.C. § 2680(h). By inserting "criminal" before "law enforcement," the majority imposed a restriction that Congress did not. This was legal error.

The majority's error is clear from the proviso's unambiguous definition of "investigative or law enforcement officer": "*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." *Id.* (emphasis added). TSOs are empowered—indeed, required—by law to execute searches of all travelers who seek to board passenger aircraft. *See* 49 U.S.C. § 44901(b). And this Court's decisions leave no doubt that the airport screenings TSOs perform are searches under the Fourth Amendment. *See United States v. Hartwell*, 436 F.3d 174, 177-78 (3d Cir. 2006) (adopting government's concession "that an airport pre-boarding security screening is a search"). Since TSOs fall within the plain language of the FTCA's definition of "investigative or law enforcement officer," the analysis should end there. *See MRL*

Dev. I, LLC v. Whitecap Inv. Corp., 823 F.3d 195, 204-05 (3d Cir. 2016) ("[I]f the text is plain, this Court need not inquire further.").

The Supreme Court has rejected similar judicial attempts to alter the scope of exceptions to the FTCA's waiver of sovereign immunity. Its unanimous decision in *Millbrook v. United States*, 569 U.S. 50 (2013), is instructive. There, the Court held that although the language of the law enforcement proviso is both broad and straightforward, "[a] number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope" of the proviso. *Id.* at 55. The Third Circuit was one such court; it had ruled that the proviso "applies only to tortious conduct by federal officers during the course of 'executing a search, seizing evidence, or making an arrest.'" *Id.* (citing *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986)). The Supreme Court rejected that and other courts' interpretations because "[n]one . . . finds any support in the text of the statute." *Id.* at 56.

The Supreme Court similarly focused on the clear text of the FTCA in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008). *Ali* involved another FTCA provision eliminating immunity for claims related to specified conduct of "any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). Five circuit courts of appeals had interpreted that clause as limited to officers performing customs or excise functions. *See Ali*, 552 U.S. at 217 n.1. The

Supreme Court abrogated those decisions as "attempt[s] to create ambiguity where the statute's text and structure suggest none." *Id.* at 227. The Court held that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" and that "Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer' to express [its] intent" that § 2680(c) extend to all law enforcement officers. *Id.* at 218-19, 221 (citation omitted).

The import of these decisions is clear: the statutory text is the lodestar, and courts must not depart from it in determining the scope of exceptions to the FTCA's immunity waiver. As with the provision at issue in *Ali*, the definition in § 2680(h) is unequivocal and expansive: Congress "could not have chosen a more all-encompassing phrase" than "any officer of the United States" to express its intent that the proviso apply broadly to any officer empowered to execute searches, seize evidence, or make arrests. *See* 552 U.S. at 221. The majority nonetheless searched for ambiguity where none exists and ignored *Millbrook*'s admonition against reading limitations into the proviso's "unambiguous text." *See* 569 U.S. at 57. In the five years since *Millbrook*, Congress has been silent, confirming its acquiescence in a broad interpretation of the proviso. It could have limited the definition of "investigative or law enforcement officer" to those empowered to execute warrants, or it could have added "criminal" before "searches." It did

neither, and the majority's decision to insert such limitations violates basic principles of statutory construction. *See Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) ("We assume that Congress expresses its intent through the ordinary meaning of its language.").

II. THE MAJORITY'S DECISION CONFLICTS WITH SUPREME COURT AND THIRD CIRCUIT AUTHORITY.

Rehearing *en banc* is warranted for the additional reason that the majority failed to consider or follow Supreme Court and Third Circuit decisions, and its ruling conflicts with those decisions in key respects. *See* Fed. R. App. P. 35(b)(1)(A).

The Supreme Court has repeatedly instructed that the FTCA's waiver of sovereign immunity should be interpreted broadly, and its exceptions given narrow construction. In *Dolan v. U.S. Postal Service*, 546 U.S. 481 (2006), the Court cautioned that strict construction of the waiver of sovereign immunity is "'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 491-92 (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984), and *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)); *see also Simmons v. Himmelreich*, 136 S. Ct. 1843, 1850 (2016) (rejecting government argument that was "at odds with one of the FTCA's purposes, channeling liability away from

individual employees and toward the United States."). The majority here ignored this imperative and broadened the government's immunity to include TSOs' intentional torts, despite the absence of any textual basis for doing so.

The majority's decision is also at odds with the Supreme Court's interpretation of the proviso in *Millbrook*, where the Court held that "Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority." 569 U.S. at 56. The majority held to the contrary, discounting TSOs' authority to execute searches and focusing instead on the particular kind of searches they conduct. *See Pellegrino*, 896 F.3d at 228 (emphasizing that "TSA screeners conduct administrative, not criminal searches"). But that distinction cannot control, as both criminal and non-criminal searches are subject to the Fourth Amendment's reasonableness requirement, and, like TSOs, criminal law enforcement officers routinely conduct searches without warrants. TSOs' authority, even if limited, places them squarely within the proviso as the Supreme Court has defined it.

The Supreme Court's interpretation of the proviso in *Carlson v. Green*, 446 U.S. 14 (1980), further confirms the errors in the majority's holding. The Court in *Carlson* assumed that a victim of unlawful conduct by federal Bureau of Prisons officials—some of whom were medical officials, not "traditional law enforcement officers performing criminal law functions," *see Pellegrino*, 896 F.3d at 222—

would have a cause of action against the United States under § 2680(h). 446 U.S. at 19-22. Indeed, the government conceded in *Carlson* that all of the defendants, including the prison's chief medical officer and the unlicensed nurse who treated the decedent, were "law enforcement officers" under the proviso. *See* Br. for Pet'rs at 27 n.25, *Carlson v. Green*, 446 U.S. 14 (1980) (No. 78-1261). The majority's ruling that the proviso applies only to formally commissioned "criminal law enforcement officers," 896 F.3d at 225, cannot be squared with *Carlson*, which the majority failed to acknowledge.

Similarly, the Third Circuit has concluded that employees in an FBI forensics lab fell within the proviso and that intentional tort claims arising out of their conduct were not barred under § 2680(h). *See Priovolos v. Fed. Bureau of Investigation*, 632 Fed. App'x 58 (3d Cir. 2015). This Court came to that conclusion notwithstanding that the employees were not "traditional" law enforcement officers.[1]

Finally, the majority's holding conflicts with prior Third Circuit rulings regarding the role and conduct of TSOs. The majority relied heavily on the premise that TSA screenings are conducted for "an administrative purpose, . . . not to gather evidence" of potential crimes, and that a screening pat-down is unlike a stop

[1] Although *Priovolos* was designated non-precedential, its holding highlights the divergent results that this Court has reached on the scope of the proviso.

under *Terry v. Ohio*, 392 U.S. 1 (1968), requiring reasonable suspicion "directed to specific individuals." *Pellegrino*, 896 F.3d at 228-29. But that reasoning is directly contrary to the Court's decision in *George v. Rehiel*, 738 F.3d 562 (3d Cir. 2013), where the Court ruled that TSA screeners "had a justifiable suspicion that permitted further investigation" of the plaintiff, "as long as the brief detention required to conduct that investigation was reasonable." 738 F.3d at 577 (citing *Terry*, 392 U.S. at 21). The Court further held in *George* that TSA screeners' role at times extends to "detaining someone and investigating them pursuant to the administrative search doctrine or an investigative seizure under *Terry*." *Id.* at 578; *see also Hartwell*, 436 F.3d at 180 (concluding that TSA screeners could use methods that "escalat[ed] in invasiveness only after a lower level of screening disclosed a reason to conduct a more probing search").

The government cannot have it both ways. Either TSA screeners are, in the *Pellegrino* majority's framing, "employees" whose role is limited to conducting administrative searches, 896 F.3d at 229, or they are, as this Court held in *George* and *Hartwell*, "officials" or "agents" empowered to investigate potentially criminal conduct and sometimes conduct *Terry* stops. *See George*, 738 F.3d at 577-78; *Hartwell*, 436 F.3d at 175-77. The conflict with *George* and *Hartwell* calls into question the uniformity of Third Circuit decisions. It also underscores that the *Pellegrino* majority rendered null the proviso's inclusion of "investigative"

officers. To the extent TSOs perform investigative functions, as the Court in *George* held, the majority disregarded not only the statutory language but also the policy underlying the proviso, which recognizes travelers' greater vulnerability to intentional torts such as false imprisonment or battery during any further "investigation" or use of increasingly invasive methods.

III. THE DECISION THREATENS SERIOUS NEGATIVE CONSEQUENCES BY DEPRIVING TRAVELERS OF ANY REMEDY FOR OFFICERS' INTENTIONAL MISCONDUCT.

The majority's errors raise questions of exceptional importance for the traveling public. *See* Fed. R. App. P. 35(b)(1)(B). By insulating the federal government from any liability for TSOs' intentional torts, the ruling will deny compensation to individuals who have been wronged—a result that is inconsistent with the FTCA's purpose and inimical to civil liberties.

The majority effectively conceded that its decision will negatively impact travelers. *See Pellegrino*, 896 F.3d at 230. Given the ruling in *Vanderklok*, in which this Court declined to recognize a *Bivens* remedy for alleged First Amendment retaliation by TSOs, the absence of any tort remedy leaves travelers without legal recourse for even egregious misconduct by TSOs. The panel's decision will also remove a significant lever of accountability, at both the institutional and individual levels. Absent potential liability under the FTCA for intentional torts, the TSA will have less incentive to implement training and other

mechanisms designed to minimize the frequency of such torts. And individual TSOs will operate with the freer hand that comes with knowledge that intentional misconduct toward travelers will not be subject to judicial fact finding.

The majority recognized the "concerns this may raise as a matter of policy." *See id.* at 230. But the majority erred as a matter of law, not just policy. The overarching purpose of the FTCA is to fill gaps in liability, not create them. In *Kosak*, the Supreme Court emphasized the FTCA's stated intent that "the United States shall be liable, to the same extent as a private party, 'for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government.'" 465 U.S. at 851-52 (quoting 28 U.S.C. § 1346(b)).[2] The Court further observed that the purpose of the FTCA's exceptions was to avoid "extending the coverage of the Act to suits for which adequate remedies were already available." *Id.* at 858. No adequate remedy is available for TSOs' intentional torts, particularly after *Vanderklok*, and the majority's holding is therefore at odds with the FTCA's purpose and structure.[3]

TSOs perform an important function, and the overwhelming majority do so without engaging in the kind of misconduct that would give rise to legal claims.

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[2] *See also Levin v. United States*, 568 U.S. 503, 506 (2013) ("The FTCA . . . was designed primarily to remove the sovereign immunity of the United States from suits in tort." (internal quotations omitted)).

[3] The Westfall Act also blocks state tort liability for TSOs' misconduct. *See* 28 U.S.C. § 2679(b)(1).

Nonetheless, some TSOs will commit intentional torts during the course of their work, given their direct authority to place their hands on the bodies of travelers routinely. Public reports reinforce what common sense dictates: serious misconduct by TSOs can have long-lasting consequences for affected travelers. *See, e.g.*, *Hebshi v. United States*, No. 4:13-cv-10253 (E.D. Mich. 2015) (woman of Arab and Jewish descent alleged she was racially profiled and wrongly detained by TSA officers); *Murley v. United States*, No. 2:10-CV-124-J (N.D. Tex. 2011) (traveler sued TSA after an agent pulled down her shirt, exposing her breasts in a public area, during an "extended screening procedure"); *see also* Andrew Blankstein & Phil Helsel, *Two TSA Officers Fired for Scheme to Grope Attractive Men at Denver Airport*, NBC News, Apr. 14, 2015; Nicole Rojas, *Fourteen Women Claim TSA Harassed Them for Wearing Hijabs at Newark Airport*, Newsweek, June 8, 2018; Kim Zetter, *TSA Chief Apologizes to Airline Passenger Soaked in Urine After Pat-Down*, WIRED, Nov. 23, 2010.

Thus, the consequences of the majority's erroneous ruling are severe. Travelers have been and will be the victims of the kind of intentional torts that FTCA was intended to remedy, but the majority's decision deprives them of any means of holding the U.S. government liable.

CONCLUSION

Amici respectfully urge this Court to grant the petition for rehearing *en banc*.

Dated: September 4, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7) and 29(b)(4) because it contains 2,597 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Local Rule 29.1(b). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point font Times New Roman.

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I hereby certify that I am a member in good standing of the Bar of the Court of Appeals for the Third Circuit, in compliance with Local Rule 28.3(d).

Dated: September 4, 2018

s/ Jonathan Feinberg

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Third Circuit using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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