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Immunity Doesn't Fly: The Case for Federal Responsibility for Torts Committed by Transportation Security Officers

Courtney Rimann
Southern Methodist University, Dedman School of Law

IMMUNITY DOESN'T FLY: THE CASE FOR FEDERAL RESPONSIBILITY FOR TORTS COMMITTED BY TRANSPORTATION SECURITY OFFICERS

COURTNEY RIMANN*

ABSTRACT

Transportation Security Officers (TSOs) are the Transportation Security Administration's first line of defense against terrorism in U.S. airways. The American flying public puts their safety, and their luggage, in the hands of these officers, who execute searches that range from metal detectors to physical pat-downs. Since the federal government has mandated searches and screening for airport security, passengers should be able to seek recovery from the federal government where a TSO commits certain intentional torts in the course of duty. Currently, only the Courts of Appeals for the Third Circuit and Eighth Circuit have cleared the runway for such recovery by finding TSOs are "investigative or law enforcement officers" under the Federal Tort Claims Act (FTCA) waiver found in the law enforcement proviso (Proviso).

This Comment will discuss how the courts have interpreted the interplay between the FTCA and the Aviation and Transportation Security Act (ATSA) as to federal liability, leading to a circuit split. This Comment will propose two paths to provide clear recovery for injured passengers. First, Congress should amend the ATSA to designate TSOs as investigative or law enforcement officers. Next, absent legislative action, the U.S. Supreme Court should resolve the circuit split by finding TSOs to be investigative or law enforcement officers based on the ordinary plain meaning of the definition provided in the Proviso.

* J.D. Candidate, SMU Dedman School of Law, May 2022. B.S., Geography, University of Southern Mississippi, 2017. I would like to thank my husband, J.D., for his constant love and encouragement on our adventure to becoming lawyers.

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I. INTRODUCTION

MOST AMERICANS ARE familiar with the Transportation Security Administration (TSA) security checkpoint where passengers enter an airport terminal: hard, gray bins; clear, quart-sized bag; three-ounce bottles; shoes off; pockets empty; laptops out.[1] For most, it is the last hurdle before boarding an airplane for a vacation, a family trip, or business. But for some, it can be the start of a lengthy litigation battle seeking recovery for

[1] *See Security Screening*, Transp. Sec. Admin., https://www.tsa.gov/travel/security-screening [https://perma.cc/TF76-3T6K] (click "Carry-on Baggage Screening").

injuries caused by TSA agents running the checkpoint.[2] Currently, the United States Courts of Appeals are divided over whether injured passengers can recover from the federal government for acts or omissions of Transportation Security Officers (TSOs) employed by the TSA, a federal agency.[3] Congress should amend the Aviation and Transportation Security Act (ATSA) to define TSOs as "law enforcement officers" for purposes of the Federal Tort Claims Act (FTCA). Even absent legislative change, the Supreme Court should resolve the current circuit split and build upon recent interpretive precedent to find that TSA screeners fall within the scope of the law enforcement proviso (Proviso) based on the plain meaning of the Proviso.

Congress federalized U.S. aviation security through the ATSA, which created the TSA and instituted mandatory screening of every passenger and bag.[4] The FTCA waives sovereign immunity for enumerated torts, allowing for suits against the federal government for actions of government agents.[5] This Comment will discuss the history of both the FTCA and the ATSA, then, turning to the current intersection of these two statutes, address the current state of the law regarding federal tort liability for TSOs' actions. Finally, this Comment will consider why passengers need recourse for injuries inflicted during airport screening and propose ways to achieve this recourse through legislative action and judicial precedent.

II. PREPARING FOR TAKEOFF: STATUTORY HISTORY OF THE FTCA AND ATSA

As the federal government has expanded its control of aviation security, it has opened the door to liability. Though the text's plain meaning ultimately governs the issue of federal liability for a TSO's actions, understanding the controlling statutes of tort liability and federal aviation security lays out the runway.

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[2] *See* Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 4 (2013).

[3] *See infra* note 98 and accompanying text.

[4] *See* 49 U.S.C. § 114 (statute forming the Transportation Security Administration); *id.* § 44902 (requiring all air carriers to "refuse to transport" passengers and property where a passenger does not "consent to a search" of the passenger or property).

[5] 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual . . . .").

A. Federal Tort Claims Act: Tort Law and Sovereign Immunity

Sovereign immunity is generally attributed to the historical idea, "the King can do no wrong."[6] Traditionally, some recovery was provided by making the Crown's agents individually liable to injured parties.[7] The idea of individual liability as a means to shield the sovereign made its way into the U.S. legal system.[8] Before the Civil War, Congress adopted private bills providing recovery from the federal government for the victim while protecting government agents from "ruinous liability."[9] A private bill for each injury quickly proved to be time-intensive and burdensome.[10] So, in 1946, Congress passed the FTCA, which waived the government's sovereign immunity in limited and codified situations.[11]

The FTCA provides that the United States will be held liable for certain tortious acts that are committed by federal employees "in the same manner and to the same extent as a private individual under like circumstances."[12] Under the FTCA, federal district courts have "exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death" resulting from certain acts or omissions of a government employee.[13] A judgment under the FTCA indemnifies the federal employee from further claims for the same injury.[14]

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[6] Eric Wang, Note, *Tortious Constructions: Holding Federal Law Enforcement Accountable by Applying the FTCA's Law Enforcement Proviso over the Discretionary Function Exception*, 95 N.Y.U. L. Rev. 1943, 1961 (2020).

[7] *Id.* at 1962.

[8] *Id.*

[9] *Id.* at 1963 (citing James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1871–76 (2010)). These private bills did not set aside or waive the federal government's sovereign immunity but did grant recovery. "Functionally, the government assumed liability while maintaining technical immunity." *Id.*

[10] *Id.*

[11] *See, e.g.*, *id.*

[12] 28 U.S.C. § 2674. This liability does not extend to "interest prior to judgment or for punitive damages." *Id.*

[13] *Id.* § 1346(b)(1).

[14] *Id.* § 2676 ("The judgment in an action under . . . this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government . . . .").

However, a claim brought under the FTCA must meet several threshold requirements for a federal court to find jurisdiction.[15] First, the law only applies to torts "caused by [a] negligent or wrongful act or omission" committed by an employee within the scope of government employment.[16] The law does not waive sovereign immunity where a tort is committed by a federal contractor[17] or by a federal employee acting outside the scope of employment.[18] Courts determine the scope of employment by looking to the state law where the tort occurred.[19] Second, a plaintiff can only bring an action if they first file a claim with the relevant agency and their claim is "denied by the agency in writing."[20] Finally, the claim cannot fall within any of the thirteen exceptions provided for in 28 U.S.C. § 2680.[21]

Of particular note to this Comment is the "intentional torts exception," which bars "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[22] Thus, sovereign immunity is *not* waived where a federal employee's actions constitute one of eleven enumerated intentional torts.[23] However, Congress provided for a "carve-out" within the intentional torts exception through the law enforcement proviso (Proviso).[24] The inten-

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[15] *See id.* § 1346(b)(1).

[16] *Id.* The tortious act or omission must be within the government employee's scope of employment and must be for an act or omission that a private citizen could be held liable for. *Id.*

[17] *Id.* § 2671 ("[T]he term 'Federal agency' . . . does not include any contractor with the United States. 'Employee of the government' includes (1) officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity . . . .").

[18] *See id.* § 1346(b)(1).

[19] KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 12 (2019). "[M]any states consider whether the employer hired the employee to perform the act in question and whether the employee undertook the allegedly tortious activity to promote the employer's interests. The mere fact that the employee committed an illegal or wrongful act does not necessarily entail that the employee acted outside the scope of his employment." *Id.* Where the alleged tort is found to fall outside the scope of employment, the plaintiff will not have a claim for recovery under the FTCA but may have a claim under state law. *Id.* at 11.

[20] 28 U.S.C. § 2675(a). The FTCA requires a final agency action in order for a federal district court to assert jurisdiction. *Id.*

[21] *Id.* § 2680.

[22] *Id.* § 2680(h).

[23] *See id.*

[24] *See* LEWIS, *supra* note 19, at 26.

tional torts exception does not apply to tortious conduct where the claim arises from "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by investigative or law enforcement officers of the United States Government.[25] The FTCA provides that "[f]or 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."[26] Sovereign immunity is waived for claims committed by any federal "investigative or law enforcement officer" as defined by the Proviso, and, thus, federal district courts retain subject matter jurisdiction to hear such claims.[27]

The Proviso was included in the 1974 Amendments to the FTCA after federal law enforcement officials executed several federal "no-knock warrants" at the wrong addresses.[28] In widely publicized incidents, federal narcotics agents executed no-knock warrants.[29] Both homes that the federal agents invaded turned out to be the wrong location, only after the agents intimidated and threatened the residents and ransacked the homes.[30] Congress enacted the Proviso to provide a recovery method for injuries suffered at the hands of federal agents improperly carrying out mandated duties.[31] Congress understood that including the Proviso within the intentional torts exception would carve out a claim for those intentional torts that are not easily exaggerated by the plaintiff.[32]

Two conditions must be met in order to find a waiver of sovereign immunity.[33] First, there must be a clear statement in a statute to find sovereign immunity was waived.[34] Second, the courts have traditionally construed any ambiguity "strictly in favor of the sovereign."[35] However, the Supreme Court has begun to re-

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[25] 28 U.S.C. § 2680(h).

[26] *Id.*

[27] *See id.*

[28] Solomon v. United States, 559 F.2d 309, 310 (5th Cir. 1977) (per curiam); Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. REV. 1245, 1305 (2014).

[29] Wang, *supra* note 6, at 1954.

[30] *Id.*

[31] *Id.* at 1954–55.

[32] *Id.* at 1955 ("[L]aw enforcement abuses are not too easily exaggerated and should be squarely within the ambit of the FTCA").

[33] *See* Sisk, *supra* note 28, at 1249.

[34] *Id.* at 1249–50 ("[T]he federal government's consent to suit must be expressed through unequivocal statutory text.").

[35] *Id.* at 1249.

ject strict construction in favor of the government where the Court does not find ambiguity within the relevant statutory text.[36] The Court has instead looked to traditional tools of construction, especially where the Court is tasked with interpreting an exception to a waiver, as in the FTCA.[37]

The Court expounded the proper interpretation for exceptions to sovereign immunity waivers in *Dolan v. U.S. Postal Service*.[38] In *Dolan*, a customer who was injured by tripping over negligently placed mail sued under the FTCA.[39] The question before the Court was whether the "postal exception" applied to a claim for negligently placed mail and thus if sovereign immunity was retained.[40] The Court held the exception did not apply, finding that the exception must be read narrowly to preserve the broad waiver of sovereign immunity granted in the statute.[41] Justice Kennedy, writing for the majority, relied both on the plain meaning of the relevant text and the context of the statute as a whole, stating:

> The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude both context and precedent require a narrower reading.[42]

Specifically, the Court pointed to the surrounding exceptions to the FTCA waiver, noting that "[o]ther . . . exceptions paint with a far broader brush," for support of the conclusion that the postal exception must be read narrowly, since the choice of words in the exception "expressed [Congress's] intent to immunize only a subset of postal wrongdoing, not all torts committed in the course of mail delivery."[43] *Dolan* stands for the rule that the scope of exceptions are not necessarily construed in favor of the

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[36] *See id.* at 1253.

[37] *See id.* at 1269–70 (discussing the Court's holding in Dolan v. U.S. Postal Serv., 546 U.S. 481 (2006)).

[38] 546 U.S. 481.

[39] *Id.* at 483.

[40] *Id.* at 485.

[41] *Id.* at 486.

[42] *Id.* Justice Thomas was the lone dissenter, finding that the statute was ambiguous and should, therefore, be construed in favor of the sovereign. *Id.* at 492–93 (Thomas, J., dissenting).

[43] *Id.* at 489–90 (majority opinion).

sovereign but are first analyzed for plain meaning and context.[44] The Court noted that its holding "does not implicate the general rule [of strict construction] in favor of the sovereign. . . . [T]his principle is unhelpful in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute' . . . ."[45]

Where the Court in *Dolan* established rules for interpreting exceptions to statutory waivers, the Court in *Millbrook v. United States* considered the scope of the Proviso as to intentional torts.[46] In *Millbrook*, the petitioner brought suit under the Proviso, "asserting claims of negligence, assault, and battery" committed by correctional officers employed by the Federal Bureau of Prisons.[47] The question before the Court was whether the Proviso only waived sovereign immunity for "tortious conduct [that occurred] in the course of executing a search, seizing evidence, or making an arrest."[48] The Court found the waiver was not so limited.[49] Justice Thomas, the lone dissenter in *Dolan*, wrote for a unanimous Court.[50] The Court described the Proviso structure and requirements as such:

> [T]he law enforcement proviso applies where a claim both arises out of one of the proviso's six intentional torts, and is related to the "acts or omissions" of an "investigative or law enforcement officer." The proviso[ ] . . . incorporates an additional requirement that the acts or omissions giving rise to the claim occur while the officer is "acting within the scope of his office or employment."[51]

Multiple lower courts had further limited the Proviso by only allowing a waiver where the tortious conduct arose from "searches, seizures of evidence, arrests, and closely related exercises of investigative or law-enforcement authority."[52] The Court rejected this interpretation, holding that the statutory language was not ambiguous, and "Congress ha[d] spoken directly to the circumstances in which a law enforcement officer's conduct may expose the United States to tort liability."[53] Ultimately, the

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[44] *Id.* at 489, 491–92.
[45] *Id.* at 491–92 (citation omitted).
[46] Millbrook v. United States, 569 U.S. 50, 52–53 (2013).
[47] *Id.* at 51, 53.
[48] *Id.* at 52.
[49] *Id.*
[50] *Id.* at 50.
[51] *Id.* at 54–55.
[52] *Id.* at 55–56 (quoting court-appointed amicus curiae).
[53] *Id.* at 56–57.

Court held the Proviso to "focus[ ] on the *status* of persons whose conduct may be actionable," and that "[t]he plain text confirm[ed] that Congress intended immunity determinations to depend on a federal officer's legal authority."[54]

Millbrook demonstrates the Court's reliance on the plain meaning of the Proviso when interpreting its scope. This interpretive precedent will help determine the scope of the Proviso as to *who* is included as an "investigative or law enforcement officer" for purposes of tort liability under the FTCA and why extra-textual considerations are unhelpful.[55]

B. The Aviation and Transportation Security Act: Airport Security and Government Control

For anyone who has flown in this century, the TSA is a familiar name. But the federal role in airport security did not begin with the TSA.[56] Increased screening with broad discretion has also unfortunately led to an increase in a misuse of power by some TSOs.[57]

1. The Path to Federalizing Aviation Security

Aviation security first garnered national attention and congressional response in the 1960s, in response to the first act of piracy, or hijacking, that was committed in U.S. airways.[58] Even after aircraft piracy was labeled a federal offense, the number of aircraft hijackings trended upward, with forty attempted in 1969.[59] In response, President Richard Nixon took a strong stance to combat the concerning increase, introducing a new security program on September 11, 1970.[60] This program laid the foundation for increased airport screening and government control of this screening.

Between the announcement of the program in 1970 and 1973, the Federal Aviation Administration (FAA) developed various rules requiring airports to develop security and screening

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[54] *Id.* at 56.

[55] *See, e.g.*, Sisk, *supra* note 28, at 1307–08.

[56] Harawa, *supra* note 2, at 8.

[57] *Id.* at 3–4.

[58] *Id.* at 8–9 (discussing the first American plane hijacking committed in 1961 by an armed passenger who boarded a flight to Key West with plans to divert the plane to Cuba by force).

[59] *Id.* at 8.

[60] *Id.* at 9 (noting that September 11, 1970, would "become an ominous date in American aviation history").

programs, culminating in a 1972 rule requiring mandatory, routine searches of "*all* carry-on items and magnometer screening of *all* airline passengers by January 5, 1973."[61] These searches were to be "conducted by airline personnel, but in the presence of *armed law enforcement officers*."[62] From the 1970s onward, aviation regulatory control was firmly in the hands of the U.S. government, but security action still fell to various other entities, mostly airport operators.[63]

The next major shift in regulatory control over the airways followed the terrorist attacks of 9/11.[64] On November 19, 2001, President George W. Bush signed the ATSA to increase air travel security and safety.[65] The ATSA established the TSA, which was "designed to prevent similar attacks in the future."[66] The TSA was initially created within the Department of Transportation but was transferred to the Department of Homeland Security in 2003.[67]

The ATSA was a strong step to prioritize security and safety in American airways and largely revitalize the public's confidence in air travel.[68] Today, the TSA still carries out the broad mission, under its vision statement: "An agile security agency, embodied by a professional workforce, that engages its partners and the American people to outmatch a dynamic threat."[69] The agency boasts it is positioned as a "counterterrorism organization."[70]

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[61] *Id.* at 9–10.

[62] *Id.* at 10 (emphasis added).

[63] *Cf. id.* at 10 (maintaining airports to develop and execute search and screening measures carried out by "airline personnel").

[64] *Id.* at 11–12.

[65] *Id.* at 12; Lauren Pugh, Note, *We're Soarin', Flyin': The Third Circuit Holds Travelers May Sue Transportation Security Officers in* Pellegrino v. United States Transportation Security Administration, Division of Department of Homeland Security, 64 VILL. L. REV. 629, 633–34, 634 n.30 (2019).

[66] *Mission*, TRANSP. SEC. ADMIN., https://www.tsa.gov/about/tsa-mission [https://perma.cc/FA7M-S5GD].

[67] 49 U.S.C. § 114(a) (current statute amended to reflect the new location of TSA within the Department of Homeland Security); Harawa, *supra* note 2, at 12 n.62.

[68] Harawa, *supra* note 2, at 12–13.

[69] TRANSP. SEC. ADMIN., TSA STRATEGY 2018–2026, at 2 (2018), https://www.tsa.gov/sites/default/files/tsa_strategy.pdf [https://perma.cc/8KYV-EPDB].

[70] Peter Neffenger, *TSA's 2017 Budget - A Commitment to Security (Part III)*, TRANSP. SEC. ADMIN. (Mar. 2, 2016), https://www.tsa.gov/news/press/testimony/2016/03/02/tsas-2017-budget-commitment-security-part-iii [https://perma.cc/K5EL-4P9V].

The TSA Administrator is "responsible for day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation," which includes hiring, training, and retaining "security screening personnel."[71] The ATSA mandates that the TSA issue regulations requiring any air carrier to "refuse to transport—a passenger who does not consent to a search" of the passenger or the passenger's property for unlawful possessions, including weapons and explosives.[72] Such a mandate requires the search of a passenger to be "consensual," but a search is mandatory to travel on any air carrier.[73] Thus, consent is essentially mandated.

TSA screening "incorporates unpredictable security measures," which include inspection of checked and carry-on baggage, traditional metal detectors, millimeter wave advanced imaging technology, and physical pat-downs.[74] Due to the agency's goal to provide a "layered approach to security" that is flexible, pat-downs and bag screenings occur for various reasons.[75] The TSA announced that a pat-down might be required "if the screening technology alarms, as part of unpredictable security measures, for enhanced screening, or as an alternative to other types of screening."[76] TSOs are responsible for deciding how to implement and carry out these "unpredictable" and flexible security measures.[77] The agency promotes in its recruiting material that TSOs can move into management positions or tactical positions located outside the security checkpoints.[78]

2. A Misuse of Authority Leading to Injured Flyers

Repeatedly, headlines have carried outrageous stories of TSOs' failures to carry out federally mandated searches appro-

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[71] 49 U.S.C. § 114(e).

[72] *Id.* § 44902(a).

[73] *See id.* § 44902(c).

[74] *See Security Screening*, *supra* note 1.

[75] *Id.*

[76] *Id.*

[77] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-268, AVIATION SECURITY: TSA HAS POLICIES THAT PROHIBIT UNLAWFUL PROFILING BUT SHOULD IMPROVE ITS OVERSIGHT OF BEHAVIOR DETECTION ACTIVITIES (2019) (reporting number of complaints filed with TSA and referencing autonomy of TSO to refer passengers for additional screening).

[78] *See Transportation Security Officer Requirements: How to Become a TSA Officer*, SECURITYGUARD-LICENSING.ORG, https://www.securityguard-license.org/articles/become-a-tsa-officer/ [https://perma.cc/JCE2-P3EN].

priately and safely.[79] These failures harm individual passengers, threaten air travel security as a whole, and jeopardize the public's confidence and respect in airport screening and security.

Over three years, the TSA received approximately 3,700 complaints related to civil rights and civil liberties,[80] many recounting incidents of humiliation that every traveler dreads as they near the security checkpoint. Multiple complaints reported uncomfortable instances of agents screening intimate areas numerous times at an unnecessarily slow pace or in another improper manner.[81] A sixty-three-year-old traveler reported that an agent said he had to inspect his "genital area" five times.[82] One traveler reported he was subject to a "routine pat-down," where the screener hit his testicle with such force it made the passenger jump in pain.[83] One woman was given a pat-down in the public checkpoint four times, then "taken to a private room and told to drop her pants for screening."[84]

Some instances of questionable TSA behavior have been organized by multiple officers and have resulted in criminal charges.[85] In 2015, two TSOs were terminated for their involvement in a "scheme to grope attractive men" at the Denver airport where a male officer would signal to a female officer when a male passenger he found attractive was in line.[86] The female officer "would falsely enter the sex of the passenger as female, so the machine would report an anomaly" near the passenger's

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[79] Harawa, *supra* note 2, at 3–4.

[80] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 77; s*ee also* Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 180 (3d Cir. 2019) (en banc) ("In 2015, for example, fewer than 200 people (out of over 700 million screened) filed complaints with the TSA alleging harm that would fall within the scope of the proviso."). "In 2017, only one out of every 100,000 passengers lodged a complaint about the 'courtesy' of a TSO, . . . a statistic beyond suits alleging harm that could fit [the Proviso]." *Pellegrino*, 937 F.3d at 180 (citation omitted).

[81] Mike Beaudet, *TSA Hit with Complaints of Invasive Security Checks*, WCVB-TV, https://www.wcvb.com/article/tsa-hit-with-complaints-of-invasive-security-checks/27349885 [https://perma.cc/2FYJ-LSGJ] (May 2, 2019, 8:12 PM).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Andrew Blankstein & Phil Helsel, *Two TSA Officers Fired for Scheme to Grope Attractive Men at Denver Airport*, NBC NEWS (Apr. 14, 2015, 6:44 PM), https://www.nbcnews.com/news/us-news/two-tsa-officers-fired-scheme-grope-hot-men-denver-airport-n341596?cid=par-time-article_20150415 [https://perma.cc/QSM9-RJGM] (criminal charges were not brought because "no victims have come forward").

[86] *Id.*

groin, triggering a pat-down.[87] The male officer would then conduct the pat-down using the palms of his hands in violation of TSA policy.[88]

In 2020, an officer at the Los Angeles International Airport was charged with "one felony count of false imprisonment for intentionally and unlawfully detaining an individual through the use of fraud or deceit."[89] The officer removed a woman from the screening line, telling her she would be required to undergo additional screening; he then took her to an elevator where he told her he could complete the screening there rather than in a private screening room.[90] He told her to "show her 'full breasts'" and "lift her pants and underwear" before telling her "she was all done and that she had nice breasts."[91]

Where individuals have filed civil litigation seeking recovery, the most common tort claims brought include false imprisonment, negligence, and battery. Unfortunately, these claims are not only for physical injuries from negligence but also include the heinous invasion and disrespect of passengers' most private areas. One passenger was taken to a private room for a "groin search," where she was instructed by the TSO to "widen her stance."[92] With another TSO present, the TSO "began the pat-down by sliding her hands along the inside of [the passenger's] thigh and proceeded to digitally penetrate and inappropriately fondle [the passenger]."[93] Another passenger had a similarly disturbing encounter when passing through security, but the TSO

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[87] *Id.*

[88] *Id.* The TSA states that "officers use the back of the hands for pat-downs over sensitive areas of the body. In limited cases, additional screening . . . with the front of the hand may be needed to determine that a threat does not exist." *Security Screening*, *supra* note 1 (click "Pat-Down Screening"). Officers should "advise" passengers of the pat-down to "help [passengers] anticipate any actions before [they] feel them." *Id.*

[89] Press Release, State of California Dep't of Just., Off. of the Att'y Gen., Attorney General Becerra Announces Arrest and Criminal Complaint Against Former TSA Agent for False Imprisonment (Feb. 6, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-arrest-and-criminal-complaint-against-former [https://perma.cc/N63J-KYZL].

[90] Alisha Ebrahimji, *A Former TSA Agent Is Accused of Forcing a Woman To Expose Her Breasts During Airport Screening*, CNN, https://www.cnn.com/2020/02/08/us/tsa-agent-arrest-trnd/index.html [https://perma.cc/3267-X28B] (Feb. 8, 2020, 12:52 PM).

[91] *Id.*

[92] Leuthauser v. United States, No. 2:20-CV-479 JCM, 2020 WL 4677296, at *1–2 (D. Nev. Aug. 12, 2020).

[93] *Id.* at *2. After the incident, Leuthauser reported the incident to the "airport police, but they advised [her] that the TSA was outside of their jurisdiction

failed to give the passenger the option of a private room and proceeded to assault the passenger under the guise of a screening at the checkpoint in public view.[94] Heinously, the passenger was threatened with arrest if she did not cooperate with the officers.[95]

TSOs have the power to demand consenting passengers complete screening outside of conscionable or feasible means. In one incident, the TSO removed a four-year-old's custom leg braces after the parents informed officers the child could not walk without them and required the four-year-old to walk through the metal detector unaided without his leg braces.[96]

The need for passenger recourse is clear. To fly, every passenger must submit to TSA screening procedures.[97] Passengers should have confidence that airport screening will be respectful, safe, and efficient. Where it is not, injured passengers should be able to recover from the one that mandated the screening and controls U.S. aviation security: the federal government. No passenger should have to face the risk of injury, trauma, or assault to reach their final destination.

III. TURBULENCE AHEAD: TSOS UNDER THE "LAW ENFORCEMENT PROVISO"

The question of whether a TSO is a law enforcement officer for purposes of the Proviso is developing into a strong circuit split.[98] By the end of 2020, four circuits had issued opinions upon the question. The Third and Eighth Circuit found that

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and did not take action." *Id.* Leuthauser brought suit for battery and intentional infliction of emotional distress under the FTCA. *Id.*

[94] Gesty v. United States, 400 F. Supp. 3d 859, 862 (D. Ariz. 2019) (dismissing the claim because the plaintiff did not allege the TSO who assaulted her was a designated law enforcement officer to fall under the Proviso).

[95] *Id.*

[96] Pugh, *supra* note 65, at 629–30 nn.4–5.

[97] *See* 49 U.S.C. § 44902(a), (c).

[98] Only the Second, Third, Eighth, and Eleventh Circuits heard an appeal or ruled on the issue. *See* Leytman v. U.S. Dep't of Homeland Sec. Transp. Sec. Admin., 804 F. App'x 78, 81 (2d Cir. 2020) (remanding the case for further fact finding on the role of a TSO); Iverson v. United States, 973 F.3d 843, 845 (8th Cir. 2020) (finding a TSO "satisf[ies] the FTCA's definition of an investigative or law enforcement officer") (emphasis omitted); Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 168 (3d Cir. 2019) (en banc) (finding that the "words of the proviso dictate the result" and TSOs fall within the scope of the Proviso); Corbett v. Transp. Sec. Admin., 568 F. App'x 690, 701 (11th Cir. 2014) (finding TSOs do not fall under Proviso, where the court relied on the statutory authority of the TSA Administrator to designate law enforcement officers).

TSOs were law enforcement officers under the Proviso,[99] and the Eleventh Circuit found the opposite.[100] In *Leytman v. United States*, the Second Circuit remanded the case back to the district level, finding the record as to the TSO's job duties inadequate to answer the question.[101] This Section will expand on the current state of the law addressing TSOs within the scope of the Proviso.

A. TSOs Fall Within the Law Enforcement Proviso

The Third Circuit can be credited with creating a circuit split when it diverged from the dominant interpretation that TSOs were not law enforcement officers under the Proviso.[102] Regardless, the Third Circuit's divergent view found its roots in the Supreme Court's most recent precedent requiring the waiver to be interpreted without extratextual assumptions hindering the analysis.[103]

In *Pellegrino*, Nadine Pellegrino was detained at a security checkpoint for further screening.[104] She was taken to a private screening room where her belongings were searched and damaged in the process.[105] The TSOs then required Pellegrino to repack her bags and threw away several of Pellegrino's belongings without telling her.[106] As she was retrieving her belongings from the private room, a TSO blocked Pellegrino as she attempted to collect one of her bags, forcing her to crawl underneath the table to reach the bag and leave the screening room.[107] Pellegrino was then detained for what the TSOs claimed was an attempted assault.[108] Based on these false allegations, Philadelphia police arrested Pellegrino and held her for

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[99] *Iverson*, 973 F.3d at 845; *Pellegrino*, 937 F.3d at 168.

[100] *Corbett*, 568 F. App'x at 701.

[101] *Leytman*, 804 F. App'x at 81.

[102] *Pellegrino*, 937 F.3d at 197–98 (Krause, J., dissenting) (pointing to other courts who only extended the scope of the Proviso to "traditional law enforcement duties").

[103] *Id.* at 171–72 (majority opinion) ("[T]he Supreme Court clamped down on a cramped reading of the proviso.") (citing Millbrook v. United States, 569 U.S. 50, 56–57 (2013)).

[104] Pellegrino v. U.S. Transp. Sec. Admin., 855 F. Supp. 2d 343, 350 (E.D. Pa. 2012), *aff'd in part, rev'd in part en banc*, 937 F.3d 164 (3d Cir. 2019) (en banc) (cited for factual background).

[105] *Id.* at 351.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 351–52.

eighteen hours.[109] Ultimately, the TSA could not present any video evidence or witnesses to corroborate the TSOs' claims.[110] After submitting an administrative claim to the TSA, Pellegrino brought suit under the FTCA, alleging false arrest, false imprisonment, and malicious prosecution.[111]

The district court found that TSOs, such as those that handled the screening of Pellegrino, were not law enforcement officers under the Proviso based on the legislative history, and therefore, the U.S. government could not be held liable for the combative and harmful screening carried out against Pellegrino.[112] Pellegrino appealed to the Third Circuit.[113]

On the first hearing, the Third Circuit affirmed the district court and issued a ruling finding TSOs are not law enforcement officers under the Proviso.[114] The Third Circuit granted a rehearing, voting to rehear the case en banc.[115] Being an issue of first impression, the Third Circuit reversed its earlier ruling and found TSA screeners to be law enforcement officers based on the text of the Proviso.[116]

Since the Third Circuit's decision, the Eighth Circuit followed suit, finding that TSOs "satisfy the FTCA's definition of an *investigative or law enforcement officer*."[117] In *Iverson v. United States*, Iverson, who walked with crutches, sued for injuries suffered from a fall during a TSA pat-down.[118] Iverson was required by a TSO to "stand on his own power" without the full support of his crutches, and "a TSO pulled him forward and then abruptly let go, causing [him] to fall," which resulted in injuries.[119] After the TSA denied his administrative claim, Iverson brought suit for battery and negligence under the FTCA.[120] The Eighth Circuit considered each term of the definition, relying heavily on the

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[109] *Id.* at 352.

[110] *Id.* at 353 (all criminal charges against Pellegrino were dropped or dismissed).

[111] *Id.* at 355–56 (administrative claim was denied by the TSA).

[112] Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 169 (3d Cir. 2019) (en banc).

[113] *Id.*

[114] *Id.*

[115] Pellegrino v. U.S. Transp. Sec. Admin., 904 F.3d 329 (3d Cir. 2018) (order granting rehearing en banc).

[116] *Pellegrino*, 937 F.3d at 180–81.

[117] Iverson v. United States, 973 F.3d 843, 845 (8th Cir. 2020).

[118] *Id.* at 846.

[119] *Id.*

[120] *Id.*

Pellegrino opinion.[121] Specifically, the court found that TSOs are officers "charged" by Congress through the ATSA "with the power to conduct airport screenings."[122] The court notably rejected the government's argument that TSOs are not officers based on the ATSA's designation of TSOs as officers, noting that the ATSA's definition of employee does not exclude officers, nor is it a statutorily sound cross-reference, stating:

> [T]he government's argument has an unacceptable statutory effect: It uses a later enactment—the ATSA—to limit the scope of an earlier enactment—the FTCA proviso. As it stands, the proviso, passed in 1974, covers TSOs because they satisfy the ordinary meaning of *officers*. If we were to import Congress's classification of TSOs from the ATSA, which was passed in 2001, with the interpretation the government prefers, TSOs would not be *officers* but mere employees. That would limit the [FTCA's] scope and alter its definition of *officers*. In short, this would require us to hold that Congress silently altered a term's meaning in one statute by passing an unrelated statute almost 30 years later.[123]

When looking at the Proviso as a whole, the Eighth Circuit found that there is "nothing in the language of the proviso to prevent TSOs from also being included as they perform their specialized searches to ensure public safety and national security."[124] Recognizing that the definition "contemplates traditional law enforcement officers," it pointed to the fact that "[t]he proviso itself expressly defines the officers whose acts can cause injuries that are actionable" and should be interpreted broadly.[125] Furthermore, the court looked to the current precedent of *Millbrook* and *Dolan* to find that the Proviso should be interpreted broadly to achieve the intended purpose.[126]

The Second Circuit had the opportunity to address the question but remanded the case due to an inadequate record.[127] Specifically, the Second Circuit seemed to rely on the statutory reading that TSA agents are divided into two exclusive catego-

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[121] *Id.* at 847–48.

[122] *Id.* at 848.

[123] *Id.* at 849–50.

[124] *Id.* at 853.

[125] *Id.*

[126] *Id.* at 854–55.

[127] Leytman v. U.S. Dept. of Homeland Sec. Transp. Sec. Admin., 804 F. App'x 78, 81 (2d Cir. 2020) (remanded for discovery regarding tortfeasor's duties to determine if TSOs were responsible for duties under the FTCA's definition of "investigative or law enforcement officers").

ries: "security screening personnel" and "law enforcement personnel."[128] The court vacated and remanded the case to include "discovery focused on the roles of the TSA employees alleged to have been involved."[129] The Second Circuit leaves the question of how, if at all, these two identified categories of TSA agents could affect the outcome of the case.[130] This may signal that the Second Circuit could apply a fact-specific inquiry in future decisions interpreting the Proviso.

B. Opposing Argument

The Eleventh Circuit, in non-binding precedent, was the first circuit to issue a ruling discussing the applicability of the Proviso to TSA agents.[131] In a per curiam opinion, the Eleventh Circuit relied heavily on a distinction between "employee" and "officer" as used in the FTCA and on the distinction between screeners and law enforcement officers in the ATSA.[132] However, the court failed to conduct any textual analysis of the statutory language of the FTCA's definition of law enforcement officer.[133]

Both *Pellegrino* and *Iverson* produced lengthy dissents opposing each court's analysis of the issue. The dissenting arguments relied heavily on the historical application of the Proviso.[134] The *Pellegrino* dissent parted with the majority's textual breakdown of the Proviso, arguing instead that the word should be read in context.[135] But, when proceeding to demonstrate this context, the *Pellegrino* dissent argued the Proviso's definition should be read with the overlying understanding that it applies to criminal law searches because the Proviso refers to the power to "execute searches."[136] The *Pellegrino* dissent focused on the division be-

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[128] *Id.* at 80.

[129] *Id.* at 81.

[130] *Id.* at 81. The Second Circuit declined to address the difference in TSA agents. "Rather than address in the first instance how the differing definitions and duties of TSA screeners and TSA law enforcement officers may affect the resolution of this dispute, if at all, we think it best to . . . remand . . . ." *Id.* at 81.

[131] Corbett v. Transp. Sec. Admin., 568 F. App'x 690, 701 (11th Cir. 2014).

[132] *Id.*

[133] *Id.* (declining to "resolve the thorny 'search' issue" referring to the use of "search" in the Proviso definition).

[134] Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 181–83 (3d Cir. 2019) (en banc) (Krause, J., dissenting); Iverson v. United States, 973 F.3d 843, 860–61 (8th Cir. 2020) (Gruender, J., dissenting).

[135] *Pellegrino*, 937 F.3d at 181.

[136] *Id.* at 185 (dissent finds the term "execute searches" a term of art); *Iverson*, 973 F.3d at 860–61 (Gruender, J., dissenting) ("[S]ometimes a 'search is not a search' in the relevant sense of the word").

tween administrative and investigative searches.[137] However, this division is not enumerated in the FTCA or the ATSA and does not support a reading of the plain meaning of the text within the context of the statute as a whole.

Similarly, the *Iverson* dissent argued that the majority misapplies a textual reading by picking and choosing definitions that allow for their desired reading.[138] However, the *Iverson* dissent relied on the division between employee and officer as presented in the ATSA, which was rejected by the majority.[139] Like the *Pellegrino* dissent, the *Iverson* dissent argued that the Proviso should be read in light of criminal law and that the searches described in the Proviso should only be those for criminal investigative purposes.[140]

The Supreme Court has not granted certiorari to determine whether a TSO is an "investigative or law enforcement officer" within the Proviso. The circuits currently seem to be split over how to read the Proviso's definition and how the FTCA and ATSA each reflect federal sovereign immunity.

IV. CLEARED FOR LANDING: ENSURING RECOURSE FOR PASSENGERS

Before the COVID-19 pandemic, the FAA reported over 10 million scheduled passenger flights annually and 2.9 million passengers flying daily through U.S. airports.[141] The TSA was created to provide for security and screening in our nation's airports,[142] but this mission involves mandatory screening that, while necessary, exposes passengers to potentially invasive screening, searches, and inspection at the hands of federal agents. The only way to travel by air in the U.S. is to submit to

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[137] *Pellegrino*, 937 F.3d at 194–97 (Krause, J., dissenting); *Iverson*, 973 F.3d at 860–61 (Gruender, J., dissenting).

[138] *Iverson*, 973 F.3d at 865.

[139] *See id.*

[140] *Id.* at 862.

[141] *Air Traffic by the Numbers*, FED. AVIATION ADMIN., https://www.faa.gov/air_traffic/by_the_numbers/ [https://perma.cc/3SF4-DMNB] (Sept. 21, 2020, 4:32 PM) (data reported from fiscal year 2019). Even with the reduction in travel due to the COVID-19 pandemic, the TSA was screening approximately one million passengers daily at the start of 2021. *TSA Checkpoint Travel Numbers (Current Year Versus Prior Year(s)/Same Weekday)*, TRANSP. SEC. ADMIN., https://www.tsa.gov/coronavirus/passenger-throughput [https://perma.cc/HW77-GLCD].

[142] *Transportation Security Overview*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/transportation-security-overview [https://perma.cc/92MY-3P84] (May 24, 2021).

this screening process to access the terminal.[143] Due to the personal and mandatory nature of the searches and the potential for abuse, a reliable path to recovery should be available against the federal government where TSOs commit intentional torts. To provide a clear path to recovery, Congress should amend the ATSA to define TSOs as "investigative or law enforcement officers" for purposes of the FTCA. Alternatively, the Supreme Court should follow the Eighth Circuit's reasoning and find that TSOs duties do fall within the scope of the Proviso.

A. Congress Should Take Legislative Action

The federal government should bear the liability for torts enumerated in the Proviso because the government mandated the security screening and provided the means to federalize aviation security.[144] The Proviso is limited to an enumerated list of intentional torts, making it a limited waiver in nature.[145] The Proviso should not be further limited by a narrow interpretation based on extratextual notions that shield the government from intentional torts committed by TSOs in the course of employment. To combat this suggested reading of the Proviso, the ATSA should be amended to define TSOs as "investigative or law enforcement officers." This legislative amendment would align the terminology used in the FTCA to allow for a clear scope of the waiver of sovereign immunity under the Proviso, creating a consistent law for the courts to apply. This amendment removes the judicial inquiry and interpretation that courts currently must undergo when applying the Proviso. Such an amendment would also create a clear statutory path to recovery that provides no avenue for expansion to other types of federally mandated searches.

Several courts have theorized that the FTCA definition of "law enforcement officers" was intended to limit recovery only to those scenarios that have been historically seen as exploited by extreme force and abuse of law enforcement authority.[146] It is argued that this scope is appropriate because traditional law enforcement officers are trained in Fourth Amendment requirements, and therefore, an intentional tort would be a violation

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[143] *See* 49 U.S.C. § 44902 (requiring air carriers to refuse to transport passengers who do not consent to a search).

[144] Harawa, *supra* note 2, at 12–13.

[145] *See* 28 U.S.C. § 2680(h).

[146] *See, e.g.*, Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 194–95 (3d Cir. 2019) (en banc) (Krause, J., dissenting).

that the government should and could be liable for.[147] However, this theory does not play out when applied to TSA screening and the division of responsibilities. TSOs are placed in a position to invade passengers' person and property to comply with the mandated security measures daily. If these TSOs are not "trained" on the same constitutional requirements as law enforcement officers, they should not be conducting similarly invasive searches. Yet, that is what the statute mandates.[148] Because the ATSA mandates screening, TSOs should be defined statutorily as investigative or law enforcement officers within the originating statute. This designation could be limited to define TSOs as officers only under the FTCA's definition.

In a similar argument, it has been argued that the Proviso should only apply to "traditional" law enforcement functions and that the type of "consensual" screening conducted by the TSA is not a traditional law enforcement function.[149] Law enforcement functions provided for in the ATSA are not isolated to those designated "law enforcement officers." The TSA Administrator can utilize personnel to execute law enforcement functions through multiple avenues. First, the TSA Administrator "may designate an employee . . . as a law enforcement officer."[150] Second, the TSA Administrator can grant authorization for "an individual who carries out air transportation security duties" to carry a firearm and make arrests.[151] Third, the TSA Administrator may allow local airport operators to use federal personnel to "supplement State, local, and private law enforcement personnel."[152] Where law enforcement officers are not solely responsible for these functions, the FTCA should not be narrowly read only to provide recourse based on title rather than function.

By amending the ATSA, recourse and litigation for injured passengers is not only simpler but fits within the statutory construction of the entire ATSA. The ATSA provides the TSA Ad-

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[147] *See, e.g.*, Iverson v. United States, 973 F.3d 843, 858 (8th Cir. 2020) (Gruender, J., dissenting).

[148] *See* 49 U.S.C. § 114(e)(4) ("The Administrator shall . . . be responsible for hiring and training personnel to provide security screening at all airports . . . ."). The TSA Administrator is tasked with issuing safety regulations to "[p]rotect[ ] against violence and piracy," which includes "requir[ing] a uniform procedure for searching and detaining passengers and property . . . ." *Id.* § 44903(b), (3).

[149] *See supra* Section III.B.

[150] 49 U.S.C. § 114(p)(1).

[151] *Id.* § 44903(d) (with approval of Attorney General and Secretary of State).

[152] *Id.* § 44903(c).

ministrator with the authority to delegate necessary police power and law enforcement functions through multiple avenues and is not limited to law enforcement officers in name. The statute even defines agency personnel authorized to conduct traditional law enforcement functions as "law enforcement personnel," not employees, while granting them similar functions as enumerated in the FTCA definition.[153] Additionally, other individuals in the agency can be authorized to carry a firearm and make arrests without a warrant for airport security purposes.[154]

To clarify the delegated authority granted by Congress to the TSA Administrator, Congress should amend the ATSA to provide that TSOs are "investigative or law enforcement personnel" for purposes of the FTCA.

B. The Supreme Court Should Resolve the Circuit Split

Four circuits have considered whether a TSO is an "investigative or law enforcement officer."[155] This developing circuit split leads to muddled precedent for lower courts and uncertainty for future litigants. To create consistent and clear precedent, the Supreme Court should apply sound principles of statutory construction and adopt the conclusion of the Third and Eighth Circuits, following the plain meaning analysis of the Eighth Circuit. To find TSOs are officers under the Proviso, the Court should first look to the "ordinary public meaning"[156] of the Proviso as a whole, while rejecting extratextual inferences and analysis. Next, the Court should consider the statutory scheme of the TSO's origin statute in light of *Millbrook*. This correct interpretation provides recourse without expanding the Proviso to any federal employee conducting routine inspections.

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[153] *See id.* § 44903(a)(2) ("The term 'law enforcement personnel' means individuals—(A) authorized to carry and use firearms; (B) vested with the degree of the police power of arrest the Administrator considers necessary . . . and (C) identifiable by appropriate indicia of authority.").

[154] *Id.* § 44903(d) ("[T]he Administrator may authorize an individual who carries out air transportation security duties—(1) to carry firearms; and (2) to make arrests without warrant for an offense . . . committed in the presence of the individual or for a felony . . . .").

[155] *See supra* Section III.

[156] Iverson v. United States, 973 F.3d 843, 854 (8th Cir. 2020).

1. The Plain Meaning of the Proviso Includes TSOs

The Proviso only waives sovereign immunity for six intentional torts that are committed by an "act[ ] or omission[ ] of investigative or law enforcement officers."[157] The Proviso states that: "[f]or 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."[158]

The dissenting opinions in *Pellegrino* and *Iverson* accused the majority of finding individual definitions to fit their reading. The Supreme Court should look to the majority's reasoning in *Iverson* to find an interpretation true to statutory construction and FTCA precedent. The Eighth Circuit first looked to the "ordinary meaning"[159] of the terms of the Proviso to consider the parties' arguments, but the court ultimately found that "when interpreting the statute, we consider 'the whole statutory text.'"[160]

In considering if a TSO is "any officer of the United States," the court made several important points about the authority of a TSO.[161] First, "Congress, by statute, charged TSOs with the power to conduct airport screenings."[162] Second, the "TSA holds them out to the public as officers . . . to ensure the public respects them."[163] Recognizing TSOs' authority is also consistent with the federalization of aviation security beginning in the 1970s.[164] The federal government expanded its control from mandated regulation to controlling and executing the screening with the TSA.[165] This expansion delegated authority to conduct all airport screening to the TSA, its Administrator, and TSOs.[166] "Congress thus mandated that TSOs carry out screenings and authorized physical searches as one means to complete that

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[157] 28 U.S.C. § 2680(h).

[158] *Id.*

[159] *Iverson*, 973 F.3d at 847 (quoting Stenberg v. Carhart, 530 U.S. 914, 942 (2000)).

[160] *Id.* at 847–48 (quoting Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006)); *see also supra* note 42 and accompanying text.

[161] *Iverson*, 973 F.3d at 848.

[162] *Id.* (citing 49 U.S.C. § 44901).

[163] *Id.*

[164] *See supra* notes 63–67 and accompanying text.

[165] *See supra* notes 63–67 and accompanying text (discussing the transformation from the anti-piracy regulations instituted by President Nixon and the ATSA signed by President George W. Bush).

[166] *See supra* notes 63–67 and accompanying text.

duty. The statute specifically authorizes federal employees, TSOs, to screen passengers and property."[167] When considering the term to "execute searches," the court did not distinguish between prevention of federal violations and active violations.[168] The TSOs are conducting searches to remove items that are not allowed on flights, including weapons, explosives, and liquids and gels.[169] TSO searches are not merely to prevent violation of federal regulation but to prevent the transportation of items that violate federal law and threaten the safety of other passengers. The Supreme Court should follow the reasoning of the Eighth Circuit and interpret the Proviso as a whole without allowing the later statute to alter the plain meaning of the FTCA.[170]

The dissenting opinions in *Pellegrino* and *Iverson* argued that the Proviso should be read only to apply to traditional law enforcement functions or "traditional police functions."[171] This argument is flawed. Both the *Pellegrino* and *Iverson* dissents argued that the respective majority erred by reaching outside the context but then proceeded to reach outside the text and overlay the Proviso with police functions and criminal law connotations that are not present in the text of the Proviso.[172] The scope of the Proviso determines liability, and liability provides relief to injured passengers. Congress has statutorily mandated for airport security through screening of every passenger and every bag.[173] The Proviso does waive liability for functions that are typically conducted by police officers in criminal investigations, but it does not limit the waiver exclusively to these functions only when carried out by police officers. Where the government created the power and duty to conduct searches, the government should be liable where it has waived immunity. Liability should

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[167] *Iverson*, 973 F.3d at 851.

[168] *Contra id.* at 864 (Gruender, J., dissenting).

[169] *See id.* at 848 (majority opinion); *id.* at 864 (Gruender, J., dissenting). Further, the *Iverson* majority refused to apply the canon *noscitur a sociis* because the term "*[s]earches* is neither an obscure word nor is its meaning doubtful" and the "list is joined by the disjunctive 'or.' . . . . Therefore, . . . the terms in the list need not modify each other." *Id.* at 853 (majority opinion) (citations omitted).

[170] *See supra* notes 121–124 and accompanying text.

[171] *See supra* notes 139–140 and accompanying text.

[172] *See Iverson*, 973 F.3d at 863–64 (Gruender, J., dissenting); Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 199–200 (3d Cir. 2019) (en banc) (Krause, J., dissenting).

[173] *See* 49 U.S.C. §§ 114(e)(4), 44903(b)(3).

flow to where the power is delegated. The power cannot flow to where the liability flows.

In a similar argument, the *Pellegrino* and *Iverson* dissents argued the Proviso cannot provide for liability because its language is ambiguous, and following established precedent, any ambiguity should be resolved in favor of the sovereign.[174] However, on its face, the Proviso is not ambiguous. The dissenting opinions found ambiguity only because their interpretation assumes that the Proviso applies to traditional police powers or traditional law enforcement functions. Just as this interpretation was flawed by reaching beyond the context of the FTCA, the Proviso is not ambiguous where extratextual assumptions give rise to the ambiguity. Congress did not include language in the Proviso that limits the scope to police powers or criminal law, and the Court should not limit liability where Congress did not.

The Supreme Court should follow the guidance outlined in *Dolan* and *Millbrook*.[175] In this instance, narrowly interpreting the Proviso to find it only applies to criminal law enforcement officers or only to investigative searches is an "unduly generous interpretation[ ] of the exception[ ]."[176] Narrowly interpreting the Proviso based on the extratextual notion that it only applies to criminal law enforcement harms the "calibration" of recourse that Congress has provided by the passage of the Proviso.[177] Just as *Millbrook* limited the interpretation to the text of the Proviso, the interpretation here should be limited to the plain meaning of the text. It is of note that Congress chose not to include "criminal" as a modifier to "investigative or law enforcement officer," and by this absence, the Proviso should not be constrained by this extratextual modifier.

2. The ATSA Statutory Scheme Does Not Limit Law Enforcement Functions

The statutory scheme of the ATSA, read as a whole, does not designate the law enforcement functions enumerated in the Proviso exclusively to appointed "law enforcement officers." The dissenting opinion in *Pellegrino* argued that the text of the ATSA

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[174] *Iverson*, 973 F.3d at 867 (Gruender, J., dissenting); *Pellegrino*, 937 F.3d at 199–200 (Krause, J., dissenting).

[175] *See supra* text accompanying notes 38–54.

[176] *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (citing Kosak v. United States, 465 U.S. 848, 853 n.9 (1984)).

[177] Wang, *supra* note 6, at 1960–64.

is a major reason to bar liability under the Proviso.[178] This line of reasoning is a reasonable interpretation of section 114(p) of the ATSA in isolation, but it is not a complete reading of the statute and should be rejected by the Supreme Court.[179]

The ATSA mandates the TSA Administrator establish screening operations for air transportation, including "hiring and training personnel to provide security screening at all airports in the United States where screening is required."[180] The statute outlines the "[l]aw enforcement powers"[181] of the TSA Administrator and specifies that the Administrator has power to "designate an employee of the [TSA] or other Federal agency to serve as a law enforcement officer,"[182] who has the authority to carry a firearm, to make arrests without a warrant for limited situations, and to execute warrants.[183]

In section 44903 of the ATSA, the term "law enforcement personnel" is defined in relation to air transportation security requirements.[184] As a part of these requirements, an airport operator is required to "establish an air transportation security program that provides a law enforcement presence and capability at each of those airports that is adequate to ensure the safety of passengers" to include the use of "services of qualified State, local, and private law enforcement personnel."[185] Where the TSA Administrator finds these services are inadequate for airport security, "the Administrator may authorize the operator to use, on a reimbursable basis, personnel employed by the Administrator . . . to supplement State, local, and private law enforcement personnel."[186]

Both terms, law enforcement personnel and law enforcement officer, independently fit within the FTCA's definition of "law enforcement officer."[187] The ATSA does not limit the enumerated law enforcement functions, such as carrying a firearm and

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[178] *Pellegrino*, 937 F.3d at 190–92 (Krause, J., dissenting).

[179] *See supra* notes 122–124 and accompanying text (where the Eighth Circuit held the later enacted statute (the ATSA) should not change the plain meaning of the former statute (the FTCA)).

[180] 49 U.S.C. § 114(e)(4).

[181] *Id.* § 114(p).

[182] *Id.* § 114(p)(1).

[183] *Id.* § 114(p)(2).

[184] *Id.* § 44903(a)(2).

[185] *Id.* § 44903(c)(1).

[186] *Id.*

[187] *See supra* Section IV.A (discussing the TSA Administrator's various ways to delegate law enforcement functions under the ATSA).

executing arrests, solely to individuals designated as law enforcement officers.[188] Instead, the TSA Administrator has the authority to designate law enforcement personnel with traditional law enforcement duties and the authority to supplement state, local, and private security personnel with agency personnel (as well as with personnel from other agencies, with certain approvals).[189]

The ATSA allows for the specific designation of law enforcement officers within the TSA, but the statute does not confine traditional law enforcement functions (specifically those listed within the Proviso's definition) to TSA Administrator-designated law enforcement officers. Reading the statute as a whole supports the conclusion that the ATSA does not distinguish between officer and employee *solely* based on exclusive, nonmutual law enforcement functions. Therefore, when applying the Proviso, the Court should look to the "*status* of persons whose conduct may be actionable."[190]

As discussed by the Eighth Circuit, the use of "employee" to describe TSA screening agents should not per se remove TSOs from the scope of the Proviso.[191] This, again, overlays extratextual understanding of the FTCA by allowing "a later enactment—the ATSA—to limit the scope of an earlier enactment—the FTCA proviso."[192] This argument also only considers the term "officer" in isolation from the context of the Proviso as a whole. As the Court found in *Dolan*, Congress was capable of including broad exceptions[193] and specific exceptions.[194] Just as the Court recognized a specific exception in the postal excep-

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[188] *See supra* Section IV.A (discussing how the TSA Administrator may allow agency personnel to supplement airport transportation screening programs); *see* 49 U.S.C. § 44903(d) ("[T]he Administrator may authorize an individual who carries out *air transportation security duties*—(1) to carry firearms; and (2) to make arrests without warrant . . . .") (emphasis added).

[189] *See* 49 U.S.C. § 44903(c).

[190] Millbrook v. United States, 569 U.S. 50, 56 (2013).

[191] *See* Iverson v. United States, 973 F.3d 843, 849 (8th Cir. 2020) ("We decline the invitation to disregard the FTCA's ordinary meaning and instead import Congress's classification of TSOs as *employees* from the ATSA . . . Congress described TSOs as *employees* in the ATSA, but it also defined *employees* in ATSA to include *officers*.").

[192] *Id.*

[193] Dolan v. U.S. Postal Serv., 546 U.S. 481, 489–90 (2006). The Court highlights other broad exceptions in the FTCA. For example, as the *Dolan* Court noted, other FTCA exceptions include "[a]ny claim for damages caused by the fiscal operations of the Treasury . . . ," "[a]ny claim arising out of combatant activities of the military . . . during time of war," and "[a]ny claim arising from the activities of the Tennessee Valley Authority." *Id.* The *Dolan* Court emphasized Congress's use of the term *any* in each of these exceptions.

tion at issue in *Dolan*, the Court should view the Proviso as a specific exception to the definition of "investigative or law enforcement officer." The judiciary should not limit this provided remedy by importing definitions from later statutes. As the Third Circuit stated: "Congress has created a remedy; we are simply giving effect to the plain meaning of its words."[195] The Court should give effect to that remedy for all injured passengers.

3. Correctly Recognizing TSOs Under the Proviso Does Not Unduly Expand the Scope

Correctly finding TSOs to fall within the Proviso will not expose the federal government to liability beyond the scope intended by Congress. The TSO's role is security focused. Holding the government liable protects passengers from the same type of harms Congress intended through the Proviso.

The TSA is tasked with the "day-to-day Federal security screening operations"[196] and the duty "to protect passengers and property . . . against an act of criminal violence or aircraft piracy."[197] Because of this focus, correctly finding TSOs to be law enforcement officers under the Proviso will not open the floodgates of litigation for any intentional tort committed by a federal employee executing any type of inspection.[198]

The federal government mandated screening to be provided by the TSA.[199] This includes "regulations requiring [any] air carrier . . . to refuse to transport—a passenger who does not consent to a search . . . or property of a passenger who does not consent to a search of the property . . . ."[200] "[TSOs] conduct security screening of passengers, baggage and cargo at airports to prevent any deadly or dangerous objects from being transported onto an aircraft."[201] The TSA Administrator has the authority to delegate traditional law enforcement functions, such

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[194] *Dolan*, 546 U.S. at 490 (where "Congress expressed the intent to immunize only a subset of postal wrongdoing, not all torts committed in the course of mail delivery" fall in the postal exception).

[195] Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 180 (3rd Cir. 2019) (en banc).

[196] 49 U.S.C. § 114(e)(1).

[197] *Id.* § 44903(b).

[198] *Contra Pellegrino*, 937 F.3d at 196 (Krause, J., dissenting).

[199] *See supra* Section II.B.1.

[200] 49 U.S.C. § 44902(a).

[201] *Transportation Security Officer*, TSATestPrep.info, https://tsatestprep.info/tso-desc [https://perma.cc/EU3V-XTY9].

as carrying firearms and making arrests, to deputized personnel and *any* agency personnel.[202] This cross-section of invasive searches that are mandatory to board an aircraft and delegation of security functions distinguishes searches conducted by TSOs.

Furthermore, the title TSO was instituted to align better the nomenclature and public perception with the statutory job duties. In 2005, the TSA officially dubbed security screeners TSOs.[203] Though nomenclature should not be dispositive to federal torts law, this change points to the need to provide TSOs with a title that fits their responsibilities and allows them to use their training to pursue other security-focused positions.[204]

Where the government mandates security protocols and completely controls the regulation, it should not be able to hide behind sovereign immunity where sovereign immunity is waived for the category of harm caused. The government should be liable for torts committed by TSOs conducting screening mandated by the ATSA. The Proviso was passed to provide recourse for torts committed by federal agents out of concern for injuries stemming from force and abuse of power.[205]

The Supreme Court should follow the reasoning laid out by the Eighth Circuit, finding TSOs are *investigative or law enforcement officers* within the Proviso, when read as a whole. This interpretation avoids allowing extratextual factors to change Congress's intended waiver and preserves the limited nature of the Proviso, all while ensuring appropriate liability where the federal government mandated aviation security operations.

V. CONCLUSION

Only two circuits recognize federal liability for intentional torts, including assault, misrepresentation, and false arrest, committed by TSOs responsible for screening the millions of passengers who travel through U.S. airports annually. Even where these searches are consensual, passengers have very little control because TSOs have the authority and discretion to conduct the

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[202] *See supra* notes 153–154 and accompanying text.

[203] Pugh, *supra* note 65, at 630 n.5.

[204] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-299, AVIATION SECURITY: TSA'S STAFFING ALLOCATION MODEL IS USEFUL FOR ALLOCATING STAFF AMONG AIRPORTS, BUT ITS ASSUMPTIONS SHOULD BE SYSTEMATICALLY REASSESSED 56 (2007). The renaming of screeners to TSOs also allowed TSA to assist TSOs in pursuing upward career progression, including DHS law enforcement positions. *Id.*

[205] *See, e.g.*, Solomon v. United States, 559 F.2d 309, 310 (5th Cir. 1977) (per curiam).

search. TSOs are officers empowered by law, through the ATSA, to conduct mandatory screening. Law enforcement functions are not limited to designated law enforcement officers under the ATSA. In order to provide a clear path for federal liability, the ATSA should be amended to designate TSOs as an "investigative or law enforcement officer" for purposes of FTCA liability. Absent legislative action, the Supreme Court can, and should, rely on the plain meaning of the Proviso and hold that TSOs fall within the scope of the Proviso. Airport security is of utmost importance, but that security cannot come at the price of passengers' peace of mind, safety, and recourse.