No. 22-15402

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELE LEUTHAUSER,
Appellant

v.

UNITED STATES OF AMERICA,
AND
ANITA SERRANO,
Appellees

On Appeal from the United States District Court
for the District of Nevada
Case No. 20-CV-479, Hon. James C. Mahan

REPLY BRIEF OF APPELLANT MICHELE LEUTHAUSER

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INTRODUCTION

In response to Appellant's request that the Court adopt the majority view of its sister circuits regarding whether TSA screeners may be held accountable for sexually assaulting her, the government asks the Court to adopt the minority position by framing the question as whether Congress "unequivocally" waived sovereign immunity. They then present "context" and "connotations" that attempt to demonstrate that Congress did not mean what it said when it wrote that the government will be liable for the intentional torts of those who "execute searches."

The correct standard is not unequivocality and neither the government nor the Court may substitute "what they think Congress meant" with "what Congress actually said." This is especially true when doing so would remove the last judicial remedy for violations of a constitutional right, resulting in injustice for Appellant and all those in the future who may be injured by TSA screeners who intentionally abuse their power. The Court should adopt the majority position because it is consistent with the law and with justice.

ARGUMENT

I. *The Tide Continues in Favor of Allowing FTCA Remedies Against TSA Screeners*

As a preliminary matter, during the briefing period for this case, two other cases were decided that weigh in favor of holding TSA screeners accountable under the FTCA.

First, another district court joined the chorus of federal courts holding that TSA screeners are "investigative or law enforcement officers." In *Mengert v. United States*, 21-CV-443 (N.D. Okla., Aug. 9th, 2022), the case involved a woman who was similarly abused by TSA: she went through a body scanner and was subsequently ordered to go to a private room with two female TSA screeners for a pat-down search, wherein those screeners broke TSA policy and exceeded the boundaries of a lawful search. *Id*., * 2. The nature of the excessive search in *Mengert* a was demand that she expose her genitals. *Id*. As here, where TSA digitally penetrated Leuthauser's vagina, the search was unconstitutional and, if proven, will constitute a battery.

The *Mengert* court adopted the reasoning of *Iverson* and Pellegrino in full. *Id*. at *8, 9 ("For all the reasons set forth in the Eighth Circuit opinion and Third Circuit

en banc opinion, the Court finds that TSA officers are officers within the meaning of the FTCA's law enforcement proviso."). Now three years after her initial complaint was filed, her case proceeds past the motion to dismiss phase and she may actually see some justice for being subject to a strip search invented by two rogue TSA screeners.

Second, to the extent that past courts may have been tempted to indulge TSA's argument that the FTCA should be strictly construed while enjoying the comfort that *Bivens* remedies may apply, the U.S. Supreme Court slammed that door shut in June with *Egbert v. Boule*, 596 U. S. ____ (2022). In considering a *Bivens* remedy outside of the precise context of federal agents raiding one's home, the *Egbert* court held that "[a] court faces only one question: whether there is *any* rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed." *Id*. at * 11 (*cleaned up*) (*emphasis in original*). It then directed courts below to do some exhaustively creative reasoning, stating that anything from "expansion of government liability" to the existence of a complaint department within the agency are a sufficient "rational reason" to refuse *Bivens* remedies. The concurring opinion would have preferred to mince fewer words. *Id*. at *2 ("to ask the question is to answer it") (Gorsuch, J., *concurring*).

It is clear that unless the Supreme Court changes its mind by the time such a case gets there, *Bivens* remedies will not be available at the TSA checkpoint. The

Court therefore must be aware that, in combination with the Westfall Act's prohibition on bringing state law tort claims against federal officers performing their official duties, *see* 28 U.S.C. § 2679, a ruling for the government here means that no form of judicial review of TSA checkpoint abuse will be available, no matter the nature or severity of the abuse. Essentially, TSA screeners would have absolute immunity. The Court should decline to implement such a travesty of justice on the basis of the government's asserted "context" and "connotations" in the face of plain language, as discussed *infra*.

II. The Intent of Congress Was to Open the Door, Not Shut It

In passing the Federal Tort Claims Act, the Westfall Act, and in repeatedly refusing to override *Bivens*, Congress expressed a clear intent to create a judicial remedial scheme for those injured by federal employees. The FTCA and Westfall Act were designed not to immunize, but rather to set the proper forum and a unified framework. As pointed out by *amicus* Institute for Justice, "Congress passed the FTCA in 1946, out 'of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." Brief of IJ, p. 13[1], *citing Dalehite v. United States*, 346 U.S. 15, 24 (1953). They rejected

[1] All page numbers to all briefs cited here are to ECF-stamped header page numbers, not litigant-provided footer page numbers.

amendments that would have abrogated *Bivens*, intentionally creating government liability while leaving also personal liability on the table. *Id*., p. 15. And, a read of the Westfall Act shows no words intended to *preclude* liability, but rather to *shift* liability: state-law tort remedies against the individual were exchanged for federal remedies against the government. 28 U.S.C. § 2679(b).

It is only the combination of the U.S. Supreme Court's limitation of *Bivens* remedies, when considering a claim that either does not have a state-law tort analog or is restricted by the FTCA (*e.g.*, by the law enforcement proviso), and in light of the willingness of the Department of Justice to certify (and courts to uphold) under Westfall that even employees who are breaking work policies to commit heinous invasions upon members of the public are acting within the scope of their duties, that we end up with a situation where no justice can be had. To say that Congress intended things to work this way impugns our legislators without foundation.

III. Connotations and Context Do Not Defeat the Plain Meaning of Congress' Words

The core of the government's argument is this: the text of the proviso includes those empowered to search, but there are several clues we can follow to conclude that Congress really meant only specific types of searches. *See also Iverson* at 849

("the government also argues that statutory contexts, both within and outside of the FTCA, counsel that we should depart from the plain meaning").

For example, the government insists that we are analyzing a "term of art" here. Appellee's Brief, p. 30. But "searches" is a word of common use, and the vast majority of the precise legal definitions one may find of "searches" most certainly include TSA searches. *Pellegrino* at 172 (TSA screenings "searches" as matter of ordinary meaning, under Fourth Amendment, and under *Terry v. Ohio*). To say that a word in common usage is a term of art and then insist that one of the more nuanced definitions is the one Congress meant, without any language from Congress directing the same, is ignoring the plain text to insert one's own viewpoint.

Appellant's opening brief, as well as the majority opinions in *Pellegrino* and *Iverson*, already articulate why "searches" is a word with plain and clear meaning. Appellant's Brief, pp. 17, 18 (*citing* *Pellegrino* and *Iverson*). But the government insists that there is some ambiguity, and that ambiguity must be resolved in the government's favor. Appellee's Brief, pp. 8 ("issue presented is whether Congress has *unequivocally* waived…," *emphasis added*), 21, 22); *see also* pp. 20, 21 (suggesting that any ambiguity must be resolved in favor of immunity). In fact, they even go so far as to say the Court should affirm if it is "plausible" that the court below was correct. Appellee's Brief, pp. 20, 38, 40.

This is not the correct standard. The government must get around *Dolan*'s command that the FTCA be broadly interpreted in favor of waiving sovereign immunity. Appellant's Brief, pp. 13, 14. Their brief insists that Appellant "misunderstands *Dolan*." Appellee's Brief, p. 38. Apparently, so do all of the judges who signed the majority opinions in *Pellegrino* and *Iverson*. *Pellegrino* at 171, 172; *Iverson* at 854. *Dolan*'s plain text refuses to apply the rule of construing waivers "in favor of the sovereign" to the FTCA context. *Dolan* at 491. The idea that this should be reversed when considering an "exception to the exception" – other than when context clues lead to that conclusion, such as in *Foster* – has not been adopted by any Court of Appeals, and this Court should not be the first.

The government brings our attention to *Martinez v. United States*, 997 F.3d 867 (9th Cir. 2021) for the prospect that exceptions in the FTCA apply unless Congress was "unequivocal" that they do not. This fails for two reasons. First, Martinez was exploring an exception, not an "exception to the exception," and the government concedes that *Dolan*'s rule applies to exceptions. Appellee's Brief, pp. 39, 40. Second, the *Martinez* court was not exploring the contours of how broadly the exception should be applied. In *Martinez*, the exception involved was the discretionary function exception, and the only question truly before the court was whether the federal officials were performing a discretionary function (in particular,

whether an officer can still be said to be performing a discretionary function when he ignores a drug testing protocol). In other words, the government cited *dicta*.

As another example of context the Court is expected to buy into, the government tells us that the context of TSA having separate law enforcement officers from screeners means that one group should be subject to the FTCA while the other is not. Appellee's Brief, pp. 32, 33. But there is no reason why only one group should fall under the proviso: if both groups execute searches, then both groups qualify. The government's insistence that it makes sense only to apply the proviso to one was made up out of whole cloth. And in attempting to prove a point that doesn't exist, Appellant blatantly misrepresents the case. Appellee's Brief, pp. 33, 34 ("Leuthauser's entire argument on appeal rests on the proposition that … screeners 'execute searches' and are therefore law enforcement officers."). Appellant acknowledges that there are two groups, one of law enforcement officers and one not, and she was searched by the latter. But it is the fact that the latter group is also empowered to search that is relevant, not whether they are law enforcement officers.

IV. Allowing Accountability for TSA Misconduct Will Not Create a Deluge in the Federal Courthouse

As noted by *amicus* Freedom to Travel USA, even clearing the hurdle of the law enforcement proviso, a litigant seeking FTCA remedies with regards to abuse by TSA screeners face a substantial uphill battle. Brief of FTTUA, p. 29. The fact that the government is always well-represented is only part of the reason why bringing claims against TSA screeners is difficult. As far as the FTCA is concerned, there are strict pre-suit requirements and statutes of limitations. 28 U.S.C. § 2401. There is no right to a trial by jury. 28 U.S.C. § 2402. There is no availability of punitive damages. 28 U.S.C. § 2674. Attorney's fees are not always recoverable, and in any event, contingency fees are strictly limited to 25% or less, even if the case goes to appeal. 28 U.S.C. § 2678. And specific to TSA screeners, the government often denies public records requests, withholds evidence as "Sensitive Security Information," and commits their torts in private rooms where there are two of them as witnesses against one plaintiff by his or herself with no cameras.

With this in mind, there is little incentive for anyone to sue TSA, or almost any other federal tortfeasor, over anything less than a substantial injury for which the government is clearly liable. But, we need not speculate: FTCA remedies against TSA screeners have been the law in Pennsylvania, New Jersey, and Delaware for the last 3 years, as well as North Dakota, South Dakota, Nebraska, Minnesota, Iowa,

Montana, and Arkansas for the last 2 years, thanks to *Pellegrino* and *Iverson*, respectively. The busiest airport in these states is Newark Liberty International Airport, and despite 14.2M departures between June 2021 and May 2022 at this 12th busiest airport in the country[2], a search of PACER for cases filed in the District of New Jersey (the sole district serving the 11th most populated state in the country) during that date range where "United States" or "United States of America" is a named defendant and "Other Personal Injury" or "Other Civil Rights" were selected as the "Nature of the Suit" on the civil cover sheet, returned 15 cases total, of which **zero** were related to TSA screening.

The government's prophecy that federal employees will be sued left and right because there can be no "limiting principle" is disingenuous. TSA is currently not being sued with any regularity even where such claims do not face any sovereign immunity barriers, and with 15 annual claims for personal injury in a medium-sized state against *any federal agency whatsoever* in a jurisdiction where the FTCA is properly construed as the broad waiver of sovereign immunity it was intended to be, no other agency appears to have that problem either.

Notwithstanding, if the Court wants a limiting principle, it is easy to distinguish TSA screeners from EPA inspectors at hazardous waste sites, FDA

[2] Source: U.S. Dept. of Transportation. https://www.transtats.bts.gov/airports.asp

slaughterhouse inspectors, and various inspectors of "the books" of private entities. Appellee's Brief, pp. 30, 35. "TSO screenings fall within the proviso because they are more personal than traditional administrative inspections: They extend to the general public and involve searches of an individual's physical person and her property." *Pellegrino* at 180. In other words, a search of "the books" is not the kind of search likely to result in the commission of an intentional tort against one's person, nor is an inspection of a business. A TSA search, on the other hand, involves up-close-and-personal interaction, where a government agent is physically touching members of the public. *This* is exactly the kind of search that has the likelihood of abuse Congress was considering when it passed the FTCA, and exactly the kind of search that needs a remedy available for when it is abused.

CONCLUSION

If Congress wishes to immunize TSA screeners, they are free to do so. But they have chosen to do the opposite. The Court need not destroy the only judicial remedy the public has when they are injured by the federal government in an airport because the agency and its counsel feel that there are contexts and connotations that should be read into the plain words of the legislature.

No one should be sexually assaulted by rogue TSA screeners, but when it happens, we should make them whole. Anything less would be injustice. The judgment of the court below should be **reversed**.

Dated: Los Angeles, CA
August 12th, 2022

Respectfully submitted,

/s/Jonathan Corbett

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CERTIFICATE OF SERVICE

I, Jonathan Corbett, certify that on August 12th, 2022, I effected service of this brief upon all appellees by using the CM/ECF system.

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