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2019]

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

LAUREN PUGH*

“And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing . . . is not a ‘search.’”¹

I. THERE’S NO BREAKIN’ FREE FROM THE TSA: A LOOK INTO
THE PHYSICALITY OF TSA SEARCHES

“Magical,” “enchanting,” and “whimsical;” these are the words one thinks about when taking an airplane ride to Disney World.² “Miserable,” humiliating,” or “appalling,” on the other hand are not.³ While traveling to Disney World, four-year-old Ryan experienced the latter.⁴ At the air-

* J.D. Candidate, Villanova University Charles Widger School of Law; B.A., 2017 Saint Joseph’s University. I would like to dedicate this Note to my parents, Mary and Bill Pugh. Thank you so much for all the love and support you have given me throughout my entire life. I am so lucky to have you as parents. Also, I would like to thank the staff of the *Villanova Law Review* for all the hard work and helpful feedback throughout the process of publishing this article. The headings used throughout this Note were inspired by songs from Disney’s *High School Musical*. See *HIGH SCHOOL MUSICAL* (Walt Disney Records 2006).

1. Terry v. Ohio, 392 U.S. 1, 16 (1968).

2. See *Magic Kingdom Park*, WALT DISNEY WORLD, <https://disneyworld.disney.go.com/destinations/magic-kingdom/> [<https://perma.cc/K6K8-8F3N>] (last visited Aug. 23, 2018) (describing Disney World as enchanting place full of live entertainment and family fun); see also *Walt Disney World Resort*, SOUTHWEST VACATIONS, <https://www.southwestvacations.com/destinations/walt-disney-world-resort-vacation-packages> [<https://perma.cc/CHY9-ZSA6>] (last visited Sept. 17, 2018) (describing Walt Disney World as the most magical place on Earth).

3. See FOX 35 ORLANDO, *TSA, Absolutely Out of Control, Forces Disabled 4YO to Remove Braces, Walk Through Magnetometer*, YOUTUBE (Mar.3, 2010), https://www.youtube.com/watch?v=CvNNks_m5bE [<https://perma.cc/6AW6-4QCH>] (illustrating Fox 35 Orlando television newscast describing father of four-year-old disabled boy as appalled when boy was forced to go through security without his leg braces). But see *Magic Kingdom Park*, *supra* note 2 (describing Disney World as “the most magical place on Earth”).

4. See Daniel Rubin, *Daniel Rubin: Another Case of TSA Overkill*, THE PHILA. INQUIRER (Feb. 14, 2011, 11:07 AM), http://www.philly.com/philly/news/20100215_Daniel_Rubin_Another_case_of_TSA_overkill.html?arc404=true [<https://perma.cc/9SM4-YP25>] (reporting TSO instructed four-year-old Ryan, who is unable to walk on his own and wears custom made leg braces as result of being born sixteen weeks premature, to take off his leg braces and walk through metal detector without help from his mother or father before he boarded his first ever flight to Disney World).

port, a Transportation Security Officer (TSO) instructed Ryan's parents to take off Ryan's leg braces so he could walk through the metal detector, despite his inability to walk on his own.⁵ Unfortunately, Ryan is not alone in his experience with intrusive TSOs.⁶ Although Ryan's parents complied with the TSO's instructions by removing his leg braces and decided not to press charges against the TSO, Ryan may have been victorious in court if during the search the TSO physically removed Ryan's leg braces and assaulted him in the process because of the United States Court of Appeals for the Third Circuit's decision in *Pellegrino v. United States Transportation Security Administration, Division of Department of Homeland Security*.⁷

5. *See id.* (reporting that although Ryan's parents told TSO that Ryan could not walk on his own, TSO insisted Ryan comply with his demand if he wished to pass through security). Ryan's mother suggested that she help Ryan walk through the metal detector, but the TSO instructed her that Ryan must walk through the metal detector by himself. *See id.* (detailing how Ryan made it through the metal detectors without falling). A week after the incident, the airport's Transportation Security Administration (TSA) director called Ryan's parents to apologize for the incident. *See id.* (describing how TSA director acknowledged that Ryan should not have been forced to walk through the metal detector by himself). Although TSOs were originally known as TSA "screeners," the TSA changed the name in October 2005 to "transportation security officer." *See Transportation Security Officers Have Renewed Focus and New Look on Seventh Anniversary of 9/11*, TRANSP. SEC. ADMIN. (Sept. 11, 2008), <https://www.tsa.gov/news/releases/2008/09/11/transportation-security-officers-have-renewed-focus-and-new-look-seventh> [<https://perma.cc/YB5A-4XCH>] (describing name change from "screener" to "transportation security officer").

6. *See, e.g.,* Melissa Chan, *A TSA Agent Pat Down a Boy During a Routine Security Check. His Mother is 'Livid' over It*, TIME (Mar. 28, 2017), <http://time.com/4715428/tsa-pat-down-boy-video-jennifer-williamson-dallas-airport/> [<https://perma.cc/8TGT-JAZG>] (reporting TSO thoroughly patted down thirteen-year-old boy suffering from sensory processing disorder for about two minutes at Dallas-Fort Worth International Airport); Petula Dvorak, *A Panty Liner Triggers a TSA Pat-Down Just One Step Removed from a Pap Smear*, THE WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/local/a-panty-liner-triggers-a-tsa-pat-down-just-one-step-removed-from-a-pap-smear/2017/03/30/ec86c10c-154d-11e7-ada0-1489b735b3a3_story.html?utm_term=.74cfabd1a413 [<https://perma.cc/88YV-4K8G>] (reporting that sixty-five-year-old woman, Evelyne Harris, passed through airport scanner at Baltimore-Washington International Marshall Airport when TSO pulled her aside, choked her, and groped her private parts); *Video of TSA Agents Searching 96-Year-Old Woman in Wheelchair Sparks Outrage*, CBS NEWS (June 8, 2018, 9:11 PM), <https://www.cbsnews.com/news/tsa-agents-search-96-year-old-woman-wheelchair-dulles-airport-outside-washington/> [<https://perma.cc/EFJ5-25ZK>] (reporting video went viral of TSOs at Dulles Airport in Washington, D.C. intensely patting down ninety-six-year-old woman in wheelchair).

7. *See* Rubin, *supra* note 4 (reporting Ryan's parents removed his brace and Ryan went through the security check without falling). Ryan's father said he did not intend to file a lawsuit against the TSOs. *See id.* (explaining that Ryan's father left "terse message" with airport manager but did not want to file lawsuit). A civil assault occurs when an actor "acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and . . . the other is thereby put in such imminent apprehension." *See* RESTATEMENT (SECOND) OF TORTS § 21 (1965) (describing elements for civil assault); *Pellegrino v. United States Transp. Sec. Admin, Div. of Dep't of Homeland Sec.*, 937 F.3d 164, 168–70 (3d Cir. 2019) (holding that United States

An individual who is injured or whose property is damaged by a TSO may file a complaint or a claim with the Transportation Security Administration (TSA).⁸ If the TSA denies the complaint or fails to resolve the claim within six months, the individual may file suit in a United States district court.⁹ With the Third Circuit's recent decision in *Pellegrino*, an individual injured by a TSO may now have a remedy.¹⁰

Generally, the United States cannot be sued in state or federal courts because it possesses sovereign immunity.¹¹ However, under the law enforcement proviso, the Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers of the United States Government" for any claim arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.¹² The FTCA defines an "investigative or law enforcement officer" 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."¹³

waived its sovereign immunity when TSOs are sued for assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution).

8. See *Claims*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/passenger-support/claims> [<https://perma.cc/V836-WGH7>] (last visited Nov. 9, 2018) (specifying procedures for filing claims with TSA); see also *Complaint*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/contact-center/form/complaints> [<https://perma.cc/7T2H-V3QR>] (last visited Nov. 9, 2018) (providing forms for filling out complaints with TSA).

9. See *TSA Tort Claim Package*, TRANSP. SEC. ADMIN., https://www.tsa.gov/sites/default/files/sf95cover_package_revised07-08-15-508.pdf [<https://perma.cc/CC98-4X85>] (last visited Nov. 9, 2018) (providing that if claim is denied, passenger can file suit in appropriate United States district court).

10. See *Pellegrino*, 937 F.3d at 168 (noting plaintiffs may sue TSOs for certain intentional torts under Federal Tort Claims Act). Importantly, a suit under the Federal Tort Claims Act is the sole remedy in federal court for torts committed by TSOs. See 28 U.S.C. § 2679(b)(1) (2018). Although under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* an individual may sue federal employees in their individual capacity for constitutional violations if the court finds an implied right of action, the Third Circuit has held that there is not an implied right of action under *Bivens* for alleged constitutional violations by TSOs. See *Vanderklok v. United States*, 868 F.3d 189, 199, 208–09 (denying plaintiff's *Bivens* claim for First Amendment retaliation by TSO); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–97 (1971) (holding Fourth Amendment violations by federal agent acting under color of his authority gives rise to cause of action for damages). For a further discussion of the Third Circuit's decision in *Vanderklok*, see *infra* notes 79–86 and accompanying text.

11. See Nicholas Henes, *Liability and Consent of the United States to Be Sued-Torts in General: The United States Supreme Court Interprets the Federal Tort Claim Act's Law Enforcement Proviso*, 89 N.D. L. REV. 341, 343 (2013) (discussing United States' general immunity in state and federal court when Congress has not chosen to waive such immunity).

12. See 28 U.S.C. § 2680(h) (2018) (listing exceptions to Federal Tort Claims Act); see also Henes, *supra* note 11, at 343 (discussing United States' waiver of sovereign immunity under FTCA).

13. See § 2680(h); see also Henes, *supra* note 11, at 349 (noting that exception is known as "law enforcement proviso").

In *Pellegrino*, the Third Circuit held that TSOs are “investigative or law enforcement officers” under the law enforcement proviso of the FTCA.¹⁴ Specifically, *Pellegrino* waives the United States’ sovereign immunity from any claim arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution when committed by a TSO.¹⁵ Accordingly, the United States can be sued when TSOs commit those specific intentional torts listed in the FTCA.¹⁶

This Note argues that in *Pellegrino*, the Third Circuit correctly interpreted the FTCA in holding that the law enforcement proviso is not limited only to criminal law enforcement officers and instead applies to TSOs as well.¹⁷ The plain text of the FTCA defines an investigative or law enforcement officer as “any officer of the United States who is empowered by law to execute searches.”¹⁸ Therefore, because TSOs are officers who are empowered to execute searches, other circuit courts should follow the Third Circuit’s lead and read the FTCA’s law enforcement proviso as encompassing TSOs.¹⁹ Part II of this Note provides background information about the history of the TSA and FTCA, as well as relevant case law interpreting the FTCA.²⁰ Part III summarizes the procedural history and facts

14. For a further discussion of the Third Circuit’s decision in *Pellegrino*, see *infra* notes 103–28 and accompanying text.

15. For further analysis of the impact of the Third Circuit’s decision in *Pellegrino*, see *infra* notes 183–90 and accompanying text.

16. See *Pellegrino v. United States Transp. Sec. Admin., Div. of Dep’t of Homeland Sec.*, 937 F.3d 164, 168 (3d Cir. 2019) (holding Ms. Pellegrino’s claims against TSOs may proceed because United States waived its sovereign immunity).

17. For an argument in favor of the law enforcement proviso applying to TSOs, see *infra* notes 139–56 and accompanying text.

18. See 28 U.S.C. § 2680(h) (2018) (defining law enforcement or investigative officer under FTCA) (emphasis added); see also *infra* notes 139–56 and accompanying text (discussing arguments in favor of FTCA applying to TSOs).

19. See *Pellegrino*, 937 F.3d at 168 (holding TSOs can be sued under FTCA’s law enforcement proviso); see also § 2680(h) (waiving United States’ sovereign immunity will allow plaintiffs to bring claims alleging assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution); see also *infra* notes 30–36 and accompanying text (describing searches TSOs perform). TSOs are empowered to conduct “screening[s] of all passengers and property.” See 49 U.S.C. § 44901(a) (2018) (describing screenings of passengers and property). Under the Aviation and Transportation Security Act (ATSA), TSOs are designated as “employees.” See *id.* (“[T]he screening shall take place before boarding and shall be carried out by a Federal Government employee.”). The TSA administrator “may designate an employee of the Transportation Security Administration or other Federal agency to serve as a law enforcement officer.” See 49 U.S.C. § 114(p)(1) (2018). Only when employees are designated as “officers” may they “carry a firearm,” “make an arrest,” and “seek and execute warrants.” See § 114(p)(2)(a)-(c). Although TSOs are classified as “employees” under the ATSA, in 2005 their job classification title changed from “screener” to “transportation security officer.” See *Transportation Security Officers have Renewed Focus and New Look on Seventh Anniversary of 9/11*, *supra* note 5. Moreover, TSOs wear officer uniforms and badges. See *id.*

20. For a detailed discussion of the creation of the TSA, see *infra* notes 28–35 and accompanying text. For a detailed discussion of the passage of the FTCA, see *infra* notes 36–47 and accompanying text. For a detailed discussion of the defini-

of *Pellegrino*.²¹ Part IV examines the court's reasoning in deciding *Pellegrino*.²² Part V includes a critical analysis of the Third Circuit's decision in *Pellegrino*, identifies how it is consistent with the Supreme Court's definition of a search, and offers other possible solutions to hold TSOs accountable for the improper searches they perform such as changing TSA policies and using social media to ignite change.²³ Finally, Part VI discusses the impact of *Pellegrino*.²⁴

II. BREAKING FREE: TENSIONS BETWEEN THE NEED FOR SECURITY AND THE GOVERNMENT'S SOVEREIGN IMMUNITY

Every day approximately 2,587,000 passengers fly in and out of airports throughout the United States.²⁵ In order to fly, passengers must adhere to the TSA's security procedures, which include walking through metal detectors and, in some instances, full physical pat down searches.²⁶ While airport searches are constitutional, as explained below, passengers sometimes feel as though officers perform them inappropriately.²⁷

A. *The Creation of the TSA*

To understand how the court in *Pellegrino* concluded that individuals who experience inappropriately performed TSA searches have the right to sue under the FTCA, it is necessary to look at why Congress created the TSA.²⁸ In response to the terrorist attacks that occurred on September 11, 2001, President George W. Bush signed the Aviation and Transportation Security Act (ATSA) on November of the same year, creating the TSA

tion of a search, see *infra* notes 38–65 and accompanying text. For recent court cases interpreting the FTCA, see *infra* notes 66–86 and accompanying text.

21. For the discussion of the facts and procedural history of *Pellegrino*, see *infra* notes 87–102 and accompanying text.

22. For a complete narrative analysis of the Third Circuit's decision in *Pellegrino*, see *infra* notes 103–38 and accompanying text.

23. For a critical analysis of the Third Circuit's decision in *Pellegrino* and a discussion of solutions that could hold TSOs more accountable for the searches they perform, see *infra* notes 139–82 and accompanying text.

24. For a discussion of the potential impacts of *Pellegrino* on individuals subject to TSO searches while traveling in airports, see *infra* notes 183–90 and accompanying text.

25. See *Air Traffic by the Numbers*, FED. AVIATION ADMIN., https://www.faa.gov/air_traffic/by_the_numbers/ [<https://perma.cc/2N52-W2H6>] (last visited Nov. 11, 2018) (providing statistics for air travel throughout United States).

26. See *Security Screening*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening> [<https://perma.cc/PWT2-XEY5>] (last visited Nov. 11, 2018) (discussing current security measures employed throughout airports, including walk through metal detectors and physical pat downs, which are in place to prevent prohibited items and other threats to security from entering certain areas of airports).

27. See *supra* note 6 and accompanying text (describing instances where TSOs have reportedly performed searches inappropriately).

28. For a discussion of the creation of the TSA, see *infra* notes 28–35 and accompanying text.

within the United States Department of Transportation.²⁹ When passing the ATSA, President Bush emphasized the importance of ensuring that the airways are safe for travel.³⁰ Today, the TSA seeks to strengthen transportation systems, “while ensuring the freedom of movement for people and commerce.”³¹

Under the ATSA, TSOs are designated as “employees” who “shall provide for the screening of all passengers and property.”³² To accomplish its goals of increased airport security, the TSA enacted a variety of measures, including full physical pat downs of certain individuals by TSOs.³³ A pat down consists of a thorough inspection of the entire body, including sensitive areas.³⁴ A TSO will perform a pat down either when a passenger sets

29. See Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 12 (2013) (providing background information on creation of TSA). The TSA now falls under the authority of the Department of Homeland Security. See *id.* at 12 n.62 (describing how in March 2003 TSA was transferred to Department of Homeland Security); see also Aviation and Transportation Security Act, PUB. L. NO. 107-71, 115 Stat. 597 (2001) (presenting statutory text creating TSA); 49 U.S.C. § 114 (2018) (providing text of Aviation and Transportation Security Act).

30. See Harawa, *supra* note 29 at 13 (explaining reasons behind President Bush’s creation of TSA). While signing the ATSA, President Bush said the new security measures were “permanent and aggressive” steps to improve airport security. See *id.* at 12 (quoting *Transcription of President Bush’s Speech During Signing of Aviation Security Bill, Text: President Bush Signs Aviation Security Bill*, THE WASH. POST (Nov. 19, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attached/transcripts/bushtext_111901.html [<https://perma.cc/5PT2-8S2C>] (providing transcript of President Bush’s speech before signing ATSA into law)).

31. See *Mission*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/about/tsa-mission> [<https://perma.cc/FE4R-ER39>] (last visited Nov. 11, 2018) (providing TSA’s mission statement, which includes overview of its vision, core values, workforce expectations, and history).

32. See 49 U.S.C. § 44901(a) (2018) (defining duties of TSOs). Although TSOs were originally called TSA “screeners,” the TSA changed the name in October 2005 to “transportation security officer.” See *Transportation Security Officers Have Renewed Focus and New Look on Seventh Anniversary of 9/11*, *supra* note 5. Distinct from TSOs, the ATSA also allows the TSA administrator to designate an employee as a “law enforcement officer” who is allowed to carry a firearm, make arrests, and seek and execute warrants. See § 114(p)(1)-(2).

33. See Katherine A. Lowe, *Safety in the Sky: Will Reforming and Restructuring the TSA Improve Our Security or Merrily Infringe on Our Rights?*, 81 J. AIR L. & COM. 291, 294 (2016) (explaining various security measures implemented by TSA). The various security measures implemented by the TSA include: hand searches of baggage, pat down searches of individuals, governmental-issued identification check points for passengers, walk through metal detectors for passengers, and a limit of one carry-on item and one personal item per passenger. See *id.* (describing methods used by TSA to increase security in airports after September 11, 2001 terrorist attacks).

34. See *Security Screening*, *supra* note 26 (providing details as to what individuals may expect when TSOs conducts pat down searches). The TSA states:

A pat-down may include inspection of the head, neck, arms, torso, legs, and feet. This includes head coverings and sensitive areas such as breasts, groin, and the buttocks. You may be required to adjust clothing during the pat-down. The officer will advise you of the procedure to help you

off the screening technology alarm or a passenger chooses it as an alternative form of screening.³⁵

B. *Sovereign Immunity and the Creation of the FTCA*

Since the ratification of the United States Constitution, the doctrine of sovereign immunity has helped shield the United States from legal liability.³⁶ Specifically, sovereign immunity prevents potential plaintiffs from suing the United States and its employees in state or federal courts.³⁷ Nevertheless, a federal court may allow a plaintiff to bring a *Bivens* claim to sue a federal employee if the employee violated the United States Constitution while acting under the color of federal authority.³⁸ Also, Congress can

anticipate any actions before you feel them. Pat-downs require sufficient pressure to ensure detection, and areas may undergo a pat-down more than once for the TSA officer to confirm no threat items are detected.

Id. (explaining TSOs use back of their hands when touching sensitive areas of body). An additional screening, however, may be necessary to eliminate the possibility of a threat, which involves a TSO patting down a sensitive area with the front of the hand. *See id.* (describing that in limited cases TSOs use front of hands on sensitive area during pat down searches).

35. *See id.* (providing information on why TSOs use pat down screenings). A TSO of the same gender as the subject of the search conducts the pat down screening. *See id.* (offering details of what to expect when TSOs conduct pat downs).

36. *See* Henes, *supra* note 11 at 344 (citing *United States v. Lee*, 106 U.S. 196, 205 (1882)) (describing history behind sovereign immunity and how the US inherited the doctrine from England).

37. *See id.* at 343 n.11 (providing that “[i]t is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts” (internal quotation marks omitted) (quoting *Alden v. Maine*, 527 U.S. 706, 749 (1999))); *see also* 1 JAYSON & LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 1.01 (2019) (explaining that prior to the enactment of FTCA there were virtually no judicial remedies for “those who suffer[ed] injury or damage as a result of the negligence or misconduct of employees of the United States Government”).

38. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–97 (1971) (holding federal agents violating Fourth Amendment while acting under color of their authority gives rise to cause of action for damages); *see also Bivens Actions*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/bivens_actions [<https://perma.cc/58R4-D58B>] (last visited Sept. 7, 2018) (describing how individuals bring *Bivens* claims). A *Bivens* claim requires a constitutional injury for which damages are an appropriate remedy. *See* Jordan M. Emily, *The Essence of Civil Liberty: Legitimacy and Judicial Oversight for the Targeted Killing of an American Citizen Through the Bivens Claim*, 47 U. MEM. L. REV. 887, 896 (2017) (describing requirements for *Bivens* claims). To decide whether damages are an appropriate remedy, courts apply a two-part test: “(1) no alternative remedy is available for the plaintiff and (2) no special factors counsel hesitation in granting relief.” *See id.* (discussing elements courts consider when deciding *Bivens* claims). The Supreme Court infrequently extends *Bivens* claims to new contexts. *See id.* at 908 n.96 (noting that Supreme Court rarely extends *Bivens* claims beyond Fourth Amendment’s protections against unreasonable searches and seizures, Fifth Amendment’s Due Process Clause, and Eighth Amendment’s prohibition against cruel and unusual punishment).

waive the United States' sovereign immunity and provide the terms under which a party can sue the United States or its employees.³⁹

In 1946, responding to a dramatic increase in the size of the federal government, Congress passed the FTCA.⁴⁰ The FTCA sought to eliminate the time-consuming usage of private bills—individual bills brought directly to Congress—which was one of the only ways an individual citizen could bring a claim against the United States for tortious conduct of government employees when acting within the scope of their employment.⁴¹ In creating the FTCA, Congress sought “to establish a uniform remedy and fair compensation for tort victims, while freeing itself from the heavy burden of private relief legislation.”⁴² The FTCA waives the United States' sovereign immunity and gives the federal district courts jurisdiction over claims against the United States when the claimant alleges “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”⁴³ A suit against the United States under the FTCA is thus the only judicial remedy for unconstitutional torts committed by federal employees acting within the scope of their employment.⁴⁴

39. See Henes, *supra* note 11, at 343 (citing *Mader v. United States*, 654 F.3d 794, 797 (8th Cir. 2011)) (describing waivers of sovereign immunity).

40. See *id.* at 348 (describing that Congress passed FTCA as part of its Legislative Reorganization Act of 1946). The size of the government increased as a result of the Great Depression, World War II, and general Roosevelt era reforms, which contributed to Congress's passage of the Legislative Reorganization Act. See *id.* (citing David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 378 (2011)) (describing circumstances leading to enactment of Legislative Reorganization Act).

41. See Fuller, *supra* note 40 at 378 (describing why Congress enacted FTCA). Before the enactment of the FTCA, individual citizens had to bring “private bills” against the United States for tortious actions of government employees, which was considered a time-consuming and clumsy process. See *id.* “A private bill deals with one or more named individuals or entities, often providing benefits in response to a specific request in an area such as immigration or private claims.” *Id.* Individuals brought their private bills directly to Congress, and their claims were rarely successful. See Hervey A. Hotchkiss, *An Overview of the Federal Tort Claims Act*, 33 A.F. L. REV. 51, 51 (1990) (explaining history of FTCA).

42. See Hotchkiss, *supra* note 41, at 51 (describing why Congress enacted FTCA). “Congress enacted the Federal Tort Claims Act (FTCA) in 1946 as a waiver of sovereign immunity permitting a limited but meaningful financial remedy for persons injured by negligent or wrongful acts or omissions of federal employees acting within the scope of their employment.” *Id.* (footnote omitted) (detailing FTCA's purpose).

43. See 28 U.S.C. § 1346(b)(1) (2018) (providing language of FTCA). The FTCA states that federal district courts have exclusive jurisdiction “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” See *id.* (providing FTCA's terms).

44. See § 28 U.S.C. 2679(b)(1) (2018) (explaining FTCA is the sole remedy for torts committed by federal employees).

The FTCA contains various exceptions, such as the intentional tort exception, which reasserts the United States' sovereign immunity for certain intentional torts committed by governmental employees.⁴⁵ Importantly, the FTCA's "law enforcement proviso" serves as an exception to intentional torts exception and waives the United States' sovereign immunity for certain intentional torts when committed by "investigative or law enforcement officers of the United States."⁴⁶ The FTCA defines an investigative or law enforcement officer 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."⁴⁷

C. Definition of a Search

1. Definition of a Search as Defined Under the Fourth Amendment

Whether TSOs fit under the law enforcement proviso depends on whether they conduct searches, seize evidence, or make arrests.⁴⁸ Because TSOs do not seize evidence or make arrests, the only way they could qual-

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.

Id. "If the United States is sued in tort, or once the United States substitutes itself as a defendant in a tort case, the FTCA provides the exclusive avenue to relief, if any can be had." *See Vanderklok v. United States*, 868 F.3d 189, 201 (3d Cir. 2017) (citing § 2679(b)(1)).

45. *See* 28 U.S.C. § 2680(h) (2018) (providing language for intentional tort exception of FTCA). The intentional tort exception reasserts the United States' liability for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process. *See id.* (naming intentional torts covered by intentional tort exception). It also reasserts sovereign immunity for libel, slander, misrepresentation, deceit, and interference with contract rights. *See id.* (listing intentional torts covered by FTCA's intentional tort exception).

46. *See id.* (waiving United States' sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers of the United States Government . . . to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution"); *see also* Fuller, *supra* note 40, at 377–79 (providing background information on creation of FTCA). The FTCA did not always include the law enforcement proviso. *See id.* at 385 (explaining Congress amended FTCA in 1974 to include law enforcement proviso in response to abuses by law enforcement officers).

47. *See* 28 U.S.C. § 2680(h) (2018) (providing definition of "investigative or law enforcement officer" under FTCA).

48. *See* Henes, *supra* note 11, at 354 (noting officers who are granted a waiver of sovereign immunity under law enforcement proviso must be empowered to conduct searches, seize evidence, or make arrests).

ify for the law enforcement proviso is by virtue of executing searches.⁴⁹ Under the Fourth Amendment, individuals are protected “against unreasonable searches and seizures.”⁵⁰

The Supreme Court has stated that the right of people to be “free from all restraint or interference of others” is one of the most sacred rights.⁵¹ Under the Fourth Amendment, a search takes place “when the government violates a subjective expectation that society recognizes as reasonable.”⁵² In *Terry v. Ohio*,⁵³ the Supreme Court held that a search occurs when an officer takes hold of an individual and pats down the outer surfaces of his or her clothing.⁵⁴ To comply with the Fourth Amendment, a search must be “reasonable.”⁵⁵ Although the Supreme Court has stated

49. See *TSA Myth Buster: Do TSA Officers Arrest Passengers?*, TRANSP. SEC. ADMIN. (July 3, 2016), <https://www.tsa.gov/blog/2016/07/03/tsa-myth-busters-do-tsa-officers-arrest-passengers> [<https://perma.cc/9FPC-W84R>] (discussing how TSOs do not have authority to arrest passengers but may call for law enforcement assistance when necessary).

50. See U.S. CONST. amend. IV (providing text of Fourth Amendment). The Fourth Amendment states that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

See id. In evaluating Fourth Amendment claims, courts conduct a three-part test, which includes: (1) determining whether the government performed a search, (2) evaluating whether the search was legal, and (3) deciding the proper remedy if the search was illegal. See Bryan D. Lammon, *The Practical Mandates of the Fourth Amendment: A Behavioral Argument for the Exclusionary Rule and Warrant Preference*, 85 WASH. U. L. REV. 1101, 1104–05 (2007) (explaining Fourth Amendment requirements).

51. See *Terry v. Ohio*, 393 U.S. 1 (1968) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)) (stressing importance of Fourth Amendment).

52. See Lammon, *supra* note 50, at 1105 (quoting *Kyllo v. United States*, 533 U.S. 27, 33 (2001)) (explaining searches under Fourth Amendment).

53. 393 U.S. 1 (1968).

54. See *id.* at 16–19 (explaining search occurred under Fourth Amendment when officer took hold of defendant and “patted down the outer surfaces of his clothing”). In *Terry*, the Court also rejected the notion that the Fourth Amendment does not apply unless the officer performs an arrest or a “full-blown search.” See *id.* at 19. Thus, the Court concluded that a search occurred because the officer took hold of the defendant and patted him down. See *id.*

55. See *id.* at 19 (noting courts must look at whether search was reasonable). The Court in *Terry* concluded that the officer “had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized.” See *id.* at 30. The Court went on to state that:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety,

that an officer should generally obtain a warrant based on probable cause before it searches an individual, the Court has considered many exceptions to this requirement that allow searches to occur without a warrant or probable cause.⁵⁶ Moreover, the Supreme Court has reiterated that there is not one specific definition to decide whether a search is reasonable, but instead it often uses a balancing test weighing “the need to search (or seize) against the invasion which the search (or seizure) entails” to determine if a search is reasonable.⁵⁷

2. *Definition of an Administrative Search*

Distinct from searches under the Fourth Amendment, administrative searches do not require probable cause or search warrants.⁵⁸ Thousands of administrative searches occur all around the country every day.⁵⁹ When evaluating whether an administrative search is permissible, courts conduct a balancing test and weigh the government’s interest in performing the search against the individual’s interest in maintaining privacy.⁶⁰

The administrative search doctrine has been used to justify searches at airports.⁶¹ Although the United States Supreme Court has never ruled

he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30–31.

56. *See* Lammon, *supra* note 50 at 1109 (citing *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 528–29 (1967)) (stating how officers should generally obtain warrants before conducting searches). Despite this preference, there are many exceptions to the warrant requirement, including those that occur under exigent circumstance. *See id.* Exigent circumstances exist when an officer pursues a fleeing felon, fears the destruction of evidence, must prevent a suspect’s escape, or believes there is a risk of danger to third parties. *See id.* (citing *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)). Consequently, “[a]s long as the government is reasonably pursuing a legitimate government interest, the warrant and probable cause requirements regularly fade away.” *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255 (2011) (explaining various exceptions to warrant and probable cause requirement).

57. *See Terry*, 393 U.S. at 21 (quoting *Camara*, 387 U.S. at 534–37) (describing Fourth Amendment balancing test).

58. *See Primus*, *supra* note 56, at 255–57 (describing how administrative searches differ from searches under Fourth Amendment).

59. *See id.* (noting prevalence of administrative searches in United States). Administrative searches include searches and screenings that occur at sobriety checkpoints, international boarders, airports, government buildings, and public schools. *See id.*

60. *See id.* at 256–57 (describing test courts use to determine whether administrative searches are reasonable). This balancing test is “very deferential to the government,” and thus most administrative searches are found to be reasonable. *See id.*

61. *See id.* at 259 (noting government’s reliance on administrative search doctrine to justify airport screenings).

on the constitutionality of airport searches, it stated in dicta that the searches are reasonable because without them the risk to public safety is substantial.⁶² Moreover, the Third Circuit, in *United States v. Hartwell*,⁶³ held that searches at airports are justified by the administrative search doctrine, which permits suspicionless checkpoint searches when there is “a favorable balance between ‘the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.’”⁶⁴ Applying this test, the Third Circuit found that airport searches do not violate the Fourth Amendment to the United States Constitution’s prohibition against unreasonable searches and seizures because the state has a great interest in maintaining air travel safety, the search procedures are tailored to achieve that interest, and the searches are minimally invasive.⁶⁵

D. Courts Interpret the FTCA

Courts have encountered various cases involving the FTCA and its law enforcement proviso.⁶⁶ For example, in *Millbrook v. United*

62. See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (stating that “[w]e reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’—for example, searches now routine at airports and at entrances to courts and other official buildings”); see also *City of Indianapolis v. Edmond*, 531 U.S. 32, 33 (2000) (holding Court’s decision “does not affect the validity of border searches or searches in airports and government buildings, where the need for such measures to ensure public safety can be particularly acute”).

63. 436 F.3d 174 (3d Cir. 2006).

64. See *id.* at 178–79 (citing *Illinois v. Lidster*, 540 U.S. 419, 427 (2004)) (describing when courts apply the administrative search doctrine).

65. See *id.* at 181 (holding that TSA’s search of defendant at airport was justified by administrative search doctrine). Under the Fourth Amendment, searches must be reasonable, which ordinarily requires individualized suspicion of wrongdoing. See *Edmond*, 531 U.S. at 37 (emphasizing searches of individuals are ordinarily unreasonable absent individualized suspicion of wrongdoing). The Supreme Court, however, has held that administrative searches which seek to serve “special needs, beyond the normal need for law enforcement,” do not require individualized suspicion to be considered reasonable. See *id.* (describing administrative search doctrine). Therefore, in *Hartwell*, the Third Circuit categorized airport searches as administrative searches and thus found them reasonable under the Fourth Amendment absent individualized suspicion. See *Hartwell*, 436 F.3d at 178 (categorizing airport searches as administrative searches).

66. See *Campos v. United States*, 888 F.3d 724, 737 (5th Cir. 2018) (holding law enforcement proviso did not allow alien’s suit to proceed against United States Customs and Border Protection officer because officer’s conduct did not sink to necessary level). “The law enforcement proviso . . . only applies in situations in which the kinds of egregious, intentional misconduct occurs that was present in the events that prompted Congress to adopt the proviso . . .” *Id.* at 736. The Fifth Circuit noted that since 1987, it has applied the law enforcement proviso with great caution. See *id.* (explaining that law enforcement proviso applies only in limited circumstances where there is “egregious, intentional misconduct”); see also *Moore v. United States*, 213 F.3d 705, 710–13 (D.C. Cir. 2000) (holding postal inspectors fall within law enforcement proviso because they investigate criminal matters, but federal prosecutors do not fall within proviso); *Nurse v. United States*,

States,⁶⁷ the Supreme Court interpreted the law enforcement proviso broadly based on its plain text and held that its waiver of sovereign immunity extended to all acts or omissions of law enforcement officers that arise during the scope of their employment regardless of whether the act or omission occurred during a search, seizure, or arrest.⁶⁸ The Supreme Court thus abrogated the Third Circuit's decision in *Pooler v. United States*,⁶⁹ which narrowed the law enforcement proviso's scope by reading it as only applying if the tortious conduct committed by the officer occurred during a search, seizure, or arrest.⁷⁰

The Third Circuit has also considered whether FTCA's law enforcement proviso applies to administrative agencies.⁷¹ Specifically, in *Matsko v. United States*,⁷² the Third Circuit relied heavily on *Pooler* when it held that the law enforcement proviso did not apply to a Mine Safety and Health Administration inspector whose tortious conduct occurred outside the scope of the inspector's employment.⁷³ Although the Third Circuit decided *Matsko* before the Supreme Court's decision in *Millbrook*, the

226 F.3d 996, 1002 (9th Cir. 2000) (holding that United States Customs Service agents fell within law enforcement proviso).

67. 569 U.S. 50 (2013).

68. *See id.* at 55–56 (“[T]here is no basis for concluding that a law enforcement officer’s intentional tort must occur in the course of executing a search, seizing evidence, or making an arrest in order to subject the United States to liability.”). In *Millbrook*, the Court had to decide whether a correctional officer’s conduct at a prison fit within the law enforcement proviso of the FTCA. *See id.* at 54. In this case, a correctional officer sexually abused a prisoner and the federal government argued the law enforcement proviso did not extend to the prisoner’s claims. *See id.* at 53. The federal government’s argument relied on the Third Circuit’s decision in *Pooler v. United States*, which interpreted the proviso as applying only to conduct occurring during the execution of a search, seizure, or arrest. *See id.* (detailing the government’s argument). *See Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986) (holding law enforcement proviso applies only to tortious conduct that occurred during searches, seizures, or arrests).

69. 787 F.2d 868 (3d Cir. 1986).

70. *See Millbrook*, 569 U.S. at 55–57 (“[T]he waiver effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.”). The Supreme Court noted that other circuit courts have incorrectly “read into the text additional limitations designed to narrow the scope of the law enforcement proviso.” *See id.* at 55 (citing *Pooler*, 787 F.2d at 872).

71. *See Matsko v. United States*, 372 F.3d 556, 560 (3d Cir. 2004) (considering whether law enforcement proviso applies to Mine Safety and Health Administration inspector).

72. 372 F.3d 556 (3d Cir. 2004).

73. *See id.* at 560 (reasoning that although inspector had authority to inspect mines and investigate possible violations, employees of administrative agencies do not fall within law enforcement proviso because they are not law enforcement officers). The court in *Matsko* relied on *Pooler* when it stated that “the FTCA did not intend to bring within its scope actions by ‘officers’ not within the bounds of an investigation.” *See id.* The court then concluded that the mine inspector was not acting within the scope of his employment when he assaulted the plaintiff. *See id.*

Third Circuit noted that it did not need to consider the correctness of *Pooler's* narrow reading of the proviso because administrative agencies, regardless of the investigations they conduct, are not covered by law enforcement proviso.⁷⁴

Faced squarely with the issue of whether the FTCA's law enforcement proviso applies to TSOs, the Eleventh Circuit in *Corbett v. Transportation Security Administration*,⁷⁵ an unpublished decision, concluded that the proviso did not apply to TSOs.⁷⁶ The Eleventh Circuit did not consider whether TSOs perform searches, and instead concluded that they simply are not "officers" under the proviso.⁷⁷ In holding that TSOs are federal employees and not officers, the Eleventh Circuit relied on the distinction of the words "officer" and "employee" under the FTCA and the different use of the terms in statutes governing airport security.⁷⁸

Although not involving a claim under the FTCA, in *Vanderklok v. United States*,⁷⁹ the Third Circuit considered and ultimately denied a plaintiff's *Bivens* claim alleging First Amendment retaliation by a TSO.⁸⁰ The court began its inquiry into whether a *Bivens* claim existed by explaining that recognizing a cause of action under a constitutional amendment is context-specific and thus the court must look at the issue in the particular context of airport security as it relates to the specific defendant, an airport screener.⁸¹ First, the court looked to see whether alternative or existing

Therefore, it held that the FTCA's law enforcement proviso did not provide a waiver of sovereign immunity. *See id.*

74. *See id.* ("We need not determine whether *Pooler's* narrow reading was mistaken, because employees of administrative agencies, no matter what investigative conduct they are involved in, do not come within the § 2680(h) exception.")

75. 568 F. App'x 690 (11th Cir. 2014).

76. *See id.* at 701 (holding FTCA's law enforcement proviso does not apply to TSOs).

77. *See id.* (noting that "[w]e need not resolve this thorny 'search' issue" because "TSA screeners are not subject to the law enforcement proviso for a simpler reason—they are not 'officers of the United States Government,' as required by § 2680(h)'s statutory language.").

78. *See id.* (explaining how FTCA and federal statutes governing airport security differentiate between officers and employees).

79. 868 F.3d 189 (3d Cir. 2017).

80. *See id.* at 199, 208–09 (denying plaintiff's *Bivens* claim for First Amendment retaliation by TSOs). "[A]ctions brought directly under the Constitution against federal official have become known as '*Bivens* actions.'" *Id.* at 198 (noting that federal courts' authority to imply new constitutional torts, which are not expressly authorized by statute, is rarely invoked); *see also* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–97 (1971) (holding violation of Fourth Amendment by federal agent acting under color of his authority gives rise to cause of action for damages).

81. *See Vanderklok*, 868 F.3d at 199–200 ("It is not enough to argue . . . that First Amendment retaliation claims have been permitted under *Bivens* before. We must look at the issue anew in this particular context, airport security, and as it pertains to this particular category of defendants, TSA screeners."). The *Vanderklok* court explained that courts no longer imply rights and remedies under *Bivens* as a matter of course. *See id.* at 200. Instead, the court must first ask "whether any

processes existed for the plaintiff to exercise his First Amendment right to free speech without retaliation by TSOs.⁸² The court found no alternatives existed because the TSO did not fall within the law enforcement proviso and thus could not be sued under the FTCA and the plaintiff never asserted that the officer acted outside the scope of his employment.⁸³

Next, the *Vanderklok* court looked to see if there were special factors counseling against creating a new cause of action under *Bivens*.⁸⁴ The court found that there were several factors to consider in the realm of airport security, such as the importance of securing the nation's airports and air traffic, a reluctance for judicial intervention into matters involving foreign policy and security, a hesitancy to overstep Congress's power in assigning liability, and a practical concern in fashioning a court-made remedy for TSA employees.⁸⁵ These factors led the *Vanderklok* court to hold that *Bivens* does not offer a remedy against TSOs who retaliate against passengers that exercise their First Amendment rights, but left the specific issue of whether TSOs fall under the FTCA open to interpretation.⁸⁶

alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *See id.* (citing *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)). Next, the court stated that "even in the absence of an alternative, . . . [we] must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." *See id.*

82. *See id.* at 200 (describing that in analyzing *Bivens* claims, courts first look to see whether alternative or existing processes exist that are capable of protecting constitutional issues at stake).

83. *See id.* at 200–04 ("In summary, then, there can be a remedy against the United States in cases where the employee had the responsibility of an officer, and there can be a state law remedy against the individual when the offending TSA employee acted outside the scope of employment."). The Third Circuit looked at the district court's prior orders and concluded that "there are no alternative judicial remedies available to [the traveler], because the District Court concluded that [the TSO] was not an investigative or law enforcement officer and there was no challenge as to whether [the TSO] acted within the scope of his employment." *See id.* at 204. The Third Circuit noted that there is a possible non-judicial remedy in the Traveler Redress Inquiry Program (TRIP), which is administered by the TSA and allows travelers to fill out an online complaint about their grievances. *See id.* at 204–05. Despite this option, the court noted that TRIP is primarily designed for those challenging their inclusion on terrorism watch lists and was not an adequate remedy for the plaintiff in this case. *See id.* at 205.

84. *See id.* at 205–06 ("In determining whether to imply a *Bivens* claim for First Amendment retaliation by TSA screeners, we must ask whether there are special factors counseling hesitation.").

85. *See id.* at 206–09 ("[T]he role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context.").

86. *See id.* at 199 (acknowledging that there may be no other alternative remedies available other than *Bivens* action for plaintiff). In *Vanderklok*, the Third Circuit stated that the district court's decision that the law enforcement proviso does not apply to TSOs was not on appeal. *See id.* at 203.

III. DON'T EVER STOP, BOP TO THE TOP: FROM THE DISTRICT COURT,
TO THE THIRD CIRCUIT, AND TO THE THIRD CIRCUIT AGAIN,
THE FACTS AND PROCEDURAL HISTORY
OF *PELLEGRINO*

In *Pellegrino*, the Third Circuit found itself confronted with the issue it left open in *Vanderklok*: interpreting the law enforcement proviso as it applies to TSOs.⁸⁷ Nadine Pellegrino and her husband went to the Philadelphia Airport to travel home to Florida.⁸⁸ At the airport, Ms. Pellegrino passed through a TSA security checkpoint.⁸⁹ After passing through the metal detector, a TSO randomly selected Ms. Pellegrino for an additional search and began to examine her luggage.⁹⁰

After being selected, Ms. Pellegrino requested that she be searched in a more discreet manner, the TSO obliged and several TSOs searched through her luggage in a private room.⁹¹ Ms. Pellegrino found the search of her luggage to be unnecessarily rough and voiced concerns to the TSOs, informing them that she planned to report their conduct to TSA authorities.⁹² As Ms. Pellegrino repacked her bag, one TSO claimed she struck her with it.⁹³ At one point while the TSOs forced Ms. Pellegrino to repack her bags, a TSO allegedly blocked Ms. Pellegrino's access to her bags causing her to crawl under a table to reach them.⁹⁴

87. See *Pellegrino v. United States Transp. Sec. Admin, Div. of Dep't of Homeland Sec.*, 937 F.3d 164, 167–68 (3d Cir. 2019) (explaining court is faced with question of whether TSOs are “investigative or law enforcement officers” under FTCA).

88. See *id.* at 168 (examining facts that led to TSOs searching Ms. Pellegrino).

89. See *id.* (describing how Congress created TSA after terrorist attacks of September 11, 2001 and that TSA requires TSOs to perform screenings of passengers at airports).

90. See *id.* (explaining how TSO randomly selected Ms. Pellegrino for further screening).

91. See *id.* (describing scene while Ms. Pellegrino was in private screening room). In the private room, one TSO “allegedly counted [Ms. Pellegrino’s] coins and currency, examined her cell phone data, read the front and back of her membership and credit cards, and opened and smelled her cosmetics, mints, and hand sanitizer.” See *id.* (explaining what occurred during Ms. Pellegrino’s search).

92. See *id.* (detailing search of Ms. Pellegrino that occurred in private screening room). The TSO searched her credit cards, money, cell phone, and makeup. See *id.* (describing how Ms. Pellegrino found this search to be unnecessarily rough). Ms. Pellegrino claimed the TSOs spilled the contents that were in various containers and damaged her jewelry and eyeglasses. See *id.* (explaining how TSOs damaged Ms. Pellegrino’s property including her jewelry and eyeglasses). The TSOs then left Ms. Pellegrino to clean up the mess herself. See *id.* (explaining how it took Ms. Pellegrino several trips to clean up TSO’s mess).

93. See *id.* (describing TSO’s allegation that Ms. Pellegrino struck her with her bag).

94. See *id.* (explaining what occurred when TSOs forced Ms. Pellegrino to repack her bags). When Ms. Pellegrino crawled under the table to retrieve her bag, one TSO claimed the table tipped over and struck the TSO in the leg. See *id.* (explaining what happened to Ms. Pellegrino after search ended).

Based on the TSO's allegations, the Philadelphia District Attorney's Office filed ten charges against Ms. Pellegrino.⁹⁵ At the preliminary hearing, the judge dismissed many of the charges and the district attorney dropped others.⁹⁶ Nothing resulted from remaining charges against Ms. Pellegrino because the TSA failed to provide surveillance video of the incident, one TSO never appeared in court, and another TSO offered testimony that was self-contradictory.⁹⁷

Ms. Pellegrino eventually sought a remedy for the incident that occurred at the airport and filed a civil action against the TSA in the United States District Court for the Eastern District of Pennsylvania alleging numerous constitutional and statutory claims.⁹⁸ The district court narrowed the claims down to a property damage claim, claims for false arrest, false imprisonment, and malicious prosecution under the FTCA, and a *Bivens* cause of action for violations of the First and Fourth Amendments.⁹⁹ The parties settled the property damage claim, the court granted summary judgment in favor of the TSA on the FTCA claims on the ground that TSOs are not covered under the law enforcement proviso, and the court also granted summary judgment on the *Bivens* claim.¹⁰⁰ On appeal, a divided Third Circuit panel affirmed the district court's decision in full.¹⁰¹ The Third Circuit then granted rehearing *en banc* to reconsider the question of whether TSOs are "investigative or law enforcement officer[s]" as defined under the FTCA.¹⁰²

IV. WHAT I'VE BEEN LOOKING FOR: THE *PELLEGRINO* COURT HOLDS THAT TRAVELERS MAY SUE TSOs FOR CERTAIN WRONGFUL CONDUCT

In *Pellegrino*, the Third Circuit addressed whether TSOs qualify as "investigative or law enforcement officers" under the FTCA.¹⁰³ If so, the

95. *See id.* at 168–69 (explaining that Philadelphia District Attorney's Office charged Ms. Pellegrino with ten crimes, including aggravated assault, possession of instruments of crime, and making terroristic threats).

96. *See id.* (explaining what happened during preliminary hearing).

97. *See id.* (detailing how none of the claims against Ms. Pellegrino rose to guilty verdict).

98. *See id.* at 169 (listing various claims Ms. Pellegrino brought against TSA and several TSOs).

99. *See id.* (describing district court's decision).

100. *See id.* (explaining district court ruled that TSOs are not covered by FTCA's law enforcement proviso). After finding the FTCA's language ambiguous, the district court determined the statute's legislative history indicated that it was not intended to cover TSOs. *See Pellegrino v. United States Transp. Sec. Admin.*, No. CIV.A. 09-5505, 2014 WL 1489939, at *5–8 (E.D. Pa. Apr. 16, 2014) (explaining district court's dismissal of Ms. Pellegrino's claims).

101. *See Pellegrino*, 937 F.3d at 169 (explaining Third Circuit's divided decision); *see also Pellegrino v. United States Transp. Sec. Admin.*, Div. of Dep't of Homeland Sec., 896 F.3d 207 (3d Cir. 2018) (affirming district court in full).

102. *See Pellegrino*, 937 F.3d at 169 (stating procedural posture of case).

103. *See id.* (describing issue on appeal).

court would allow Ms. Pellegrino's intentional tort claims to proceed.¹⁰⁴ Tackling this issue of first impression among the Third Circuit, the court analyzed the law enforcement proviso by looking to its plain language and separated its opinion into four main questions: "[a]re TSOs (1) officers of the United States who are (2) empowered by law to (3) execute searches for (4) violations of federal law?"¹⁰⁵ Judge Krause, joined by three Third Circuit judges, dissented, and found that the law enforcement proviso does not extend to TSOs.¹⁰⁶

A. *The Plain Text of the Law Enforcement Proviso*

Looking to the text of the law enforcement proviso, the court first determined that TSOs fit within the definition of officers of the United States.¹⁰⁷ The court reasoned that TSOs serve in positions of trust and authority, assist in critical aspects of national security, perform the screenings of passengers, and secure the nation's airports.¹⁰⁸ The court recognized that the ATSA created the position of "law enforcement officer[s]," who are individuals who make arrests and carry firearms at airports, who are distinct from TSOs, which the ATSA designates as "employees."¹⁰⁹ Despite this distinction, the court held that both could qualify as officers under the FTCA's law enforcement proviso.¹¹⁰ Furthermore, the court explained that even if there existed "uncertainty about the reach of the

104. *See id.* at 168 (explaining that because Ms. Pellegrino's claims involved intentional torts allegedly committed by TSOs, she could only bring these claims against United States if she could show United States waived its sovereign immunity). The Third Circuit recognized that the FTCA waives sovereign immunity for certain intentional torts committed by "investigative or law enforcement officers." *See id.* (citing 28 U.S.C. § 2680(h) (2018)). The court noted that "[i]f a federal official fits this definition, plaintiffs may sue for certain intentional torts." *See id.* (describing how federal government waives immunity for certain torts committed by its employees).

105. *See id.* at 170 (describing how to analyze FTCA's law enforcement proviso) (internal quotation marks omitted).

106. *See id.* at 181 (Krause, J., dissenting) (finding law enforcement proviso does not apply to TSOs). Judge Jordan, Judge Hardiman, and Judge Scirica also joined in Judge Krause's dissent. *See id.*

107. *See id.* at 170 (relying on dictionary definitions to determine word's usage). The court noted that an officer is defined as one who "serve[s] in a position of trust' or 'authority,' especially as 'provided for by law.'" *See id.* (quoting *Officer*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

108. *See id.* (explaining why TSOs are officers). The court noted that TSO's perform the screening of all passengers, protect travelers from threats to public safety, and wear uniforms with badges that say "officer." *See id.* (emphasizing reasons why TSOs are considered officers).

109. *See id.* at 170–71 (explaining differences between "law enforcement officers" and TSOs under ATSA). The court noted that under the ATSA, TSOs technically are employees. *See id.* (citing 49 U.S.C. § 44901(a) (2018)).

110. *See id.* (imparting ATSA's definition of "employee" and "officer" onto FTCA would lead to confusion).

term ‘officer of the United States,’ it would be resolved in favor of a broad scope.”¹¹¹

Next, looking to whether TSOs are “empowered by law,” the court answered in the affirmative.¹¹² Looking at the statutory authority of TSOs, the court concluded they are empowered to conduct screenings of passengers and property at airports.¹¹³ Accordingly, TSOs are empowered by law within the meaning of the law enforcement proviso.¹¹⁴

The court then addressed whether TSOs execute searches.¹¹⁵ The court first stated that TSOs perform searches under the dictionary definition of a “search.”¹¹⁶ Specifically, they perform examinations and inspections of individuals at airports.¹¹⁷ Additionally, the court briefly mentioned how TSO screenings are searches within the meaning of the Fourth Amendment.¹¹⁸ TSO screenings also meet the definition of a search announced in *Terry* because TSO screenings require a “careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons.”¹¹⁹ The court emphasized that the screenings performed by TSOs are more intimate than other administrative inspections, affect the public directly, and involve physical, and often intrusive, examinations of a person’s physical body.¹²⁰

111. *See id.* at 171–72 (noting that “the statutory reference to ‘any officer’—as opposed to, say, *criminal* officer—supports an expansive reading” of the proviso).

112. *See id.* at 172 (noting that “empowered by law” limits the scope of officers covered under law enforcement proviso).

113. *See id.* (citing § 44901(a)) (noting TSOs are empowered to screen “all passengers and property”).

114. *See id.* (recognizing TSOs are empowered by law under FTCA’s law enforcement proviso).

115. *See id.* (noting TSO screenings are searches under term’s ordinary meaning, under Fourth Amendment, and under Court’s definition in *Terry*).

116. *See id.* (explaining dictionary definition of search). The definition of a search includes “to examine (a person) thoroughly to check on whatever articles are carried or concealed.” *See id.* (quoting *Search*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

117. *See id.* at 172–73 (explaining how TSOs perform searches at airports). The court also noted that “[d]ictionaries aside, one could simply ask any passenger at any airport” about whether TSOs search them. *See id.* at 172. Additionally, the TSOs who screened Ms. Pellegrino referred to their procedure as a search. *See id.* (citing incident report).

118. *See id.* at 173 (recognizing that TSO screenings fall within searches under Fourth Amendment). Although the government argued that passengers’ consent to the searches cancels out the Fourth Amendment effect, the Third Circuit stated “the presence or absence of consent does not determine whether a search has occurred for purposes of the Fourth Amendment.” *See id.* (explaining Fourth Amendment argument). The court additionally made clear that airport screenings are not consensual because a passenger who does not consent to a search cannot board any flight. *See id.* (citing 49 C.F.R. § 1544.201(c); § 1540.107(a)).

119. *See id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 16 (1968)) (emphasizing that TSA screenings fall with *Terry*’s definition of search).

120. *See id.* at 174–77 (recognizing that “TSO screenings often involve invasive examinations of the physical person”). The Third Circuit emphasized that the physical nature of TSA screenings distinguish them from other administrative

Answering its fourth question, the court found that TSOs execute searches for violations of federal law.¹²¹ The court acknowledged that it does not mention the law enforcement proviso's legislative history in its analysis because the text is clear.¹²² It recognized that Congress could have limited the law enforcement proviso to include only criminal law enforcement offices by inserting the word "criminal" into the proviso, but it did not.¹²³ Because the court answered each of its initial questions in the affirmative, it concluded that TSOs fit within the proviso.¹²⁴

After determining that TSOs do fit within the law enforcement proviso, the court considered the consequences of its decision.¹²⁵ Importantly, if TSOs are not covered under the law enforcement proviso, then plaintiffs like Ms. Pellegrino are left with no judicial redress.¹²⁶ The court clarified that its ruling does not hold that every administrative search falls under the law enforcement proviso.¹²⁷ Instead, it explicitly made clear that TSO searches are distinct from other administrative searches because "[t]hey extend to the general public and involve searches of an individual's physical person and her property."¹²⁸

searches. *See id.* at 176 (comparing TSA screenings to other types of administrative searches). For example, the court contrasted an inspector of the Mine Safety and Health Administration, who simply inspects mines, from TSA screeners, who perform intimate physical searches of individuals' bodies. *See id.* (citing *Matsko v. United States*, 372 F.3d 556, 560 (3d Cir. 2004)). Moreover, the court stated that "[t]o the extent *Matsko* can be read to hold that mine safety inspectors are outside the proviso simply because they are administrative agency employees, it is no longer valid." *See id.*

121. *See id.* at 177 ("TSOs search for weapons and explosives, and carrying them on board an aircraft is a criminal offense."). The court consulted various statutes that provide criminal penalties for carrying weapons onboard flights and listed the hazardous materials that are not allowed on planes. *See id.* (citing 29 U.S.C. § 46505; 49 C.F.R. §§ 172.202, 175.10(a)).

122. *See id.* at 179 (noting that when statutes are clearly written, courts do not have to consult their legislative history).

123. *See id.* at 179–80 (explaining that "Congress has created a remedy; we are simply giving effect to the plain meaning of its words").

124. *See id.* at 180 (holding that TSOs fall within FTCA's law enforcement proviso).

125. *See id.* ("Before concluding, we note the implications of the choice before us.").

126. *See id.* (citing *Vanderklok v. United States*, 868 F.3d 189, 209 (3d Cir. 2017)) ("TSOs are not susceptible to an implied right of action under *Bivens* for alleged constitutional violations . . . so a Tort Claims Act action is the only remaining route to recovery."). "Without recourse under that Act, plaintiffs like Pellegrino will have no remedy when TSOs assault them, wrongfully detain them, or even fabricate criminal charges against them." *See id.*

127. *See id.* (distinguishing TSO searches from other administrative searches).

128. *See id.* (acknowledging how TSO screenings differ from other types of inspections). Accordingly, the Third Circuit reversed the district court's decision as it pertained to the interpretation of the FTCA's law enforcement proviso. *See id.* (affirming the district court's decision in all other respects).

B. *Judge Cheryl Ann Krause's Dissent*

In contrast to the majority opinion, Judge Krause in her dissent would affirm the district court's dismissal of Ms. Pellegrino's FTCA claims because TSOs are not covered under the law enforcement proviso.¹²⁹ Judge Krause opined that the law enforcement proviso refers solely "to officers empowered to exercise traditional police powers."¹³⁰ Her dissent criticized the majority for dissecting the law enforcement proviso into pieces instead of reading the words together as Congress intended it to be read.¹³¹

Based on the plain text of the law enforcement proviso, Judge Krause found that the exception to sovereign immunity applies only when criminal law enforcement officers commit the tortious conduct.¹³² Judge Krause noted that other sections of the FTCA distinguish between officers and employees, yet the law enforcement proviso applies only to officers.¹³³ Therefore, Congress intended for there to be a difference between an employee, such as a TSO, and an officer.¹³⁴ Judge Krause determined that although the majority emphasized that its expansion of the law enforce-

129. *See id.* at 181 (Krause, J., dissenting) (arguing plain text of law enforcement proviso must be read to exclude TSOs).

130. *See id.* (Krause, J., dissenting) (arguing law enforcement proviso does not apply to "administrative searches for programmatic purposes").

131. *See id.* (Krause, J., dissenting) ("That breathtaking expansion of the proviso is textually unsound, departs from other circuits, and contravenes the rule that waivers of sovereign immunity must be strictly construed in favor of the Government.").

132. *See id.* at 181 (Krause, J., dissenting) (noting that when analyzing meaning of statutes, courts must look to plain text of statute). The dissent noted that the plain language of the law enforcement proviso excludes administrative employees, like TSOs, because they are not "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law" and they are not considered "officer[s] of the United States." *See id.* at 182 (Krause, J., dissenting) (quoting 28 U.S.C. § 2680(h) (2018)). With this language, Congress intended for the proviso to apply only to investigatory searches, not to administrative searches. *See id.* at 185 (Krause, J., dissenting). The dissent explained that when the phrase "execute searches" appears in any statute in the United States Code, it is referring to investigatory searches. *See id.* at 185 (Krause, J., dissenting) (citing 18 U.S.C. § 2231(a); § 2234; § 3109; 22 U.S.C. § 2709(a)(2)). Moreover, the dissent stressed that the phrase "violation of Federal law" only refers to criminal law because that phrase modifies "make arrests," and arrest can only be made when one violates a criminal law. *See id.* at 186 (Krause, J., dissenting).

133. *See id.* at 189–90 (Krause, J., dissenting) (explaining that terms such as "officer" and "employee" should not be conflated). "Instead of conflating 'officer' with 'employee,' [Judge Krause] read Congress's markedly different language in the very same statutory section to signal an intent to limit the proviso to a specific class of federal government personnel: those 'charged with police duties.'" *See id.* at 190 (Krause, J., dissenting) (quoting *Officer*, WEBSTER'S NEW COLLEGIATE DICTIONARY 797 (1976)).

134. *See id.* at 190 (Krause, J., dissenting) (noting that Congress's use of different language signals its intent to limit the law enforcement proviso to those who possess police powers).

ment proviso applies only to TSOs, the majority instead waives sovereign immunity for all employees who conduct administrative searches.¹³⁵

Finally, Judge Krause argued that the majority's decision "marks a dramatic departure" from the Third Circuit's precedent and that of other circuit courts.¹³⁶ She noted that "[we] should not be creating this circuit split, much less putting ourselves on the wrong side of it."¹³⁷ Judge Krause concluded by noting that courts must construe waivers of sovereign immunity narrowly in favor of the United States and Congress could expand the law enforcement proviso to expand the United States' sovereign immunity if it wishes.¹³⁸

135. *See id.* at 195–96 (Krause, J., dissenting) (discussing that although majority attempted to narrow its decision, it offers no principled reason for limiting its reading to physical searches). "Without a limiting principle, the Majority's interpretation of the law enforcement proviso works a staggering expansion of the Government's waiver of sovereign immunity." *See id.* at 196 (Krause, J., dissenting). Because many administrative agencies and their employees perform "searches" as defined under the Fourth Amendment, this will result in the waiver of sovereign immunity. *See id.* at 196–97 (Krause, J., dissenting) (noting that Secretary of Commerce inspects books, Food and Drug Administration inspectors examine meat products, and Environmental Protection Agency employees inspect areas with hazardous waste).

136. *See id.* at 197–98 (Krause, J., dissenting) (discussing various cases that disagree with majority's opinion). For example, in *Matsko*, the Third Circuit held that Mine Safety and Health Administration inspectors are not covered under the law enforcement proviso. *See id.* at 197–98 (Krause, J., dissenting) (citing *Matsko v. United States*, 372 F.3d 556 (3d Cir. 2004)). The dissent noted the *Matsko* court's reasoning that mine inspectors do not fall within the proviso because they are "employees of administrative agencies" and not investigate or law enforcement officers. *See id.* at 197–98 (Krause, J., dissenting) (citing *Matsko*, 372 F.3d 556, 560). Also, the dissent referenced *Corbett v. TSA*, where the Eleventh Circuit considered whether TSA screeners were covered under the law enforcement proviso and found that they are not because they are employees and not officers. *See id.* at 198 (Krause, J., dissenting) (citing *Corbett v. TSA*, 568 F. App'x 690, 701 (11th Cir. 2014)). Judge Krause found further support in other circuit courts for a limited application of the law enforcement proviso. *See id.* at 198 (Krause, J., dissenting) (citing *Moore v. United States*, 213 F.3d 705, 708–20 (D.C. Cir. 2000)) (holding proviso applies to postal inspectors who are empowered to investigate criminal matters); *Nurse v. United States*, 226 F.3d 996, 1002–03 (9th Cir. 2000) (holding proviso applies to custom officers); *Celestine v. United States*, 841 F.2d 851, 852–53 (8th Cir. 1988) (holding proviso applies to Veterans' Administration police officers); *Hoston v. Silbert*, 681 F.2d 876, 879 (D.C. Cir. 1982) (holding proviso applies to United States Marshalls); *Caban v. United States*, 671 F.2d 1230, 1234 (2d Cir. 1982) (holding proviso applies to Immigration and Naturalization Service agents); *Brown v. United States*, 653 F.2d 196, 198 (5th Cir. 1981) (holding proviso applies to Federal Bureau of Investigation agents); *Hernandez v. Lattimore*, 612 F.2d 61, 64 n.7 (2d Cir. 1979) (holding proviso applies to federal correctional officers)).

137. *See id.* at 199 (Krause, J., dissenting) ("[T]he Courts of Appeals have consistently interpreted the proviso to distinguish between federal officers involved in traditional law enforcement and federal employees who are not.").

138. *See id.* at 199 (Krause, J., dissenting) (noting that Congress has power to expand FTCA's law enforcement proviso, but courts do not).

V. STICK WITH THE STATUS QUO: TSOs SHOULD BE HELD ACCOUNTABLE UNDER THE FTCA'S LAW ENFORCEMENT PROVISIO

Despite the dissent's contention that the majority's decision is "on the wrong side of" a circuit split, the Third Circuit decided *Pellegrino* correctly and TSOs should be held accountable under the FTCA because they execute searches for violations of federal law under the law enforcement proviso.¹³⁹ Looking at the plain text of the Supreme Court's definition of a "search" outlined in *Terry*, a search occurs when an officer pats down the outer surfaces of one's clothing.¹⁴⁰ TSOs regularly pat down the outer surfaces of passengers' clothing.¹⁴¹ By concluding that TSOs execute searches, the Third Circuit is holding TSOs accountable for when they commit a wrongdoing, while simultaneously upholding a traveler's right to a meaningful remedy.¹⁴² Other circuit courts who are faced with interpreting the law enforcement proviso as it relates to TSOs should follow the Third Circuit's decision and find that TSOs are not absolutely immune from suit.¹⁴³ If other circuit courts are unwilling to recognize that TSOs fall under the law enforcement proviso, as the dissent argued they should, then the TSA itself must step in to offer adequate remedies for passengers.¹⁴⁴

139. *See id.* (Krause, J., dissenting) (emphasizing that majority's decision goes against other circuit court decisions); *see also* 28 U.S.C. § 2680(h) (2018) (looking at plain language of FTCA, to qualify for law enforcement proviso, "law enforcement or investigative officer" is defined 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"). *But see Pellegrino*, 937 F.3d at 168 ("Because TSOs are 'officer[s] of the United States' empowered to 'execute searches' for 'violations of Federal law,' Pellegrino's lawsuit may proceed.").

140. *See Terry v. Ohio*, 392 U.S. 1, 19 (1968) (defining search under Fourth Amendment); *see also* Henes, *supra* note 11 at 355 (stating Supreme Court has practice of reading statutory waivers of sovereign immunity strictly, using plain text approach); *see also Pellegrino*, 937 F.3d at 173–74 ("TSA screenings even meet the definition of the particular subset of Fourth Amendment searches announced in *Terry* just six years before the enactment of the proviso.").

141. *See Security Screening*, *supra* note 26 (providing information as to when TSOs pat down passengers and how they do it).

142. *See* Jonathan Stempel, *Fliers Can Sue over Airport Screener Abuses: U.S. Appeals Court*, REUTERS (Aug. 30, 2019, 11:42 AM), <https://www.reuters.com/article/us-usa-tsa-lawsuit/fliers-can-sue-over-airport-screener-abuses-u-s-appeals-court-idUSKCN1VK201> [<https://perma.cc/N2HA-P4ZG>] (discussing implications of Third Circuit's decision in *Pellegrino*). Ms. Pellegrino's lawyer stated that, "If you think you are a victim of intentional misconduct by TSA agents, you can now have your day in court." *See id.* Her lawyer also noted that "[Ms. Pellegrino] never gave up, and it is a real tribute to her courage." *See id.*

143. *See Pellegrino*, 937 F.3d at 168 ("Because TSOs are 'officer[s] of the United States' empowered to 'execute searches' for 'violations of Federal law,' Pellegrino's lawsuit may proceed.").

144. *See id.* at 199 (Krause, J., dissenting) (noting that other courts of appeals have and should continue to interpret law enforcement proviso as applying to federal officers who perform traditional law enforcement functions and not federal employees who are not involved in those functions).

A. *TSOs Execute Searches*

In *Pellegrino*, the court looked to the plain text of the law enforcement proviso to conclude that it applies to TSOs.¹⁴⁵ When the text of a statute is unambiguous, the court need only look at its plain language.¹⁴⁶ The law enforcement proviso is unambiguous because it clearly defines who qualifies as a law enforcement or investigative officer.¹⁴⁷ Therefore, the court need only look to its plain text.¹⁴⁸

Also, the Supreme Court has practiced strict adherence to the plain text approach of interpreting the law enforcement proviso.¹⁴⁹ Importantly, in *Millbrook*, the Supreme Court emphasized that it must interpret the FTCA's law enforcement proviso according to its plain text.¹⁵⁰ It found that the lower courts, including the Third Circuit, had previously read the law enforcement proviso too narrowly, contrary to its plain text.¹⁵¹ Therefore, the Court held that the lower courts erred when they limited the law enforcement proviso by adding terms to it, which the text itself never used.¹⁵²

145. See *supra*, notes 103–28 and accompanying text (explaining majority's reasoning in *Pellegrino*).

146. See *Pellegrino*, 937 F.3d at 179–80 (“Here, Congress has created a remedy; we are simply giving effect to the plain meaning of its words.”).

147. See 28 U.S.C. § 2680(h) (2018) (defining investigative or law enforcement 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”); see also *Pellegrino*, 937 F.3d at 179–80 (noting that “words matter” and Congress could have inserted “criminal” into the law enforcement proviso but did not).

148. See *Pellegrino*, 937 F.3d at 179 (citing *Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233, 244 (3d Cir. 2009)) (noting Third Circuit does not look at legislative history when statute's text is clear).

149. See *Henes*, *supra* note 11 at 355 (discussing Supreme Court's interpretation of law enforcement proviso); see, e.g., *Dodd v. United States*, 545 U.S. 353, 359 (2005) (explaining that when statute's language is plain, Court must enforce it according to its text); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (“A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text.”).

150. See *Millbrook v. United States*, 569 U.S. 50, 55 (2013) (interpreting law enforcement proviso according to its plain text). The Supreme Court noted that in *Pooler*, the Third Circuit read into the law enforcement proviso too narrowly in holding that it only applied when officers committed tortious conduct while “executing a search, seizing evidence, or making an arrest.” See *id.* at 56 (quoting *Pooler v. United States*, 787 F.2d 868, 872 (1986)). The Court held that the Third Circuit's interpretation did not find any support in the text of the law enforcement proviso. See *id.* (“The FTCA's only reference to ‘searches,’ ‘seiz[ures of] evidence,’ and ‘arrests’ is found in the statutory definition of ‘investigative or law enforcement officer.’” (citing § 2680(h))).

151. See *id.* (“A number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso.”).

152. See *id.* at 57 (holding FTCA's waiver of sovereign immunity for intentional torts committed by law enforcement officer was not limited to investigative activities, abrogating *Pooler*). “Had Congress intended to further narrow the scope of the proviso, Congress could have limited it to claims arising from ‘acts or omis-

The plain text of the FTCA's law enforcement proviso indicates a "law enforcement or investigative officer" is defined 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."¹⁵³ In *Terry*, the Supreme Court specifically held a search occurred when an officer patted down the outer surfaces of an individual's clothing, which is precisely what TSOs do to passengers during a pat down search.¹⁵⁴ Moreover, TSOs perform these searches for violations of federal law when they search for items that passengers are forbidden to take on an aircraft.¹⁵⁵ Therefore, the only way TSOs could be removed from the ambit of the proviso is if a court reads the term "criminal" into the law enforcement proviso, which the Supreme Court in *Millbrook* forbade.¹⁵⁶

B. *Consequences of Holding TSOs Accountable*

If TSOs are held accountable for their misconduct under the FTCA, those who are injured by TSOs during searches will have a real legal remedy.¹⁵⁷ Furthermore, other agencies' employees will not automatically be included under the proviso as the dissent in *Pellegrino* predicted.¹⁵⁸ Although the dissent in *Pellegrino* acknowledged the limited legal redress its decision leaves for those harmed by TSOs' intentional torts, the judges seemed more concerned with the possibility of opening the floodgates of litigation if TSOs are held accountable under the law enforcement proviso.¹⁵⁹ However, the majority made clear that its decision applies only to TSOs because the searches they perform are more intimate and physical

sions of investigative or law enforcement officers *acting in a law enforcement or investigative capacity.*" *Id.* (emphasis in original) (citing *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008)).

153. See § 2680(h) (providing text of law enforcement proviso).

154. See *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (holding search occurred when officer patted down outer clothing of defendants); see also *Security Screening*, *supra* note 26 (explaining that TSOs regularly pat down outer surfaces of passengers' clothing).

155. See *Pellegrino v. United States Transp. Sec. Admin., Div. of Dep't of Homeland Sec.*, 937 F.3d 164, 177 (3d Cir. 2019) (citing 49 U.S.C. § 46505 (2018)) (arguing TSOs perform searches for violations of federal law because searches are directed to certain illegal and prohibited items).

156. See *Millbrook*, 569 U.S. at 57 (holding that if Congress intended to narrow scope of law enforcement proviso, it could have done so); see also *Pellegrino*, 937 F.3d at 179 ("Congress could have chosen to insert 'criminal' into the proviso.").

157. See *Stempel*, *supra* note 142 (discussing how after *Pellegrino*, travelers who are victims of TSA misconduct can now have their day in court).

158. See *Pellegrino*, 937 F.3d at 195–97 (Krause, J., dissenting) (describing how majority's expansion of FTCA's law enforcement proviso will result in waiver of sovereign immunity for all employees who perform administrative searches).

159. See *id.* at 196 (Krause, J., dissenting) ("Without a limiting principle, the Majority's interpretation of the law enforcement proviso works a staggering expansion of the Government's waiver of sovereign immunity.").

than traditional administrative searches.¹⁶⁰ Despite this limitation, the dissent still expressed fear that the Department of Defense, which inspects defense contractors, the Food and Drug Administration, which examines food products, and numerous other federal employees who perform inspections would then fall under the exception.¹⁶¹

Despite this fear, the Third Circuit holding that the law enforcement proviso applies to TSOs does not mean that the proviso automatically applies to food inspectors and officers of other administrative agencies.¹⁶² Instead, courts will have to look at these other administrative agencies on a case-by-case basis to determine whether they fit within the proviso—the court would need to determine whether they “execute searches” as defined in *Terry*.¹⁶³ It is extremely unlikely that a court would find that Environmental Protection Agency (EPA) employees—which the dissent cited as potentially falling under the law enforcement proviso if extended to TSOs—execute searches.¹⁶⁴ The “searches” EPA employees perform, unlike the searches TSOs perform, are in no way analogous to how the Supreme Court defined what constituted a search in *Terry*.¹⁶⁵ Therefore, the

160. *See id.* at 180 (detailing that TSO screenings fall under FTCA’s law enforcement proviso because “they are more personal than traditional administrative inspections”).

161. *See id.* at 196–97 (Krause, J., dissenting) (finding that expanding law enforcement proviso to TSOs would unprecedentedly expand United States’ tort liability to other federal government employees who perform searches).

162. *See id.* at 180 (explaining issue in *Pellegrino* involved only whether law enforcement proviso applied to TSOs and not whether it applied to other administrative agencies).

163. *See Henes, supra* note 11, at 354 (arguing Supreme Court will likely have to determine who fits under the law enforcement proviso on a case-by-case basis).

164. *See Pellegrino*, 937 F.3d at 196–97 (Krause, J., dissenting) (asserting that to allow TSOs to fall under the law enforcement proviso could lead to Environmental Protection Agency employees and other administrative employees to also fall under the proviso). “[T]he EPA surveys hazardous waste sites.” *Id.* at 197 (Krause, J., dissenting) (citing 42 U.S.C. § 6927(a)) (listing powers of EPA employees to inspect hazardous waste sites)).

165. *See* 42 U.S.C. § 6927(a) (2018) (explaining how EPA employees are authorized to inspect hazardous waste). EPA employees conduct inspections of facilities for the purpose of determining who is in compliance with environmental regulations, which may require an employee to take physical samples of waste, but never requires them to physically touch or search a person. *See id.* (stating EPA employees may enter areas where hazardous waste is located and may obtain samples of such waste); *see also How We Monitor Compliance*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/compliance/how-we-monitor-compliance> [<https://perma.cc/5HDD-EQ7F>] (last visited Sept. 13, 2018) (specifying that on-site visits by EPA employees may include: “interviewing facility or site representatives . . . reviewing records and reports . . . taking photographs . . . collecting samples, and observing facility or site operations”). Looking at their specified duties, EPA employees, as well as some of the other administrative agency employees the dissent cited, do not conduct searches within the meaning of the law enforcement proviso because they lack the authority to physically pat down the outer surfaces of an individual’s clothing. *See Terry v. Ohio*, 392 U.S. 1, 19 (1968) (finding search occurred when officer patted down outer surface of individual’s clothing). The dissent in *Pellegrino* expressed fear that expanding the law enforcement proviso to TSOs would necessa-

majority's holding that the law enforcement proviso applies to TSOs does not lead to the conclusion that every administrative search falls under the proviso as the dissenters in *Pellegrino* fear.¹⁶⁶

C. *If Other Circuits Do Not Follow the Third Circuit's Interpretation of the Law Enforcement Proviso, TSOs Still Must Be Held Accountable for Misconduct*

If the other circuit courts are unwilling to hold TSOs accountable under the FTCA, as the dissent argued they should, alternative solutions must be implemented to ensure passengers feel safe in airports.¹⁶⁷ Because flying is a nearly inescapable method of travel, individuals should be comforted by the fact that TSOs will face civil consequences if they improperly perform a search.¹⁶⁸ If other circuit courts disagree with the majority's holding in *Pellegrino*, the TSA itself can implement more stringent requirements for its searches than to hold TSOs responsible for misconduct.¹⁶⁹ Alternatively, if this does not occur, then individuals should continue to use social media as an outlet to express their outrage of TSA abuses to incentivize the courts to act.¹⁷⁰

rily expand it to a host of other federal agencies including the Department of Defense, the Food and Drug Administration, and the EPA. *See Pellegrino*, 937 F.3d at 196–97 (Krause, J., dissenting) (describing effects of expanding law enforcement proviso to TSOs). However, the Department of Defense inspects contract records. *See* 10 U.S.C. § 2313 (2018) (listing powers agency has to inspect records). FDA inspectors inspect various food products, such as meats and certain fishes. *See* 21 U.S.C. § 606 (2018) (describing FDA's inspection and labeling procedures). Clearly, neither of these types of inspections fit within *Terry's* definition of a search. *See Terry*, 392 U.S. at 17 (holding officer searched the individual “when he took hold of him and patted down the outer surfaces of his clothing”). Moreover, the majority in *Pellegrino* clarified that TSO searches are different than those performed by other administrative agencies because they are more personal, extend to the general public, and involve intimate searches of a person's physical body and property. *See Pellegrino*, 937 F.3d at 180. Additionally, the majority in *Pellegrino* points out that the risk of abuse for those who undergo a TSO screening is greater than for other administrative searches. *See id.* at 178. Highlighting this difference, the majority noted that “[t]here is a reason that FDA meat inspectors do not generate headlines about sexual assault and other intimate violations.” *See id.*

166. *See Pellegrino*, 937 F.3d at 180 (“Nor is our ruling meant to draw every administrative search into the ambit of the proviso.”).

167. *See supra*, note 6 and accompanying text (explaining how intrusive TSOs often make individuals feel scared to travel); *see also Pellegrino*, 937 F.3d at 197–99 (Krause, J., dissenting) (noting majority's decision is on wrong side of circuit split).

168. *See Stempel, supra* note 142 (describing *Pellegrino* as “a victory to travelers who object to invasive screenings at U.S. airport security checkpoints”).

169. *See infra*, notes 171–76 and accompanying text (providing discussion of how TSA can hold its TSOs accountable for civil misconduct); *see also Pellegrino*, 937 F.3d at 180–81 (holding TSO screenings are covered under FTCA's law enforcement proviso).

170. *See infra*, notes 177–82 and accompanying text (detailing how travelers can hold TSOs accountable for civil misconduct).

1. *The TSA Must Step in*

Although the TSA allows passengers to file a complaint or claim directly with the TSA, this is not always a sufficient remedy.¹⁷¹ To address the issue of TSO misconduct and to be more transparent with travelers, the TSA should give travelers the option to request that TSOs record searches that occur in private rooms and that the recording of the search be saved for a certain amount of time.¹⁷² This procedure can be used to promote trust between the traveler and the TSO.¹⁷³ It can be accomplished most easily if TSOs are required to wear body cameras or if the private screening room has a video camera.¹⁷⁴ Then, the TSOs would be

171. See *Claims*, *supra* note 8 (detailing how passengers file claims with TSA); see also *Complaint*, *supra* note 8 (explaining procedures for filling out complaints with TSA). The TSA, however, notes that “[t]he Federal Tort Claims Act governs the way your claim is processed and establishes your rights in regard to your claim.” See *Claims*, *supra* note 8 (detailing what occurs when claims are submitted to TSA). Consequently, after *Pellegrino*, if circuits remain split on whether the law enforcement proviso applies to TSOs, then passengers may have little legal redress under the FTCA if they are not in the Third Circuit. See *Pellegrino v. United States Transp. Sec. Admin., Div. of Dep’t of Homeland Sec.*, 937 F.3d 164, 198 (3d Cir. 2019) (Krause, J., dissenting) (“A unanimous panel of the Eleventh Circuit squarely rejected the Majority’s interpretation in a persuasive and well-reasoned, albeit non-precedential, opinion.”) (citing *Corbett v. TSA*, 568 F. App’x 690 (11th Cir. 2014) (per curiam)).

172. See Ronnie Polaneczy, *Passenger Turns Down Oatmeal, Airline Summons TSA: More Tales of Airport-Security Abuse*, THE PHILA. INQUIRER (Aug. 3, 2019, 5:00 AM), https://www.inquirer.com/philly/columnists/ronnie_polaneczy/arrested-at-airport-tsa-abuse-body-camera-bodycam-aclu-philadelphia-20180803.html [<https://perma.cc/2HD6-4VNZ>] (discussing that body camera “[p]rovides a neutral ‘third party’ witness to encounters between the passengers and [airport] law enforcement”). Congressman Adriano Espaillat introduced a similar bill into the United States House of Representatives during the 2017-2018 term which would require U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) to wear body cameras. See H.R. 1608, 115th Congress (2017). Known as the “ICE and CBP Body Camera Accountability Act,” it would require ICE and CBP agents and officers to turn on body cameras at the beginning of their shifts, allow each party in any administrative proceeding, civil action, or criminal prosecution to obtain the footage, and provide sanctions for officers who do not turn on their body cameras. See *id.*

173. See Amanda Ripley, *A Big Test of Police Cameras Defies Expectations*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/upshot/a-big-test-of-police-body-cameras-defies-expectations.html> [<https://perma.cc/CBF2-NH3L>] (describing effects body cameras have had on police officers in Washington, D.C.). In Washington, D.C., a study of the effects of police body cameras found that “the effects [of using body cameras] were too small to be statistically significant.” See *id.* (describing “[o]fficers with cameras used force and faced civilian complaints at about the same rates as officers without cameras”). The cameras are still useful, because “[e]ven if cameras do not reduce violent encounters, they can still offer other kinds of benefits: for training, or to hold a rogue officer accountable after the fact.” See *id.* (describing benefits of police cameras).

174. See Martin Kaste, *New Orleans’ Police Use of Body Cameras Bring Benefits and New Burdens*, NAT’L PUB. RADIO, INC. (Mar. 3, 2017), <https://www.npr.org/sections/alltechconsidered/2017/03/03/517930343/new-orleans-police-use-of-body-cameras-brings-benefits-and-new-burdens> [<https://perma.cc/JFA3-PKZT>] (describing effects of New Orleans’ policy of requiring police officers to wear body cameras).

required to turn on the camera at the request of the traveler.¹⁷⁵ This gives the traveler the option of declining to be videotaped if they find the videotape to be more invasive to their privacy rights than the search itself.¹⁷⁶

2. *Using Social Media to Ignite Change*

If other circuit courts refuse to follow the Third Circuit's holding, which provides remedies to innocent travelers who face misconduct from TSOs, then individuals must stand up and voice their concerns.¹⁷⁷ Congress passed the law enforcement proviso in response to a public outcry against law enforcement's abuses after police officers conducted unconstitutional raids throughout the early 1970s.¹⁷⁸ Therefore, individuals

While wearing body cameras, New Orleans' police officers cannot escape punishment for some of the illegal practices that they used to be able get away with when they did not wear cameras. *See id.* ("Busting into people's houses, going into people's cars, just coming up to people and searching them with impunity, and we just aren't seeing as much of that."). Implementing body cameras, however, may be a costly endeavor. *See id.* (explaining costs of body cameras and how reviewing the footage can be time-consuming).

175. *See* Radley Balko, *A New Report Shows the Limits of Police Body Cameras*, THE WASH. POST (Feb. 5, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/02/05/a-new-report-shows-the-limits-of-police-body-cameras/> [<https://perma.cc/5ZRJ-CV7F>] (noting tradeoffs between privacy and accountability with body cameras).

176. *See* Maya Wiley, *Body Cameras Help Everyone—Including the Police*, TIME (May 9, 2017), <https://time.com/4771417/jordan-edwards-body-cameras-police/> [<https://perma.cc/XL2F-7AKF>] (explaining positive effects of having police officers wear body cameras, yet noting some individuals find it infringes on privacy rights).

Civil rights groups are right to stay vigilant about footage being recorded, stored and utilized in a manner that respects the privacy of minors, victims of sexual assault and any person who may be recorded initially as a subject in an incident but isn't ultimately determined to have a role in a crime.

Id.

177. *See* *Pellegrino v. United States Transp. Sec. Admin., Div. of Dep't of Homeland Sec.*, 937 F.3d 164, 168 (3d Cir. 2019) (holding FTCA's law enforcement proviso applies to TSOs); *see also* Norman B. Antin, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act*, 12 CONN. L. REV. 492, 524 (1980) ("[I]t is fundamentally unfair to require innocent victims to bear the losses inflicted upon them through government activity."). "[I]t is clear that increased government responsibility for the tortious and unconstitutional acts of its employees and officials is mandated." *Id.* An "effective" remedy must accompany every legal right. *See id.* (arguing that FTCA should be amended to broaden its scope to apply to "constitutional torts").

178. *See* Henes, *supra* note 11 at 348–49 (discussing why Congress enacted law enforcement proviso). The legislative history for the law enforcement proviso mentioned raids conducted in Collinsville, Illinois by federal drug enforcement agents (DEA). *See id.* at 349 (describing raids in Collinsville, Illinois). Federal DEA agents broke into innocent families' homes "ransack[ed] their home, shout[ed] obscenities and threaten[ed] their lives with [sic] cocked guns." *See* Andrew H. Malcolm, *Harassed Victims of Drug Raids Are Moving*, N.Y. TIMES (July 4, 1973), <https://www.nytimes.com/1973/07/04/archives/harassed-victims-of-drug-raids-are-moving-say-they-were-followed.html> [<https://perma.cc/W6G7-NT4H>]

should continue videotaping incidents in which they suspect TSOs are inappropriately performing searches.¹⁷⁹ Videotaping will shed light on the problem of not holding TSOs accountable for their civil misconduct.¹⁸⁰ The TSA has even responded to videos of TSOs' pat downs that have gone viral, which demonstrates the power of social media.¹⁸¹ Just as those who voiced concerns over law enforcement abuses in the 1970s were able to drive change, individuals today can urge other circuit courts to follow the Third Circuit's decision in *Pellegrino* by voicing their concerns about TSO misconduct.¹⁸²

(detailing DEA raids in Collinsville). “[D]ozens of other mistaken, violent, often illegal and sometimes fatal drug raids had been executed on innocent citizens across the country by Federal, state and local narcotics agents . . .” *See id.*; *see also* Fuller, *supra* note 40 at 385 (explaining Congress amended FTCA in 1974 to add law enforcement proviso in response to “widely publicized law enforcement excesses”).

179. *See Video of TSA Agents Searching 96-Year-Old Woman in Wheelchair Sparks Outrage*, *supra* note 6 (reporting daughter took video of TSOs at Dulles Airport in Washington intensely patting down her ninety-six-year-old mother). The TSA does not prohibit travelers from photographing or videotaping at security checkpoints if the screening process remains undisturbed. *See Frequently Asked Questions*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/frequently-asked-questions> [<https://perma.cc/P5MJ-6QW4>] (last visited Oct. 11, 2019) (noting that disturbing interferences include: “holding a recording device up to the face of a TSA officer so that the officer is unable to see or move, refusing to assume the proper stance during screening, blocking the movement of others through the checkpoint or refusing to submit a recording device for screening”).

180. *See id.* (reporting video went viral of TSOs at Dulles Airport in Washington intensely patting down ninety-six-year-old woman in wheelchair); *see also* Chan, *supra* note 6 (reporting video of TSOs thoroughly patting down thirteen-year-old boy suffering from sensory processing disorder for about two minutes at Dallas Fort Worth International Airport went viral when posed on Facebook).

181. *See TSA Mythbuster: The Rest of the DFW Pat-Down Story*, TRANSP. SEC. ADMIN. (Mar. 28, 2017), <https://www.tsa.gov/blog/2017/03/28/tsa-mythbuster-rest-dfw-pat-down-story> [<https://perma.cc/2SRE-B5CL>] (responding to video that went viral on Facebook of TSO patting down thirteen-year-old boy at Dallas Fort Worth Airport); *see also* Lisa Marie Segarra, *TSA Criticized for Lengths, Invasive Pat-Down of 96-Year-Old Woman in Wheelchair*, FORTUNE (June 9, 2018), <http://fortune.com/2018/06/09/tsa-wheelchair-woman-pat-down/> [<https://perma.cc/KH65-KEHL>] (describing TSA's response to viral video of ninety-six-year-old woman being patted down by TSO). “The video of the search, posted by the woman's daughter . . . has already garnered nearly 9 million views on Facebook. It's also been shared more than 100,000 times and has over 20,000 comments, largely with people criticizing the way the TSA handled the pat-down.” *See id.*

182. *See Pellegrino*, 937 F.3d at 168 (holding the FTCA's law enforcement proviso applies to TSA agents and Ms. Pellegrino's suit can proceed); *see also* Fuller, *supra* note 40, at 385 (explaining why Congress enacted law enforcement proviso in response to 1970s raids).

VI. WE'RE ALL IN THIS TOGETHER: THE IMPACT OF
HOLDING TSOs ACCOUNTABLE

On an average day, TSOs screen approximately 2.1 million passengers and crew throughout the United States.¹⁸³ Although the Third Circuit's decision in *Pellegrino* is not binding precedent on other courts of appeals, the Newark Liberty International Airport, located in New Jersey and thus potentially under the Third Circuit's jurisdiction, found itself as the TSA's ninth highest volume airport during the 2018 spring travel season, with a total of 1,997,744 passengers and crew members screened in one month alone.¹⁸⁴ Despite the majority in *Pellegrino*'s acknowledgment that most TSOs "perform their jobs professionally," its decision still affects millions of travelers and should be affirmed by the United States Supreme Court if the Justice Department chooses to appeal it.¹⁸⁵

If *Pellegrino* comes before the Supreme Court, the Court should affirm the Third Circuit's decision because the lack of accountability for TSOs makes travelers vulnerable and even fearful to travel because of the possibility that TSOs will assault or falsely imprison them with no legal remedy.¹⁸⁶ Moreover, vulnerable groups, such as ethnic minorities, the elderly, and women are highlighted throughout the news as groups subjected to more invasive TSA searches than other groups.¹⁸⁷ Certainly,

183. See *TSA Screens More Than 72 Million Passengers and Crew During Record-Breaking Spring Travel Season*, TRANSP. SEC. ADMIN. (Apr. 23, 2018), <https://www.tsa.gov/news/releases/2018/04/23/tsa-screens-more-72-million-passengers-and-crew-during-record-breaking> [<https://perma.cc/5AQG-RFD7>] (detailing number of people screened by TSOs).

184. See *id.* (stating 1,997,744 passengers and crew were screened at Newark Liberty International Airport from March 15, 2018 to April 15, 2018).

185. See *Pellegrino*, 937 F.3d at 168 ("As nearly all of us can attest who have flown on an aircraft in the United States, the overwhelming majority of TSOs perform their jobs professionally despite far more grumbling than appreciation."); see also THE TIMES EDITORIAL BOARD, *Editorial: TSA Screeners Shouldn't Be Able to Harass Passengers and Get Away with It*, L.A. TIMES (Sept. 4, 2019, 3:00 AM), <https://www.latimes.com/opinion/story/2019-09-03/airline-passengers-tsa-screener-court> [<https://perma.cc/4UGR-KLJJ>] ("If, as seems likely, the Justice Department appeals this sensible decision, the Supreme Court should refuse to reverse it.").

186. See *Video of TSA Agents Searching 96-Year-Old Woman in Wheelchair Sparks Outrage*, *supra* note 6 (reporting that ninety-six-year-old woman said she was scared to travel after TSO's intensive pat down).

187. See Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html> [<https://perma.cc/PP7D-XRSZ>] (describing Muslim-American's experience while traveling in airports). The stigma of "traveling while Muslim" refers to the ways that Muslim women draw the attention of TSOs which often leads to getting "pulled aside at security check-in for secondary screenings and pat-downs, [with] the examiner feeling her head through the hijab." See *id.* (detailing stigma that accompanies Muslim women when traveling in airports). The article describes that:

There are various ways, of course, that Muslims might draw unwanted attention from gate agents and security officials at airports, such as when a Middle Eastern or other foreign-sounding name might result in being compared against no-fly lists. But for followers of Islam who signal their

steps need to be taken to assure that both travelers feel safe while in airports, and TSOs do not take advantage of travelers when conducting searches.¹⁸⁸ Based on all of these concerns, other circuit courts should adhere to the precedent set forth in *Pellegrino*, the Supreme Court should affirm the Third Circuit's decision if it reviews it, and the TSA itself should take proactive steps to ensure searches are appropriately performed.¹⁸⁹ Meanwhile, travelers must continue to voice their concerns about inappropriately performed searches and remain vigilant when undergoing a search that seems to exceed routine procedures.¹⁹⁰

identity through the way they dress, their clothing can sometimes feel like a red flag.

Id. Moreover, other ethnic minorities, such as Sikhs, who also cover their heads with either a turban or scarf are often subjected to extra scrutiny by TSOs. *See id.* (describing how Sikhs feel humiliated when traveling when forced to remove their turbans). Also, the elderly are often vulnerable at airports. *See Video of TSA Agents Searching 96-Year-Old Woman in Wheelchair Sparks Outrage, supra* note 6 (providing details of TSO pat down of ninety-six-year-old woman in wheelchair); Dvorak, *supra* note 6 (reporting that TSO pulled aside sixty-five-year-old woman when passing through airport scanner choked her and groped her private parts).

188. *See* Leah Goldman, *10 TSA Horror Stories of Pat-Downs Gone Wrong*, BUS. INSIDER (Nov. 22, 2010), <https://www.businessinsider.com/tsa-security-horror-stories-2010-11> [<https://perma.cc/8A3M-K5CD>] (describing inappropriately performed TSA pat-downs).

189. *See Pellegrino*, 937 F.3d at 168 (finding law enforcement proviso does covers TSOs).

190. *See Security Screening, supra*, note 26 (describing normal screening procedures used by TSO).