United States Court Of Appeals
for the Fourth Circuit

No. 22-2045

ERIN OSMON,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

On Appeal from the United States District Court
for the Western District of North Carolina

[CORRECTED] OPENING BRIEF OF APPELLANT ERIN OSMON

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DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 26.1 and L.R. 26.1, Plaintiff discloses that she is an individual and is aware of no business entities with an interest in the outcome of this case.

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ISSUES PRESENTED

1) Did Plaintiff-Appellant waive appellate review by failing to object to a magistrate's report with sufficient specificity?

2) Are TSA screeners "investigative or law enforcement officers" for the purposes of the Federal Tort Claims Act, 28 U.S.C. § 2680(h)?

JURISDICTIONAL STATEMENT

This is an appeal of a final order of a U.S. District Court. A timely notice of appeal was filed 26 days after the entry of judgment. JA005, JA158. Jurisdiction is proper pursuant to 28 U.S.C. § 1291.

ORAL ARGUMENTS REQUESTED

The application of the Federal Tort Claims Act to screeners of the U.S. Transportation Security Administration is an important question, as it is likely the only avenue of relief for those injured at airport security checkpoints. The question has divided Courts of Appeals and Appellant respectfully requests oral arguments to sharpen the issues for the panel.

INTRODUCTION

Plaintiff-Appellant Erin Osmon sued the federal government for a battery committed by an employee of the U.S. Transportation Security Administration ("TSA") via the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680 *et seq*. Under the FTCA, the government assumes liability for state-law torts of federal employees committed on-the-job, subject to certain limitations and exceptions. One of those limitations is that for certain intentional torts, including battery, the government is only liable if that employee is classified as an "investigative or law enforcement officer." § 2860(h). This classification is defined in that same subsection as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id*.

The government successfully obtained dismissal in the district court by arguing that TSA screeners are not "investigative or law enforcement officer[s]." While the Fourth Circuit has not ever decided this question, a majority of the circuit courts to have confronted it have held the opposite. Plaintiff-Appellant asks the Court to join the majority and reverse the holding of the district court. But, before it does so, it must determine whether Plaintiff-Appellant has waived appellate review, as the district court questioned whether Plaintiff-Appellant

objected to a magistrate's recommendation to dismiss with sufficient specificity. As the objection filed by Plaintiff-Appellant put the court below on clear notice as to the nature of the dispute with the magistrate's recommendation, the Court is asked to find that appellate review has not been waived.

STATEMENT OF THE FACTS

The facts, as relevant to this appeal, may be simply stated. Plaintiff-Appellant complains of an abusive security search that occurred on June 27th, 2019 at Asheville Regional Airport (AVL) in North Carolina. In particular, the screener forced Osmon to spread her legs such that she could reach up and into Osmon's shorts to make direct contact with her genitals, all while commenting on Osmon's attire and warning her that the sexual assault would be repeated if Osmon resisted. JA007, JA010-012.

There was no legitimate security justification for this egregious search, and it is undisputed that TSA rules specifically prohibited the screener from conducting a search in the manner described in the district court complaint. A timely prerequisite FTCA notice was served on the government on December 14th, 2020, and the notice period expired without response six months thereafter.

STATEMENT OF THE CASE

Osmon filed suit on December 13th, 2021, in the U.S. District Court for the Western District of North Carolina, Case No. 1:21-CV-353. JA003. Her complaint alleged a single cause of action against the United States: civil battery brought via the Federal Tort Claims Act. JA013.

Defendant-Appellee filed a motion to dismiss on January 26th, 2022, alleging that FTCA remedies are not available for intentional torts committed by TSA screeners because § 2680(h) bars the same unless committed by "law enforcement or investigative officers," which, the motion said does not include TSA screeners. JA015-086. In opposition, Plaintiff-Appellant agreed that the employee who injured her was not a "law enforcement officer," but that 2680(h) provides a definition of covered employees that is substantially broader than "law enforcement officer."

The motion was referred to a magistrate, who rendered a Memorandum and Recommendation on August 2nd, 2022. This document contained a single recommendation: that TSA screeners "fall outside the scope of the Proviso such that the United States has not waived sovereign immunity for Plaintiff's claim," and that therefore the motion to dismiss should be granted.

Plaintiff-Appellant filed a timely objection to the magistrate's recommendation on August 16th, 2022. The objection noted the legal issue determined by the magistrate for which district judge review was sought, as well as a summary of the positions of both parties and the case law from all Courts of Appeals to have issued an opinion on the matter. The government filed a response to the objection, alleging it was insufficient because "Plaintiff fails to explain why it was error." JA142. The district court agreed with the government and ordered dismissal on September 1st, 2022. JA155 ("To the extent that this could be construed as an objection to the recommended dismissal of the Plaintiff's Complaint, such objection does not warrant a de novo review of the Magistrate Judge's reasoning."). A timely notice of appeal was filed on September 27th, 2022. JA006.

SUMMARY OF THE ARGUMENT

As a threshold matter, Plaintiff-Appellant's objection to the magistrate's recommendation was sufficient to avoid waiver of appellate review. An objection to a magistrate's recommendation needs only to put the district court on notice of the grounds for the objection. It does not need to explain in any detail an argument for "why" the magistrate's recommendation was in error; it only needs to point the

district court to the error, and Plaintiff-Appellant's objection clearly and unmistakably did so.

As to the merits, Congress did not leave the courts in the dark as to what they meant when they spoke of "investigative or law enforcement officers" in the Federal Tort Claims Act. Instead, they provided a definition using unambiguous, simple, and clear words:

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

28 U.S.C. § 2680(h). As the primary job responsibility of TSA screeners, as defined by federal law, is to search people and things as they traverse the nation's airport, TSA screeners meet this definition when using a plain reading of the statute, unadulterated by attempts to manipulate these words to have a meaning other than that they are ordinarily understood to have.

The government's argument, as largely adopted by the magistrate and district court judges, places the words of the statute into a "context" where "searches" are not searches, "officers" are not officers, and "federal law" is not "federal law," and the court below adopted this context. The logic used may be described as follows: TSA's searches do not count as searches because the word

"search" invokes traditional law enforcement responsibilities as opposed to the administrative screenings performed by TSA screeners." JA131. TSA screeners are not "officers of the United States," despite holding the title "Transportation Security *Officer*" and wearing badges that read "U.S. Officer," because Congress must have meant only "those with police powers." JA026[1]. And TSA does not search for "violations of Federal law" because that phrase has "must refer to criminal law" and therefore does not apply to administrative searches. JA133, *quoting Pellegrino v. Transp. Sec. Admin.*, 937 F.3d 164, 186 (3rd Cir. 2019) (*en banc*) (Krause, J., *dissenting*).

To date, three circuits have decided this question. The first was the Eleventh Circuit, in a non-published, non-precedential[2] opinion where the appellant was a non-attorney, *pro se* litigant and the case was decided without the benefit of oral argument. *Corbett v. Transp. Sec. Admin.*, 568 F. App'x 690, 700–02 (11th Cir. 2014) (*unpublished*). In that case, the court adopted the second of the rationales described *supra*, holding that TSA screeners are not "officers of the United States" and therefore, notwithstanding what they are "empowered by law" to do, the law enforcement proviso does not apply to them. *Id.*

[1] This argument was raised by the government but rejected by the magistrate. JA130.
[2] *See* 11th Cir. R. 36-2.

The other two circuits to decide this question are the Third and Eighth Circuits. *Pellegrino*; *Iverson v. United States*, 973 F.3d 843 (8th Cir. 2020). These cases are published, precedential in their circuits, were argued by experienced counsel, were decided with the benefit of oral arguments, and in the case of *Pellegrino*, it was decided *en banc* and with a decisive 9-4 vote. Both of these cases found that TSA screeners are covered by the law enforcement proviso because they are plainly and obviously "*empowered by law* to execute searches." *Iverson* at 851. Both cases explicitly cited the Eleventh Circuit's decision in *Corbett* and rejected it. *See also Webb-Beigel v. United States*, No. CV-18-00352-TUC-JGZ (D. Ariz., Sep. 30th, 2019) ("The Third Circuit had the benefit of deciding *Pellegrino* after extensive briefing on the issue from both sides. This appears not to have been the case in other courts," citing *Corbett* "where plaintiff filed a *pro se* complaint and appeal").

Osmon asks the Court to join the Third and Eighth circuits in rejecting the government's attempt to re-write the law.

ARGUMENT

I. *To The Extent the District Court Found Plaintiff Had Failed to Object to a Magistrate's Memorandum & Recommendation, This Finding Was in Error*

"In order to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." *Martin v. Duffy*, 858 F.3d 239 (4th Cir. 2017), *citing United States v. Midgette*, 478 F.3d 616, 622 (4th Cir. 2007) (*internal quotation marks omitted*). An objection that is "inartfully pled" is nonetheless sufficient to meet this burden so long as the district court is reasonably alerted. *Peterson v. Burgess*, 606 F. App'x 75, 77 (4th Cir. 2015) (*unpublished*).

On the other hand, "[w]hen objections to a magistrate judge's determination have been filed, *de novo* review by an Article III judge is not only required by statute, *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but has been held indispensable to the constitutionality of the Magistrate Judge's Act. *United States vs. Raddatz*, 447 U.S. 667, 681-82 (1980)." *Carmax, Inc. v. Sibley*, No. 18-1261, at *3 (4th Cir., July 19, 2018); *see also* 28 U.S.C. § 636(b)(1)(C). Further, a

"district court's failure to apply the proper standard of review to a magistrate judge's recommendation warrants vacatur of the court's order." *Peterson* at 77, *citing* *Orpiano* at 47-48.

Cases in which this Court has held that the *Martin* standard was not met demonstrate that only where the district court is truly left with no way to actually discern the basis for the objection will appellate review be waived:

- In *Wazney v. Campbell*, No. 22-6485 (4th Cir. Sep. 27, 2022) (*unpublished*[3]), appellate review was deemed waived "because the objections were not specific to the particularized legal recommendations made by the magistrate judge." The district court order giving rise to Wazney's appeal writes that his response to the magistrate's report consisted of "an affidavit (DE 18) and two letters (DE 20, 21), although none of these documents substantively respond to the Report and Recommendation." *Wazney v. Campbell*, 6:21-CV-4063 (D.S.C, April 1st, 2022). A review of that affidavit and the letters confirm that Wazney merely complained of costs, inability to find representation, and the like, without substantive discussion of the magistrate's report.

[3] The majority of case law on this topic is unpublished, apparently stemming from the frequency with which insufficient objections are used as a basis to rapidly terminate *pro se* litigation.

- In *Anderson v. Quality Corr. Health Care*, No. 21-6455 (4th Cir. Mar. 7, 2022) (*unpublished*), appellate review was deemed waived for the same reason. A review of the district court docket for that case shows three magistrate reports, each one of them with objections that are unable to be followed. The first objection (opposing recommendation of dismissal of an obviously improper party) consisted of a 3-page handwritten letter, demonstrating that Anderson did not at all understand why his claim was being dismissed, let alone make a legally sound objection. *See Anderson v. Sumter Lee Regional Detention Center*, 9:19-CV-2086, ECF No. 22 (D.S.C, Nov. 12th, 2019) ("I shouldn't be shot down because it's a government entity that this Complaint is being filed against."). The second is a 4-page handwritten letter backtracking on a voluntary dismissal, on which Andreson was partially successful. *Id.*, ECF Nos. 63, 64 ("But they didn't keep our agreement. So I also explain that if they back out on the agreement I'm not dropping my Law / Civil Suit. It's Like this, you; Let me rephrase it...") (errors in original). The third invites the district court to overrule the magistrate because "When are the courts gonna see that if these issues does not be addressed, it's goning to repeat it." *Id.*, ECF No. 83 (errors in original). On the basis of these objections that are primarily grumbling

rather than substantive, it is unsurprising that the Court held them insufficient.

In another case where the standard was not met, *MacDonald v. Anderson Cnty. Sheriff's Office*, No. 21-6225 (4th Cir. Sep. 22, 2022) (*unpublished*), the Court reviewed most of the claims briefed in the appeal, but would not review a gross negligence claim because MacDonald forgot to make an objection relating to that particular claim. *Id*. at *5 ("not specific to the particularized legal recommendations made by the magistrate judge-namely, that MacDonald's gross negligence claim was time-barred under the relevant statute of limitations.").

These cases may be contrasted to occasions when this Court has reversed a district court finding that any objection was insufficiently specific. For example:

- In *Martin* itself, a *pro se* litigant filed a one-paragraph objection along with an amended complaint. It was held that the plaintiff "sufficiently alerted the district court that he believed the magistrate judge erred in recommending dismissal of those claims." *Martin* at 246; see also *Martin v. Duffy*, 4:15-cv-04947, ECF No. 11 (D.S.C, Jan. 15th, 2016)[4] (single paragraph objection plus amended complaint).

[4] Due to the solicitude offered by the Court to this *pro se* litigant, Mr. Martin is finally getting justice for being sexually assaulted, and then retaliated against, by a

- In *Johnson v. Saul*, No. 18-2171, *2 (4th Cir. Feb. 25, 2020) (*unpublished*), the challenge was to a finding that the plaintiff was disabled, and a magistrate found that the agency record supported a finding that she was not disabled. Johnson filed an objection doing no more than "insist[ing that] she is disabled[5]." *Johnson v. Saul*, 7:17-cv-00116, ECF No. 29 (W.D. Va., Nov. 26th, 2018). This district court held this objection to be insufficient, but this Court disagreed and held otherwise.

In this case, the district court wrote that "Plaintiff does not make any specific objections to the Magistrate Judge's Memorandum and Recommendation. Instead, she simply requests that the Court 'reconsider Judge Metcalf's recommendation' and incorporates her previously made arguments by reference. [Doc. 12 at 2]. To the extent that this could be construed as an objection to the recommended dismissal of the Plaintiff's Complaint, such objection does not warrant a *de novo* review of the Magistrate Judge's reasoning." JA155. The court below continues: "After a careful review of the Memorandum and Recommendation, the Court concludes that the Magistrate Judge's proposed conclusions of law are correct and are consistent with current case law." *Id*.

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prison guard: he was appointed counsel last year and a motion for summary judgment by the government was denied earlier this month. His case will go to trial in the new year.

[5] The objection itself is sealed; we are thus left to work with only the district court's description of it.

As an initial matter, the "To the extent that this could be construed as an objection" language makes it entirely unclear as to whether the district court actually determined that Plainitff-Appellant failed to object with "sufficient specificity so as reasonably to alert the district court of the true ground for the objection" as contemplated by *Martin*, or was merely displeased with the quality of the objection. But, if her objection *can* be "construed" as an objection, the court below does not shed light on why the objection does not warrant *de novo* review. And, if it *cannot* be so construed, it is unclear why the court below went on to conduct a "careful review" adopting the magistrate's report, nor by what standard (if not *de novo*) the court was guided. If the district court wished to make an "in the alternative" ruling, it could have done so, but the ruling as issued simply leaves ambiguous what the Court is left to deal with at this juncture.

However, regardless of the intent and holding of the court below, it is clear that Plaintiff-Appellant *did* object with "sufficient specificity so as reasonably to alert the district court of the true ground for the objection" as contemplated by *Martin*. The objection Plaintiff-Appellant made was to the magistrate's recommendation that the district court hold that screeners of the U.S. Transportation Security Administration do not qualify as "investigative or law enforcement officers" under 28 U.S.C. § 2680(h), a holding that would necessitate

granting a motion to dismiss. There were no disputed facts, or findings of fact: just one dispute as to statutory interpretation – a question purely of law[6].

The objection filed identifies the question of law that is at issue, including by calling out the statutory language that the court below was asked to interpret. JA138. It identifies the position that both sides took on the matter, including a succinct explanation as to the core basis for each position. JA139. It identifies relevant case law – three circuit court opinions – that provide guidance on resolving the question of law. *Id*. And it clearly states what the magistrate's position was that was being disputed, and that Plaintiff objects that the magistrate recommended the Court adopt the minority viewpoint. *Id*.

There is no doubt that Plaintiff-Appellant's objection did not fully re-argue the issue in the same detail as had been done in its opposition to the government's motion to dismiss. But that is not the purpose of an objection. Even a single-sentence would have been sufficient, *e.g.*, "Plaintiff objects to the magistrate's recommendation that the Court hold TSA screeners are not 'investigative or law enforcement officers' pursuant to the FTCA." So long as the objection is made with "sufficient specificity so as reasonably to alert the district court of the true ground for the objection," the objection has served its purpose, which is to alert the

[6] And, given that the magistrate made but one recommendation, it would seem to be impossible that the district court could not divine which recommendation Plaintiff-Appellant's objection targeted. There was only one possibility.

district court that it must look at the motion papers as to any sections pertaining to the matter covered by the objection[7]. And, once an objection has accomplished this goal, the district court lacks discretion to determine that the objection wasn't "good enough" to warrant *de novo* review.

II. *On the Merits of Plaintiff-Appellant's Objection, Officers of the Transportation Security Administration Are Subject to the Law Enforcement Proviso*

Once the Court is satisfied that Appellant has not waived appellate review, we turn to the substance of what Appellant seeks to have reviewed, which is a recommendation by a magistrate, as adopted by the district judge, that screeners of the U.S. Transportation Security Administration do not qualify as "investigative or law enforcement officers" for the purposes of the Federal Tort Claims Act, 28 U.S.C § 2680(h). "For the purpose of [§ 2680(h)], 'investigative or law enforcement officer' means any officer of the United States who is empowered by

[7] Plaintiff-Appellant's objection, perhaps "inartfully," stated that it was incorporating its arguments on the motion to dismiss by reference. JA139. While it may be required for an objection to state the basis of the objection without referencing outside documents, no "arguments" are necessary at all, and thus, this statement was merely superfluous. Even if we strike the sentence speaking of incorporation by reference, the objection had already put the court on notice of the true nature of the dispute.

law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id*.

Three circuits, but not this circuit have decided the issue. *Pellegrino v. Transp. Sec. Admin.*, 937 F.3d 164 (3rd Cir. 2019) (*en banc*) and *Iverson v. United States*, 973 F.3d 843 (8th Cir. 2020), both found that TSA screeners *do* qualify as "investigative or law enforcement officers" under the FTCA. *Corbett v. Transp. Sec. Admin.*, 568 F. App'x 690, 700–02 (11th Cir. 2014) (*unpublished*) (*non-precedential*).

a. The FTCA's Waiver of Sovereign Immunity Is To Be Construed Broadly

Before parsing the words of the law enforcement proviso, the Court should consider the Supreme Court's holding that the FTCA is generally to be broadly construed in favor of affording a remedy for torts by government employees. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006). In *Dolan*, the Supreme Court explicitly stated that the FTCA "does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed ... in favor of the sovereign," because Congress intentionally worded the FTCA to waive sovereign immunity using "sweeping language." *Id*. at 491.

Courts in many circuits have faithfully applied *Dolan*, including in this exact context. *Pellegrino* at 171 (in considering law enforcement proviso, "if there were uncertainty about the reach of the term 'officer of the United States,' it would be resolved in favor of a broad scope."); *Iverson* at 854 (in considering law enforcement proviso, construing waiver broadly "is consistent with the Supreme Court's instructions and our sister circuits' interpretations."); *see also Bunch v. United States*, 880 F.3d 938, 944-45 (7th Cir. 2018) ("As we construe this language, we must bear in mind the Supreme Court's insistence that we not construe the waiver of sovereign immunity in the FTCA too strictly.").

Tellingly, the only Court of Appeals to hold that TSA screeners are not "investigative or law enforcement officers," the Eleventh Circuit, entirely neglected to engage with *Dolan*. A review of the briefs of the parties in *Corbett* shows that *Dolan* was not brought to the court's attention, perhaps leading to its erroneously narrow construction of the waiver provided by the law enforcement proviso. Dissenting Judges Krause in *Pellegrino* and Gruender in *Iverson* attempted to engage with *Dolan* by positing that since the law enforcement proviso is an "exception to an exception," the courts should reverse course and go back to the traditional rule of narrow construction. *Pellegrino* at 200 (Krause, J., *dissenting*); *Iverson* at 866 (Gruender, J., *dissenting*). They cite *Foster v. United States*, 522 F.3d 1071, 1079 (9th Cir. 2008), in support of construing the "exception

to the exception" narrowly, but the *Foster* court was interpreting a *different* "exception to the exception," and made clear that it was "the text" and "policy rationales" of *that particular exception* that "provides some support for a narrow reading." *Id*. The majority holding in *Iverson*, interpreting *Dolan* as standing for a broad waiver of sovereign immunity "within the FTCA context," whether "analyzing an exception or an exception to the exception," makes sense in this context, for this particular statutory text, because there are no indicia that Congress intended § 2680(h) to be construed narrowly. *Iverson* at 854.

The magistrate's recommendation mentions *Dolan*, but does not explicitly hold whether narrow or strict construction should apply. JA117-118. Instead, the recommendation notes that post-*Dolan*, "the Fourth Circuit has continued to construe waivers of sovereign immunity in the context of FTCA claims strictly." JA118. *Dolan* is binding Supreme Court precedent, so it is curious how the magistrate could conclude that post-*Dolan*, this Court continued to strictly construe FTCA's waivers of sovereign immunity even when Dolan unambiguously abrogated that practice in the FTCA context. The recommendation cited a single case within this circuit in support of this proposition: *Wood v. United States*, 845 F.3d 123 (4th Cir. 2017). But just as happened in *Corbett*, a review of *Wood* shows that the Court in that case did not engage with *Dolan* either – and a review of the Appellant's Brief in that case similarly demonstrates that Ms. Wood's counsel did

not brief the case. In other words, the Court was not asked to consider whether *Dolan* modified the general rule of strict construction of sovereign immunity. On the other hand, at least one, more recent case from this circuit **did** examine *Dolan*, and **did** apply *Dolan*'s command for broad interpretation. *Sanders v. United States*, 937 F.3d 316, 327 (4th Cir. 2019). The magistrate's view that this circuit continues to strictly construe FTCA's waiver in the face of *Dolan* is simply incorrect.

b. TSA Searches Are "Searches"

A TSA screener's job is *almost exclusively* that of executing searches of both passengers and their property, as required by law codified in several statutes and regulations. 49 U.S.C. § 44901(a) requires "the screening of all passengers and property." 49 U.S.C. § 44902 requires TSA to promulgate regulations to deny boarding to "a passenger who does not consent to a search[8] under" §44901(a). TSA implemented §§ 44901 and 44902 with, *inter alia*, 49 C.F.R. § 1540.107(a), which provides that no one may "board an aircraft without submitting to the

[8] TSA's enabling statutes vacillate between describing this work as "searches," "screenings," "examinations," and "inspections." The statutes appear to use these words entirely interchangeably, but it matters not: just as a police officer cannot evade a search warrant requirement by describing their conduct as a "screening" or "inspection," TSA is plainly "searching" whether they call it that or not.

screening and inspection of his or her person and accessible property." And it is the Transportation Security Officers ("TSOs") – like those who injured Osmon – who are the ones empowered to carry these searches out. *Iverson* at 851 ("Congress thus mandated that TSOs carry out screenings and authorized physical searches as one means to complete that duty. The statute specifically authorizes federal employees, TSOs, to screen passengers and property. We consider this sufficient to conclude that they are empowered by law to conduct searches.").

The magistrate found that "searches" in this context only contemplates "traditional enforcement activities." JA131. This cramped definition rests on a foundation – supposed context clues – that is simply too dainty to support contradicting the ordinary meaning applied to the word Congress chose. "TSO screenings are 'searches' (i) as a matter of ordinary meaning, (ii) under the Fourth Amendment, and (iii) under the definition provided in *Terry v. Ohio*, 392 U.S. 1 (1968). Attempts to distinguish (iv) between administrative and criminal 'searches' are divorced from the plain text, and any distinction, if one must be made, should account for (v) the fact that TSA searches extend to the general public and involve examinations of an individual's physical person and her property." *Pellegrino* at 172.

The court below's reasoning can only be vindicated by modifying the text of the statute to cover only "criminal searches" or "law enforcement searches." By

effectively inserting the words "criminal law enforcement" between the words "execute" and "searches" in § 2680(h), the court below essentially distinguished between those who search to find evidence of a crime and those who search to prevent air terrorism. But the text of the law plainly makes no such distinction[9], there is no principled reason why that distinction *should* be made, and in fact, the addition of the words "investigative or" make crystal clear that Congress intended *more* than law enforcement searches to be covered by the proviso.

"*Searches* is neither an obscure word nor is its meaning doubtful." *Iverson* at 853 (refusing to resort to canons of construction[10] to define "searches" when the meaning is already plain); *see also Iverson* at 854 (refusing to resort to legislative

[9] The *Iverson* court went a step further and found that *even if* the law did make such a distinction, TSA screeners *do* conduct searches in the criminal context because they are searching for contraband, the possession of which may be a criminal offense. "Under a heading indicating that it is discussing 'Criminal Law,' Black's defines a *search* as '[a]n examination of a man's ... person, with a view to the discovery of contraband or illicit or stolen property.' *Search*, Black's Law Dictionary (4th ed., rev. 1968). As discussed above, TSOs are given the power to execute physical searches, such as pat downs, with the intent of finding weapons, explosives, or other prohibited items. So even in the criminal context, TSOs' screenings constitute *searches*." *Iverson* at 853.

[10] Resorting to canons of construction would not be particularly helpful to the government anyway. The *Pellegrino* court indulged the government's insistence that *noscitur a sociis* resolves the statutory scope in their favor and found the canon to be "of little help" because the phrases are listed in the disjunctive. *Pellegrino* at 174, 175.

history[11] for the same reason). The Court should find that TSOs are plainly "empowered by law to execute searches."

c. Transportation Security Officers Are "Officers"

The Eleventh Circuit in *Corbett*, and the dissenting judge in *Iverson*, found (and the government argued in the court below) that Transportation Security Officers for the United States Transportation Security Administration are not "officers of the United States." *Corbett* at 700-02, *Iverson* at 855-68 (Gruender, J., *dissenting*). They argue that we must distinguish "officers" from "employees" and that the law enforcement proviso cannot apply to the latter. Although the magistrate found in Plaintiff-Appellant's favor on this issue, JA130, the issue is raised here in anticipation that the government will re-raise the issue on appeal.

As a threshold matter, TSA screeners, including the ones who injured Plaintiff, hold the title "Transportation Security Officer, and TSOs wear uniforms

[11] The magistrate took a brief look at legislative history and concluded it supported a finding that only law enforcement searches were intended to be in scope. JA134-135. Legislative history should not be used to interpret this straight-forward statute, but even if one goes there, one should not make the leap of logic that the magistrate did: just because the *inspiration* for the proviso may have been abusive law enforcement searches does not mean Congress intended the statute to be so narrow. If it did so intend, it would have left out the words "investigative or."

with badges that prominently display the title 'US Officer[12].'" *Pellegrino* at 170. "Officer of the United States" is more broad than "Law Enforcement Officer of the United States," and in both traditional and contemporary usage of the word "officer" harmonizes with the role TSA screeners perform:

> "'Ordinarily, a word's usage accords with its dictionary definition.' *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). Under one prominent dictionary definition shortly before 1974, the year of the proviso's enactment, an officer 'serve[s] in a position of trust' or 'authority,' especially as 'provided for by law.' *Officer*, Webster's Third New International Dictionary (1971); *see also Officer*, Black's Law Dictionary (4th ed. rev. 1968) ('[A]n officer is one holding a position of trust and authority…'). TSOs satisfy this definition, as they are 'tasked with assisting in a critical aspect of national security — securing our nation's airports and air traffic.' *Vanderklok v. United States*, 868 F.3d 189, 207 (3d Cir. 2017). To take another definition from the time, officers are 'charged' by the Government 'with the power and duty of exercising certain functions . . . to be exercised for

[12] It should be noted that TSA purposely added "Officer" badges to their checkpoint screeners' uniforms in 2008 to command respect from the public. See *Pellegrino* at 170, fn. 1. The badge on the left is that of a TSO. The badge on the right is that of a TSA federal law enforcement officer (air marshal). One is an "Officer of the United States" and the other is not??

> the public benefit.' *Officer*, Black's Law Dictionary, *supra*. TSOs qualify under this definition as well, as they perform 'the screening of all passengers and property,' 49 U.S.C. § 44901(a), to protect travelers from hijackings, acts of terror, and other threats to public safety. For good reason, the role is Transportation Security Officer, and TSOs wear uniforms with badges that prominently display the title 'Officer.' Hence they are 'officer[s]' under the proviso."

Pellegrino at 170. *Iverson* held the same:

> We also conclude that TSOs are officers. They are "charged with a duty," *Officer*, Webster's Third New Int'l Dictionary (1971), and "charged by a superior power ... with the power and duty of exercising certain functions." *Officer*, Black's Law Dictionary (4th ed., rev. 1968). Congress, by statute, charged TSOs with the power to conduct airport screenings. See 49 U.S.C. § 44901.
>
> Those screenings are a "function[ ] of the government ... exercised for the public benefit." *Officer*, Black's Law Dictionary (4th ed., rev. 1968). Specifically, the screenings ensure that no passenger enters a plane with a prohibited item, including "weapons, explosives, and incendiaries." 49 C.F.R. § 1540.5 (defining "Screening function"). This function protects passenger safety and national security.
>
> Further, TSOs "serve in a position of ... authority." *Officer*, Webster's Third New Int'l Dictionary (1971). The TSA holds them out to the public as officers through their title and uniforms. It does so to ensure the public respects them.

Iverson at 848.

In addition to the sound reasoning of the *Pellegrino* and *Iverson* courts, there is another fundamental reason why we should not construe "officers of the United States" to speak only of law enforcement officers: adopting the logic that "Officers of the United States" speaks only traditional law enforcement officers would mean that when Congress said "investigative or law enforcement officers," they intended

to cover the exact same group of people as if they had only said "law enforcement officers." This converts the words "investigative or" into surplusage. When possible, "we should interpret the standard to give effect to each word and clause." *Canyon Fuel Co. v. Sec'y of Labor*, 894 F.3d 1279, 1289 (10th Cir. 2018).

d. TSA Is Searching "For Violations of Federal Law"

The government also argued in the court below that TSA does not search "for violations of Federal law" because this phrase implies a criminal law enforcement context. The magistrate appeared to take the government's view. JA133. To address it, we must return again to the text of the statute:

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

§ 2860(h). "To begin, the phrase 'for violations of Federal law' may not even apply to the power to 'execute searches.' When interpreting a statute that includes a list of terms or phrases followed by a limiting clause, that clause should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Pellegrino* at 177 (*cleaned up*).

But this matters not: TSA screeners are clearly looking "for violations of Federal law" when they are conducting their searches. Weapons and explosives are banned from entering the secure area of the airport by federal law. 49 U.S.C. § 46505 (possession subject to *criminal* penalties). Surely it is not Defendant's position that "preventing weapons from entering" is anything but of paramount importance on the list of daily tasks for a TSA screener. It is indisputable that bringing a gun past the checkpoint is a violation of federal law and that TSA's searches are aimed at stopping that violation of federal law. And, even for prohibited-but-not-a-crime-to-possess items, such as water bottles over 3.4 oz, it is still federal law that they may not enter. "The phrase 'for violations of Federal law' sweeps notably broader than other statutes that specify violations of *criminal* law." *Pellegrino*[13] at 177.

Just because a TSO, upon uncovering a violation of federal law, must contact a law enforcement official to make the arrest, does not mean that the search itself was not intended to find violations of federal law. Just because a TSO may *also* be looking for items that are merely "prohibited" by federal law, even if the items are not contraband subjecting the person in possession to *criminal* penalties, from entering the secure area does not mean the "search" is not looking "for a

[13] After failing at this argument in *Pellegrino*, TSA opted not to make it in *Iverson*. *See* *Iverson* at 853, fn. 3. It is unclear why they have brought it back in this case, as no Court of Appeals has ever accepted it.

violation of federal law." And, if Congress had intended "violations of Federal law," to be limited only to violations of federal *criminal* law, they have shown that they are more than able to make such a distinction. *See* 18 U.S.C. § 115(c)(1) ("any violation of Federal criminal law"); 5 U.S.C. § 8331(20) ("offenses against the criminal laws of the United States"). Congress here was simply trying to distinguish between those who are searching pursuant to *state* law versus those who are searching pursuant to *federal* law. TSOs are unquestionably the latter.

e. The "Types of Torts" Covered By the Proviso Does Not Work to Exclude TSA Screeners

The magistrate found that the specific torts enumerated in the proviso were those likely to be committed by abusive law enforcement, and therefore the argument that Congress only intended to cover law enforcement officers is strengthened. JA134-135. "To be sure, these torts are commonly claimed against criminal law enforcement officers performing criminal law functions. But as our case demonstrates, that these torts are typically brought against criminal law enforcement officers does not mean that they are exclusively brought against them." *Pellegrino* at 175.

Looked at another way, these are the "types of torts" likely to be committed by *any* careless or malicious government employee who conducts searches *of any variety* as their job function. TSA literally puts their hands on passengers as a matter of routine, orders them into private rooms, and writes up incident reports that may have legal consequences for them. It would be shocking if this did *not* result in the occasional battery, false imprisonment, or abuse of process claim. These enumerated torts are indicative of Congress' intent to cover search-and-seizure-related claims, and there is no reason to presume that intent is any narrower.

CONCLUSION

The government has invited the Court to immunize TSA screeners from tort remedies by re-writing statutory language, and the court below indulged them without even conducting *de novo* review of a magistrate's recommendation. The Court should decline to allow TSA screeners to intentionally injure the public with impunity. The judgment in the court below should be **reversed**.

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Dated: Richmond, VA
November 29th, 2022

Respectfully submitted,

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Dated: Richmond, VA
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CERTIFICATE OF SERVICE

I, Jonathan Corbett, certify that on Novembr 29th, 2022, I effected service of this brief upon all respondents by using the CM/ECF system.

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