

No. 22-15402

United States Court of Appeals for the Ninth Circuit

Michele Leuthauser,

Plaintiff–Appellant,

v.

United States of America
and Anita Serrano,

Defendants–Appellees.

On Appeal from the United States District Court
for the District of Nevada (Las Vegas)

Case No. 2:20-cv-00479-JCM-VCF

**BRIEF OF *AMICI CURIAE* FREEDOM TO TRAVEL USA &
RESTORE THE FOURTH, INC. SUPPORTING
PLAINTIFF–APPELLANT MICHELE LEUTHAUSER**

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Corporate Disclosure Statement

In accordance with the requirements of Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that *amici curiae* Freedom to Travel USA and Restore the Fourth, Inc. are grassroots nonprofit organizations that have no parent corporation and no shareholders who are subject to disclosure.

Respectfully submitted,

Dated: June 3, 2022

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Amicus Identity, Interest, & Authority to File

A. The Amici's Identity

Freedom to Travel USA is a nonprofit nonpartisan grassroots civic association concerned with the privacy and dignity of every American who travels by air. Freedom to Travel files amicus briefs in cases that concern TSO screening procedures. *See, e.g.,* Brief of *Amici Curiae* Freedom to Travel USA, et al., *Pellegrino v. TSA*, 937 F.3d 164 (3d. Cir. 2019) (en banc). In this capacity, Freedom to Travel was granted independent oral argument time by the First Circuit. *See Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013).

Freedom to Travel co-founder Wendy Thomson exemplifies Freedom to Travel's membership. Doctors amputated Wendy's right leg when she was 4-years-old because of a birth defect. As a result, Wendy wears a prosthetic leg. In her past career as a management consultant, Wendy regularly needed to travel by air. But since the mid-2000s, Wendy faced increasingly degrading TSO pat-downs at airports because of her prosthesis. Wendy eventually had to give up air travel completely – and her consulting career with it.

Restore the Fourth is a national, non-partisan civil liberties group dedicated to robust enforcement of the Fourth Amendment. Restore the Fourth advances this mission by overseeing a network of local chapters whose many members include lawyers, academics, advocates, and ordinary citizens. Restore the Fourth submits amicus

briefs in consequential Fourth Amendment cases. *See, e.g.*, Brief of *Amici Curiae* Restore the Fourth, Inc., et al. in Support of Petitioner, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2020) (per curiam); Brief of *Amici Curiae* Restore the Fourth, Inc., et al. in Support of Reh’g En Banc, *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).

B. The Amici’s Interest

The Amici are interested in *Leuthauser* because they collectively believe that federal tort liability is an essential check against abusive government searches of airline passengers. The Amici also believe the plain meaning of the Federal Tort Claims Act’s law-enforcement proviso, 28 U.S.C. § 2680(h), establishes such liability.

C. The Amici’s Authority to File

The Amici file this brief under FRAP 29(a)(2), which permits the filing of consented-to amicus briefs during initial consideration of a case on the merits. Appellant *Leuthauser* consents to this brief. Appellees United States of America and Anita Serrano consent to this brief provided the Court deems the brief timely filed.

The Amici also affirm under FRAP 29(a)(4)(E) that no party and no counsel for any party in this case: (1) wrote this brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only Freedom to Travel USA and Restore the Fourth, including their members and counsel, have contributed money to fund the preparation and submission of this brief.

Argument

When Alexis de Tocqueville first visited America in the 1830s, one aspect of the young nation that quickly drew his attention was “[t]he right granted to the courts of justice of judging the agents of the executive government, when they have violated the laws.”¹ He was surprised to find that this right was “so natural a one that it cannot be looked upon as an extraordinary privilege.”² He was also surprised to find that this right, far from weakening “the springs of government,” in fact “increased ... that respect which is due to the authorities” while at the same time “render[ing] those ... in power more scrupulous of offending public opinion.”³

Congress carried forward these observations when it passed the “law enforcement proviso” to the Federal Tort Claims Act (FTCA). Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)). This provision secures the tort liability of “any officer of the United States who is empowered by law to execute searches.” *Id.* In its own words, Congress enacted this provision to “submit the Government to liability whenever its agents act under color of law so as to injure the public through search[es] ... without warrants.” S. REP. NO. 93-588 at 3, 93rd Cong. (1973).

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 107 (H. Reeve trans., 7th ed., 1847).

² *Id.*

³ *Id.*

In few contexts is such liability more important than when the government conducts administrative searches of airline passengers. *See Ruskai v. Pistole*, 775 F.3d 61, 68 (1st Cir. 2014) (collecting cases). “Because administrative searches require no warrant ... they invest law enforcement with the power to invade the privacy of ordinary citizens.” *Bruce v. Beary*, 498 F.3d 1232, 1248 (11th Cir. 2007). “This power carries with it a vast potential for abuse.” *Id.* (quoting *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998)).

That potential has materialized time and again over the last decade. Ever since the government started using body scans and pat-downs to screen airline passengers, *see Redfern v. Napolitano*, 727 F.3d 77, 80 (1st Cir. 2013), passengers have suffered “shocking” abuses at the hands of Transportation Security Officers (TSOs) – government agents empowered to search every person who travels by air.⁴ *See* 81 Fed. Reg. 11363 (Mar. 3, 2016). U.S. Representative Francisco Canseco, for example, has described his experience with a TSO pat-down this way: “[The TSO] touched me in my private parts and it hurt.”⁵ Former U.S. Senator Claire McCaskill has spoken to her own experience with a TSO pat-down in similar terms.⁶

⁴ Daniel Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 3 & nn.4–8 (2013) (collecting stories).

⁵ Keith Laing, *GOP Lawmaker: TSA Agent ‘Hurt My Privates’ During Pat-Down*, THE HILL, Apr. 26, 2012, <https://bit.ly/3NURRcK>.

⁶ *See* Aaron Blake, *Sen. Claire McCaskill on TSA Pat-Down: ‘OMG’*, WASH. POST, Mar. 11, 2013, <http://wapo.st/15Ic9M2>.

The government’s response to these abuses has been a well-rehearsed “bureaucratic kabuki dance.” *United States ex rel. Joslin v. Cmty. Home Health of Md., Inc.*, 984 F. Supp. 374, 381 (D. Md. 1997). First, the government denies that any abuse occurred.⁷ Then, in the face of public backlash – as occurred following TSO strip-searches of three seniors⁸ – the government issues a *mea culpa* and promises reform. But the government makes no lasting changes and never prosecutes any TSOs. Instead, as whistleblowers and investigations have revealed, TSO abuses continue unabated.⁹

Against this backdrop, the Court should not hesitate to hold that the FTCA’s law-enforcement proviso covers TSOs. The proviso governs “**any** officer of the United States ... empowered by law to execute searches,” 28 U.S.C. § 2680(h), and “the word ‘any’ naturally carries ‘an expansive meaning.’” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). “When used (as here) with a singular noun in affirmative contexts, the word ‘any’ ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies *every* member of the class or group.” *Id.* (italics in original) (certain internal punctuation omitted).

⁷ See, e.g., *Villafranca*, *infra* note 53 (“[A]n investigation was initiated and it was determined that the Transportation Security Officer (TSO) followed standard operating procedures”).

⁸ See *Esposito & Tejada*, *infra* note 16.

⁹ See *HOMELAND SEC. COMM.*, *infra* note 21 at 20 (noting the many “serious examples of misconduct ... at all levels” of the TSA).

The Amici recognize, however, that “[t]he life of the law has not been logic: it has been experience.” O. HOLMES, *THE COMMON LAW* 1 (1881). In giving effect to “text that actual legislators (plus one President) [have] enacted into law,” courts may be steered by any number of experience-driven assumptions or biases. *SAS Inst.*, 138 S. Ct. at 1359. With this in mind, the Amici seek to dispel certain myths about TSO screening that might otherwise influence how the Court reads the FTCA’s law-enforcement proviso. These myths are: (1) TSO screening entails a minimal risk of abuse; (2) even if some TSO abuses occurred in the past, such abuses are nothing to worry about today; and (3) even if TSO abuses continue to be a problem, tort liability is not a meaningful remedy for passengers.

I. Airline passengers face a significant risk of tortious injury from Transportation Security Officers (TSOs).

Because countless airline passengers undergo TSO screening every day without incident, it is easy to assume that abusive TSO searches rarely happen, especially when one has never personally experienced or witnessed this kind of abuse. But as Justice Robert Jackson observed over 70 years ago, most search-related abuses are usually “perpetrated by surprise.” *Brinegar v. United States*, 338 U.S. 160, 181–82 (1949) (Jackson, J., dissenting). Accordingly, “there are ... many unlawful searches ... about which we never hear.” *Id.* The “citizen’s choice” in these circumstances is to “submit [quietly]” or to “resist at risk of arrest or immediate violence.” *Id.*

When traveling by air, passengers face exactly this situation. “[C]oncerned about being late for their flight or about appearing uncooperative,” airline passengers are highly vulnerable to abusive TSO screenings (e.g., improper genital touching) and are prone to keep quiet when these kinds of abuses occur.¹⁰ This situation only gets worse when passengers are traveling in a group. No passenger wants to risk inconveniencing either their family or friends, much less being separated from them. In the meantime, once a passenger has entered a TSO checkpoint, the passenger has no “opportunity for injunction or appeal to disinterested intervention.” *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting). The passenger also cannot turn back, for doing so means risking prosecution and over \$12,000 in fines.¹¹ See 49 C.F.R. § 1503.401(a), (b)(1) (civil penalties).

Now factor into this equation the ever-increasing amount of power that TSOs have been granted over the bodies of passengers. In 2010, the government first allowed TSOs to perform “enhanced pat-downs”¹²—i.e., manual, intense probing of a passenger’s “entire body, including the posterior, crotch, and chest” for an indefinite

¹⁰ U.S. GOV’T ACCOUNTABILITY OFFICE (GAO), GAO-13-43, AIR PASSENGER SCREENING: TSA COULD IMPROVE COMPLAINT PROCESSES 23 (2012), <https://bit.ly/2MMvf2E>.

¹¹ Susanna Kim, *TSA Says It Can Fine You for Backing Out*, ABC NEWS, Nov. 23, 2010, <https://abcn.ws/2yGuejT>.

¹² *Redfern*, 727 F.3d at 79 (noting TSA’s adoption of “enhanced pat-downs” as a primary method for screening passengers).

period.¹³ In the twelve years since then, the government has green-lighted even “more involved” pat-downs¹⁴ that are so intrusive that the government has “informed local police” to stand down “in case anyone calls to report an ‘abnormal’ ... frisking.”¹⁵

TSOs also have the power to conduct pat-downs “in a private screening location that is not visible to the traveling public.” 81 Fed. Reg. at 11378. These circumstances stand in sharp contrast to other well-established passenger screening methods – for example, metal detectors – where “the possibility for abuse is minimized by the public nature of the search.” *United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir. 2006) (Alito, J.). It is no surprise, then, that many TSO abuses have involved backroom pat-downs, during which TSOs have ordered passengers to remove clothing¹⁶ and have touched passengers in ways tantamount to sexual assault.¹⁷

¹³ CNN Wire Staff, *A Primer on the New Airport Security Procedures*, CNN (Nov. 23, 2010), <https://cnn.it/2OeYnvx>.

¹⁴ Max Greenwood, *TSA Implementing New Pat-Down Procedures*, THE HILL, Mar. 4, 2017, <https://bit.ly/2SxgEHO>.

¹⁵ Justin Bachman, *TSA Warns Local Police About Its New Airport Pat-Downs*, BLOOMBERG, Mar. 6, 2017, <https://bloom.bg/2lvHmDZ>.

¹⁶ See Richard Esposito & Alicia Tejada, *Now Three Grandmas Say They Were Strip-Searched at JFK*, ABC NEWS, Dec. 6, 2011, <http://abcn.ws/2dSDiJL>; see also *TSA Admits Violations in Searches of Elderly Women*, WABC 7 NEWS, Jan. 18, 2012, <https://7ny.tv/2oA4vUC>.

¹⁷ See *TSA Pat-Down at DIA Leads to Sex Assault Investigation*, CBS NEWS (DENVER), Jan. 15, 2014, <http://cbsloc.al/1gNugFl> (passenger “ushered into a small private room at the TSA checkpoint”).

Finally, there is the general work environment in which TSOs exercise their pat-down power – a state-of-affairs that increases the likelihood of abusive TSO searches and makes these abuses harder to detect. Two key aspects of this environment stand out:

Uncollected Complaints: TSOs are free to ignore passengers who come to them with complaints. A Government Accountability Office (GAO) study reveals that TSOs are not obligated to “collect ... the screening complaints that air passengers submit in person.”¹⁸ The government also makes no effort to ensure the availability of comment cards to passengers in all federal airports.¹⁹ Nor does the government take any steps to “monitor air passenger satisfaction with screening operations” or to “identify patterns and trends in screening complaints to help improve screening.”²⁰

Zero Accountability: In July 2016, the Homeland Security Committee of the U.S. House of Representatives issued a report identifying many “serious examples of misconduct” by TSOs.²¹ Such misconduct included “using cocaine on the job, facilitating large scale drug and human smuggling [operations], and engaging

¹⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 23–24.

¹⁹ *Id.*

²⁰ *Id.*

²¹ HOMELAND SEC. COMM., U.S. HOUSE OF REPRESENTATIVES, MISCONDUCT AT TSA THREATENS THE SECURITY OF THE FLYING PUBLIC 20 (2016), <http://bit.ly/29RVePM>; *see also id.* at 12 (citing over 44,000 misconduct allegations against TSOs between 2013 and 2015).

in child pornography activities.”²² But even though “the number of ... misconduct complaints” involving TSOs has increased over time, the government has decided to “investigate[] fewer of them” and to impose “fewer and lesser punishments.”²³ A concrete illustration of this is the government’s quiet termination of – but complete failure to criminally charge – two TSOs who fondled multiple unsuspecting male passengers at Denver International Airport.²⁴

To recap: Passengers in a rush and afraid of being detained. Virtually unlimited TSO power to pat-down passengers that TSOs may exercise in backrooms. And zero government concern for either passenger complaints or rampant TSO misconduct.

The result is a perfect storm of abusive TSO searches.

A. Sexual harassment

TSOs have harassed male, female, and transgender passengers. One of the most notorious instances (as noted above) is the case of two Denver TSOs who conspired to “fondl[e] male passengers as they came through a security checkpoint.”²⁵ The TSOs “press[ed] a

²² HOMELAND SEC. COMM, *supra* note 21, at 8.

²³ *Id.* at 10–11.

²⁴ Alex Johnson, *No Charges for Denver TSA Screeners*, NBC NEWS, July 7, 2015, <http://nbcnews.to/1NQ0hNN>.

²⁵ Tom McGhee, *TSA Screeners Accused of Groping Men During Checks at Denver Airport*, DENVER POST, Apr. 14, 2015, <http://dpo.st/2996Ema> (later updated June 7, 2016).

touchscreen button indicating that [a] man being screened was actually a woman.”²⁶ The TSOs then used the ensuing false alarms to perform unnecessary “pat down[s] of the ... groin.”²⁷

Following the revelation of this scheme, former TSO Jason Harrington disclosed that he was not surprised by the Denver TSOs’ conduct.²⁸ While at O’Hare Airport from 2007 to 2013, Harrington routinely heard fellow TSOs use terms like “Code Red” and “Fanny Pack, Lane 2” to harass women.²⁹ CBS News also found a “pattern of women” complaining of sexual harassment across “500 records of TSA complaints” at Dallas-Fort Worth Airport.³⁰

Transgender passengers have reported similar harassment. When a body scan registered an anomaly based on Shadi Petosky’s male genitalia, TSOs detained Petosky for over 40 minutes, patted her down twice, and took apart her luggage.³¹ Petosky’s experience

²⁶ McGhee, *supra* note 25.

²⁷ *Id.*

²⁸ Jason Harrington, *Former TSA Agent: Groping Scandal Is Business as Usual*, TIME, Apr. 15, 2015, <http://ti.me/1ywhFUx>.

²⁹ Jason Harrington, *Dear America, I Saw You Naked*, POLITICO MAGAZINE, Jan. 30, 2014, <https://politi.co/3zeBQdn>.

³⁰ *Female Passengers Say They’re Targeted by TSA*, CBS NEWS (DFW AFFILIATE), Feb. 3, 2012, <https://cbsloc.al/2PyKIk7>.

³¹ James Queally, *Transgender Woman Says TSA Detained, Humiliated Her Over Body ‘Anomaly,’* L.A. TIMES, Sept. 22, 2015, <http://fw.to/c8PnFeL>; *see id.* (noting Petosky missed her flight and that TSA defended the TSOs’ conduct as perfectly acceptable).

led 32 members of Congress to express “strong concerns regarding the [TSOs’] treatment of transgender individuals.”³²

The list just keeps going. Harvard student Zainab Merchant reports that TSOs forced her to reveal “her bloodied menstrual pad” to them.³³ Chiropractor Mark Frey reports that TSOs “put their hands inside his shorts” and “‘fondl[ed]’ him.”³⁴ And then there is ex-TSO Jason Harrington’s chilling observation that given just how often “passengers have their private parts fondled” after “passing through the scanners,” many victims of abusive TSO searches “will likely never even know they were assaulted.”³⁵

B. Traumatized children

Under present government policy, children generally may not go through a body scan unless they are “able to remain standing in the required position for 5 seconds.”³⁶ This means TSO pat-downs are the primary form of screening for young children.

³² Letter from Rep. Adam Schiff, et al., to TSA Administrator Peter Neffenger, at 1 (Oct. 8, 2014), <http://bit.ly/2cMauO4>.

³³ Rowaida Abdelaziz, *Muslim Woman Says TSA Forced Her to Show Her Bloodied Pad During Airport Screening*, HUFFINGTON POST, Aug. 23, 2018, <https://bit.ly/2LjzI7r>.

³⁴ Lidia Ryan, *Westchester Man Suing TSA for Groping Him in Front of Daughters*, CONN. POST, Aug. 13, 2018, <https://bit.ly/2CcoaTS>.

³⁵ Harrington, *supra* note 28.

³⁶ *Traveling with Children (Screening Technology)*, TRANSP. SEC. ADMIN., <http://bit.ly/1KvSSUq> (last visited June 3, 2022).

For Selena and Todd Drexel, this meant watching a TSO pat-down their six-year-old daughter Anna after TSOs denied Selena's request for "alternatives" and told her "they were going to do what they were going to do."³⁷ A TSO "rubb[ed] [Anna's] inner thighs" and put "her fingers inside the top of [Anna's] blue jeans."³⁸ At first "confused" by this, Anna later "broke down into tears."³⁹

Anna and her parents are not alone in this experience. TSOs forced Lori Croft to watch as a TSO patted-down her 4-year-old granddaughter, Isabella, while "yelling and calling the crying girl an uncooperative suspect."⁴⁰ TSOs likewise forced Anne Schulte to watch as TSO subjected her 3-year-old daughter Lucy to a pat-down that left Lucy in tears.⁴¹ And TSOs forced Kevin Payne to watch as a TSO patted-down his 10-year-old daughter Vendela for "nearly two minutes," leaving Vendela with a "blank stare."⁴²

³⁷ See Andrew Springer, *Parents of 6-Year-Old Girl Pat Down at Airport Want Procedures Changed*, ABC NEWS: GOOD MORNING AMERICA, Apr. 13, 2011, <http://abcn.ws/2cLjQ1n>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Roxana Hegeman, *TSA Defends Pat-Down of 4-Year-Old at Kan. Airport*, ASSOCIATED PRESS, Apr. 26, 2012.

⁴¹ See Gio Benitez, *TSA Apologizes for Traumatizing Disabled Toddler*, ABC NEWS, Feb. 21, 2013, <https://abcn.ws/3NUC0dR>.

⁴² Elizabeth Chuck, *Father Outraged by 'Uncomfortable' TSA Pat-Down on 10-Year-Old Daughter*, NBC NEWS (NATIONAL), Jan. 6, 2016, <http://nbcnews.to/1Ju6h0M>.

Besides improper touching, TSO pat-downs expose children to trauma from TSOs who turn pat-downs into “a game to play.”⁴³ A 2014 video of a TSO patting-down a 2-year-old puts this danger in concrete terms: “[w]hile [the child] wriggles about, a male [TSO] ... pats down the child, feeling his legs and torso, then applauds him. ‘You did a good job!’ the [TSO] tells the boy.”⁴⁴

C. Humiliation of seniors and the disabled

For many seniors and disabled persons, TSO pat-downs are a fact of life. Consider Lenore Zimmerman (age 85), Ruth Sherman (age 88), and Linda Kallish (age 66). Due to their respective medical devices, all three women had to undergo TSO pat-downs.⁴⁵ During these pat-downs, TSOs ordered each woman to remove her pants.⁴⁶ The government later admitted fault for these searches – but only after U.S. Senator Chuck Schumer intervened.⁴⁷

Now consider Tom Sawyer, a cancer survivor with a urostomy bag. During a pat-down, a TSO tore Sawyer’s urostomy bag despite

⁴³ Daniel Tercer, *TSA Frisks Groom Children to Cooperate with Sex Predators, Abuse Expert Says*, RAW STORY, Dec. 1, 2010, <http://bit.ly/2cMnjrz> (quoting TSA Security Director James Marchand).

⁴⁴ Ryan Grenoble, *Video of TSA Patting Down Boy, 2, and Sister 6, Sparks Outrage*, HUFF. POST, Apr. 24, 2014, <https://bit.ly/3tfhr4d>.

⁴⁵ Esposito & Tejada, *supra* note 16.

⁴⁶ *Id.*

⁴⁷ *See TSA Admits Violations, supra* note 16.

Sawyer's warnings, spilling urine all over Sawyer.⁴⁸ After this abuse garnered national attention, then-TSA Administrator John Pistole apologized to Sawyer.⁴⁹ Yet, less than nine months later, Sawyer suffered the same humiliation *at the same airport*.⁵⁰

This kind of abuse is a persistent risk. Consider breast cancer survivor Denise Albert, who told TSOs in advance about a port in her chest for chemotherapy.⁵¹ TSOs refused to listen to Albert and tried "to do a body cavity search [of Albert] in public" – a reality confirmed by video showing a TSO "grabb[ing] [Albert's] left thigh and [running] her hands up to Albert's crotch."⁵²

D. Physical endangerment

How TSOs handle passengers can be a life-or-death matter. Melinda Deaton was traveling through Dallas-Love Field Airport when her feeding tube triggered a TSO pat-down.⁵³ Without regard

⁴⁸ Jane Allen, *Prosthetics Become Source of Shame at Airport Screenings*, ABC NEWS, Nov. 24, 2010, <http://abcn.ws/2dJmIwE>.

⁴⁹ *Man Says He's Mishandled By Airport Screener Again*, CBS NEWS (DETROIT), July 23, 2011, <http://cbsloc.al/2dxddit>.

⁵⁰ *See id.*

⁵¹ Travis Andrews, *'You Cannot Touch Me There,': Breast Cancer Patient Claims TSA 'Humiliated' and 'Violated' Her*, WASH. POST, Dec. 8, 2016, <https://wapo.st/3zaS8UF>.

⁵² *Id.*

⁵³ *See Omar Villafranca, TSA Agents Allegedly Strip-Search Woman, Fiddle with Feeding Tube*, NBC NEWS (DALLAS AFFILIATE), July 19, 2012, <http://bit.ly/2dk1VjL>.

to Melinda's medical bracelet, TSOs removed Melinda's clothing and handled her feeding tube, risking its sterility and her life.⁵⁴ The government later declared the TSOs acted properly.⁵⁵

Then there is the case of Hannah Cohen. Flying home after receiving treatment for a brain tumor, Hannah was "blind in one eye, deaf in one ear and partially paralyzed."⁵⁶ These infirmities left Hannah "easily confused and frightened" – a state of mind that took hold when a TSO body-scan led to a false alarm on Hannah's shirt.⁵⁷ While Hannah's mother pleaded with the TSOs to exercise restraint, the TSOs "smash[ed] [Hannah's] face into the floor."⁵⁸

This risk of physical injury is not limited to the disabled. CNN commentator Angela Rye reports undergoing a TSO pat-down that "hit[] [her] right in the crack of [her] labia," causing her to "jump and feel a lump in [her] throat" as she held back tears.⁵⁹ A police officer on the scene who filmed the pat-down later informed Rye that he intended "to write up an incident report."⁶⁰

⁵⁴ See Villafranca, *supra* note 53.

⁵⁵ See *id.*

⁵⁶ Matt Teague, *Disabled Cancer Patient Slammed to the Ground by TSA Guards*, GUARDIAN, July 2, 2016, <http://bit.ly/29mxcQD>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Angela Rye, *Dear TSA: The Country Is Not Safer Because You Grab Vaginas*, CNN, Dec. 22, 2016, <http://cnn.it/2hFEq4W>.

⁶⁰ *Id.*

II. Abusive TSO searches of airline passengers are not a thing of the past—they remain a problem today.

In considering the preceding TSO abuses, it is important to observe that what is past is prologue. Put another way, TSO abuses still take place today, no matter how much the government may try to downplay this reality by casting TSO abuses as mere “stories” or by stressing token limits on the screening process.⁶¹ Current events tell a different tale – one that merits close attention.

Here are just a handful of TSO abuses that passengers have reported in the last few years (from 2018 to 2022):

- 2018: TSOs subject Jeanne Clarkson’s 96-year-old wheelchair-bound mother to a prolonged pat-down including “the area around her stomach and breasts.”⁶²
- 2018: TSOs subject Heather Bowser to a backroom pat-down of her prosthetic leg, during which the TSOs force Bowser “to take [her] pants down” over her protest.⁶³
- 2019: TSOs command Jamii Erway, a transgender teenager, to submit to a backroom strip search after a body scanner signals a false positive.⁶⁴

⁶¹ E.g., *Screening for Passengers 75 and Older*, TRANSP. SEC. ADMIN., <http://bit.ly/1RvBBgI> (last visited June 3, 2022) (seniors age 75 or older need not remove their shoes during screening).

⁶² Lori Aratani, *Watch the Video of TSA Officers Doing a Pat-Down of a 96-Year-Old Woman in a Wheelchair That Has People Outraged*, WASH. POST, June 12, 2018, <https://wapo.st/2Om6SFfi>.

⁶³ Peggy Gallek, *I-Team: Woman With Prosthetic Leg Says She Felt Humiliated at TSA Checkpoint*, FOX NEWS 8 (CLEVELAND), Aug. 27, 2018, <https://bit.ly/2ACXBFe>.

- 2019: TSOs put college student Nathaniel Ross, whose life depends on a feeding tube, through a humiliating pat-down of the “open holes in [his] chest and stomach.”⁶⁵
- 2021: TSOs “grope[] and yell[] at” gymnast Shawn Johnson after a TSO objects to breast milk that Johnson was carrying for her 2½ month old baby.⁶⁶
- 2021: TSOs put Megan Beezley, a transgender woman, through a pat-down during which an officer twice places “the side of her hand between Beezley’s buttocks.”⁶⁷
- 2022: TSOs force New York City actor Marc Winski to submit to “an extra pat-down” after saying “he sounded ‘nervous’ due to his speech disorder” (a stutter).⁶⁸

Recent accounts of TSO abuses also populate social media like Twitter⁶⁹ and Instagram,⁷⁰ which have become a key way to discuss

⁶⁴ Melissa Alonso & Rebekah Riess, *Mother Sues TSA Over Request to Strip Search Transgender Teen*, CNN, Aug. 26, 2021, <https://cnn.it/3Mt1C0F> (“[TSOs] told Jamii she needed to be strip searched ... and wouldn’t be allowed to leave ... until she complied”).

⁶⁵ Joseph Shapiro & Allison Mollenkamp, *Despite Calls to Improve, Air Travel Is Still a Nightmare for Many With Disabilities*, NAT’L PUBLIC RADIO, Nov. 9, 2021, <https://n.pr/3m9C3GT>.

⁶⁶ Gabrielle Chung, *Shawn Johnson Says She Was ‘Groped’ by TSA Agent While Taking Breast Milk Through Security*, PEOPLE, Oct. 12, 2021, <https://bit.ly/3ajF6K4>.

⁶⁷ Lori Aratani, *Transgender Woman Alleges Assault During TSA Pat-Down, But Agency Says Protocols Were Followed*, WASH. POST, Nov. 23, 2021, <https://wapo.st/3aFeseX>.

⁶⁸ Lillian Gissen, *‘Is That Discrimination?’ Traveler Claims He Was Stopped for an Extra Pat-Down Because of His Stutter*, DAILY MAIL (UK), May 5, 2022, <https://bit.ly/3NMpqNQ>.

abusive searches given the government's indifference to collecting passenger complaints.⁷¹ Former U.S. Senator Claire McCaskill first reported on Twitter her experience with an abusive TSO pat-down: "Got [a] private, more aggressive pat down. OMG."⁷²

Many passengers have followed McCaskill's lead. Elizabeth Nolan Brown tweeted about a TSO pat-down that went "under [her] waistband, between [her] thighs, and all over [her] crotch."⁷³ Liz Groeschen tweeted that she almost missed her flight because a TSO patted-down her vagina.⁷⁴ And Melissa Emmal tweeted about a TSO pat-down that "made contact with [her] labia FOUR times."⁷⁵

At this point, one should recognize that for every reported TSO abuse, countless others go unreported. Many passengers opt to suffer in silence, fearing public humiliation or antagonizing the government if they speak out. There are also many passengers who

⁶⁹ See James Bovard, Opinion, *Believe Women: Apply Congress' Christine Blasey Ford Test to TSA's Female Victims*, USA TODAY, Oct. 15, 2018, <https://bit.ly/2yhQEHU> (collecting examples).

⁷⁰ See Tricia Crimmins, 'This Is Inhumane': Transgender Man Says TSA Agents Broke His Walker, Assaulted His Girlfriend, DAILY DOT, May 24, 2022, <https://bit.ly/3NjOwDS> (summarizing transgender passenger's Instagram and TikTok posts on TSO abuses).

⁷¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 23–24.

⁷² Blake, *supra* note 6 (quoting McCaskill's tweets).

⁷³ Bovard, *supra* note 69.

⁷⁴ *Id.*

⁷⁵ *Id.*

may not realize they are victims of abusive TSO searches since “[i]t’s difficult to tell where airport security ends and sexual assault begins these days.”⁷⁶ This reality cements the importance of tort liability – i.e., litigation – in bringing TSO abuses to light.

III. Federal tort liability is an essential check on abusive TSO searches of airline passengers.

Lawsuits to redress TSO abuses are not bound to be simple, fast, or inexpensive. The United States is, after all, “the richest, most powerful, and best represented litigant” in the nation. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). But the fact that passenger litigation of TSO abuses may be difficult or generally unavailing is no excuse to read statutes like the FTCA as barring such litigation altogether. Aggrieved passengers have many good reasons to want their day in court, even if the odds are against them. These reasons include: (1) a desire to obtain compensation for their injuries; (2) a desire to secure reforms that will prevent future TSO abuses; and (3) a desire to vindicate the truth of their experience.

Compensation: Litigation affords passengers a real chance of being compensated for physical and dignitary injuries caused by TSO abuses. For the most part, such compensation is product of a settlement. For example, in July 2012, the government agreed to pay \$225,000 to settle a lawsuit brought by passenger Tim Rasmussen

⁷⁶ Harrington, *supra* note 28.

based on a TSO screening that left Rasmussen with “back and hip injuries.”⁷⁷ A year earlier, in June 2011, the government agreed to pay \$2,350 to settle a lawsuit brought by passenger Lysie Murley “after her breasts were exposed during a vigorous [TSO] frisking” at a Texas airport.⁷⁸ Passengers thus can obtain financial compensation for TSO abuses so long as federal tort liability exists.

Reform: Beyond money, litigation gives passengers a chance to secure reforms that can help prevent future TSO abuses. Consider passenger Stacey Armato, who sued in 2012 after TSOs detained her and refused to follow agency rules for screening breast milk.⁷⁹ Two years later – after a district court upheld the viability of Armato’s suit under the FTCA’s law-enforcement proviso⁸⁰ – the government agreed to pay \$75,000 to Armato and to “retrain [TSOs] and clarify [agency] guidelines on screening breast milk.”⁸¹ Other passenger lawsuits have achieved similar important reforms.⁸²

⁷⁷ Thomas Clouse, *TSA Settles Lawsuit from Prosecutor*, SPOKESMAN-REVIEW, July 2, 2012, <https://bit.ly/2Q8KLUh>.

⁷⁸ *Tiny Payout in TSA Breast Exposure Lawsuit*, THE SMOKING GUN, June 1, 2011, <https://bit.ly/2qn4bJM>.

⁷⁹ *Woman Settles with TSA over Breast Milk Incident*, CBS NEWS, April 23, 2014, <https://cbsn.ws/2yEczcz>.

⁸⁰ See *Armato v. Doe*, No. 2:11-cv-02462, 2012 U.S. Dist. LEXIS 190080 (D. Ariz. May 15, 2012) (motion-to-dismiss order).

⁸¹ *Woman Settles with TSA*, *supra* note 79.

⁸² See, e.g., Tim Harlow, *MSP Screeners to Get Training on Handling Sacred American Indian Items After Lawsuit*, STAR TRIB., Feb. 10, 2018,

Truth: In our judicial system, “[a] trial is supposed to involve a search for the truth.” *Neaman v. United States*, No. 2:16-cv-00217, 2018 U.S. Dist. LEXIS 20645, at *20 (D. Nev. Feb. 7, 2018). This ideal holds special meaning to passengers abused by TSOs. In speaking out, these passengers often face reflexive government denials of any misconduct⁸³ and, in some cases, retaliation. *See, e.g., Vanderklok v. United States*, 868 F.3d 189, 193 (3d Cir. 2017) (detailing allegation that a TSO responded to a passenger complaint by falsely reporting the passenger to the police). Litigation then becomes a passenger’s only hope of vindication. Consider the above-noted Armato case: filing suit enabled Armato to obtain surveillance footage proving she was telling the truth about what TSOs did to her.⁸⁴

<http://strib.mn/3x4NftE> (“[TSOs] will get extra training on how to screen American Indian religious items after the Native American Church of North America settled a lawsuit with the Transportation Security Administration.”); *Lawsuit Filed by Va. Airport Protestor Who Stripped to Underwear Settled*, STAR TRIB., July 10, 2013, <http://strib.mn/2zsaJez> (“[T]he settlement ... call[s] for Richmond airport police to take part in a two-hour training course on the First and Fourth Amendment rights of passengers Airport officials also agreed to review rules affecting free speech.”).

⁸³ *See, e.g., Villafranca, supra* note 53 (quoting the government: “In this specific incident, an investigation was initiated and it was determined that the [TSO] followed standard operating procedures conducted in the presence of a Supervisor TSO.”).

⁸⁴ *See Woman Settles with TSA, supra* note 79 (“[Armato] won thanks, in part, to video she obtained from the TSA It shows Armato detained in a glass enclosure, even after she showed a TSA supervisor a printout of TSA guidelines for breast milk.”).

Taken together, the preceding aspects of passenger litigation go hand-in-hand with Congress's self-stated reason for enacting the FTCA's law-enforcement proviso: "[to] submit the Government to liability whenever its agents act under color of law so as to injure the public through search[es] ... without warrants." S. REP. NO. 93-588, at 3. Congress recognized that without a guaranteed right to sue under these circumstances, victims of abusive federal searches might end up uncompensated; government reform might stagnate; and egregious wrongdoing might prevail over truth.

Conclusion

In "situations of abuse," tort liability is "an important means" of holding people accountable. *Butz v. Economu*, 438 U.S. 478, 506 (1978). That is why Congress passed the FTCA's law enforcement proviso: to reaffirm that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

No great effort is then required determine whether the FTCA's law-enforcement proviso covers TSOs. It does. The proviso's "words are general and include various classes of persons" – namely, any officer empowered to execute searches. *United States v. Hartwell*, 73 U.S. 385, 395 (1868). "[N]o authority ... would justify ... restricting" the proviso's broad words "to one class and excluding others, where the purpose of the statute is alike applicable to all." *Id.*

Respectfully submitted,

Dated: June 3, 2022

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Certificate of Compliance

The undersigned counsel certifies under FRAP 32(g) that this brief meets both the formatting and the type-volume requirements set by FRAP 29(a)(5) and 32(a) for amici briefs submitted during initial consideration of a case on the merits.

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Dated: June 3, 2022

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Certificate of Service

The undersigned counsel certifies that on Friday, June 3, 2022, he electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. The undersigned counsel further certifies that all participants in this appeal are registered CM/ECF users and that the CM/ECF system will accomplish service.

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