No. 22-15402

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Michele Leuthauser,

Plaintiff–Appellant,

v.

United States, et al.,

Defendants–Appellees,

On Appeal from the United States District Court
for the District of Nevada
No. 2:20-cv-00479-JCM-VCF
Hon. James C. Mahan

AMICUS BRIEF OF THE INSTITUTE FOR JUSTICE SUPPORTING APPELLANT AND REVERSAL

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Dated: May 25, 2022

/s/Patrick Jaicomo
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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the principles of a free society. The foundation of those principles is the ability of individuals to hold the government and its officials accountable for conduct that violates civil and constitutional rights. IJ represents clients in cases concerning the scope of government accountability,[2] and it regularly files amicus briefs on the topic.[3] Part of IJ's mission is to remove the various barriers to the enforcement of individual rights. IJ thus has an interest in this Court's review and reversal of the district court's judgment below.

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[1] No one other than the Institute for Justice authored any part of this brief or contributed money for its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E). The parties have consented to this filing. *See* Fed. R. App. P. 29(a)(2).

[2] *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740 (2021); *Byrd v. Lamb*, 990 F.3d 879 (5th Cir. 2021), *cert. pending*, No. 21-184 (Aug. 6, 2021); *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020), *cert. pending sub nom. Mohamud v. Weyker*, No. 21-187 (Aug. 6, 2021).

[3] *See, e.g.*, *Thompson v. Clark*, 142 S. Ct. 1332 (2022); *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); *Egbert v. Boule*, 142 S. Ct. 457 (2021) (mem.).

ARGUMENT

Across the United States, tens of thousands of federal officers from dozens of agencies are empowered to search and seize. To ensure relief to the victims of that army's inevitable excesses, Congress designed an intentionally redundant system with two parallel, complementary remedies: (1) intentional tort claims against the United States under the Federal Tort Claims Act (FTCA) and (2) Fourth Amendment claims against individual officers under *Bivens*. Congress envisioned this failsafe program to guarantee the vindication of individual rights. Yet victims of federal searches and seizures often find no relief in American courts. This is a case in point.

Michele Leuthauser alleges that a Transportation Security Officer (TSO)[4] at the Las Vegas airport subjected her to an unjustified and abusive body cavity search, violating her rights under the Constitution and

[4] On its website, the TSA describes TSOs as "the face of the agency." It explains that those officers are "the people on the front lines and the most important role at TSA" with "Daily Responsibilities" that include "[p]erforming searches . . . which may include physical interactions with passengers (e.g., pat downs, property searches)" and "conducting bag searches." Trans. Sec. Admin., *Transportation Security Officer* (May 12, 2022), https://perma.cc/E2W7-DEWZ.

Nevada tort law. Rather than permitting Leuthauser's parallel remedies to proceed under the FTCA and *Bivens*, the district court dismissed both. The court reasoned that Leuthauser could not sue the United States because, although TSOs fall within the plain-text definition of "investigative or law enforcement officer" under the FTCA,[5] 28 U.S.C. § 2680(h), that provision applies only to "traditional" law enforcement officers.[6] ER-

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[5] The district court made much of the semantic distinction Leuthauser "concede[d]" between TSA screeners and TSA law enforcement officers. ER-A005. But, as Leuthauser explains on appeal (at 16–18), that distinction is irrelevant to the statutory definition in 28 U.S.C. § 2680(h). *See also* note 6, *infra*. It also conflicts with the ordinary meaning of the term "law enforcement." *Black's Law Dictionary* (9th ed. 2009) (defining "law enforcement" as "[t]he detection and punishment of violations of the law" and explaining, relevant to TSOs, "[t]his term is not limited to the enforcement of criminal laws"). While TSOs are not authorized to enforce criminal laws, they are empowered to execute searches to detect violations of federal law pertaining to items prohibited from commercial air travel. *See* note 4, *supra*.

[6] The FTCA does not include the word "traditional." Instead, it permits claims against "investigative or law enforcement officers." The Act defines that term expansively, encompassing the non-criminal scope of TSO search authority: "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). Leuthauser (at 14–23) and several other circuit courts have exhaustively explained that definition includes TSOs, whose primary function is, after all, searching the persons and effects of the millions of air passengers who travel daily in the United

A019–22. And the court reasoned that Leuthauser could not sue the TSO because her case presents a new context for *Bivens* and special factors counsel hesitation against extending a constitutional remedy.[7] ECF No. 97 at 4–11. The district court is wrong on both issues, *see* notes 4–7, *supra*, but amicus writes to highlight for this Court how the district court's

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States for items that, under federal law, threaten transportation security. *See Iverson v. United States*, 973 F.3d 843, 848–55 (8th Cir. 2020); *Pellegrino v. United States*, 937 F.3d 164, 170–77 (3rd Cir. 2019) (en banc); *see also* note 4, *supra* (TSA describing the execution of searches as a daily responsibility for TSOs). The district court reached the opposite conclusion by employing a circular definition, holding that "the word 'search' means 'an examination of a person's body [or] property . . . *conducted by a law-enforcement officer* . . . .'" ER-A021. In other words, according to the district court, a TSO is not an "investigative or law enforcement officer" because she does not conduct searches because searches can only be conducted by law enforcement officers.

[7] As this Court and others have indicated, Leuthauser also has a Fourth Amendment claim under *Bivens* against the TSO. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Boule v. Egbert*, 998 F.3d 370, 387 (9th Cir. 2021) (permitting a *Bivens* remedy for "a conventional Fourth Amendment . . . claim arising out of the actions by a rank-and-file" federal officer), *cert. granted*, 142 S. Ct. 457; *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1258–59 (9th Cir. 2008) (jurisdictional ruling, permitting *Bivens* claims to proceed against TSA agent); *Dyer v. Smith*, No. 3:19-cv-921, 2021 WL 694811, at *3–5 (E.D. Va. Feb. 23, 2021) (permitting Fourth Amendment *Bivens* claims against a TSA screener). Nevertheless, as Leuthauser notes (at 9), the availability of *Bivens* is not before this Court on appeal.

decision thwarts both Congress's motivation for amending the FTCA and broader accountability principles.

I. Congress was so determined to provide relief to victims of federal search-and-seizure abuses that it twice amended the FTCA to provide a remedy complementary to *Bivens*.

If the district court's denial of any remedy to Leuthauser stands, federal officers are less accountable today than they were a century ago. Until the mid-1900s, it was uncommon to seek damages against federal officers under federal law.[8] Such claims could proceed, however, under state tort law. That changed in 1971. The Supreme Court's decision in *Bivens* opened the federal courthouse doors and added a second avenue for relief against federal officers by permitting constitutional claims against them. Then, in 1974, Congress added a third avenue for relief by amending the FTCA to permit claims for intentional torts committed by federal officers. Those three remedies—state-law torts, FTCA torts, and constitutional claims under *Bivens*—coexisted until 1988, when Congress passed the Westfall Act. That Act foreclosed state-law claims but

[8] *But see, e.g.*, Michael G. Collins, *'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1522 & n.160 (1989).

explicitly confirmed the availability of parallel and independent remedies against federal officers under *Bivens* and the FTCA.

a. Until 1971, federal officers were largely unaccountable for abusive searches and seizures under federal law.

Congress passed the FTCA in 1946, out "of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24 (1953). The Act waived federal sovereign immunity and opened the United States to vicarious liability for certain torts. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended in 28 U.S.C. §§ 1346(b)(1), 1402, 1504, 2110, 2401–02, 2411–12, 2671–80) (Original Act). Among its many exceptions, the FTCA excludes claims for certain intentional torts. 28 U.S.C. § 2680(h). As originally enacted, the so-called "intentional-torts exception" effectively barred the most common tort claims applicable to federal officers who search and seize. Original Act, 60 Stat. at 845–46. Consequently, claims like Leuthauser's were understood to sound in state tort law until 1971. *See* James E. Pfander, *Constitutional Torts and the War on Terror*, 21–22, 103 (2017).

That year, the Supreme Court formally recognized a cause of action against federal officials under the Constitution in *Bivens v. Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Notwithstanding the availability of analogous state tort claims, *see id.* at 390–95, *Bivens* broadly "established that the victims of a constitutional violation by a federal agent have a right to recover damages." *Carlson v. Green,* 446 U.S. 14, 18 (1980). That right was (and is) especially clear for search-and-seizure claims. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017) (explaining *Bivens* is "settled law" in the "search-and-seizure context in which it arose").

b. In 1974, Congress amended the FTCA to provide for claims against "investigative or law enforcement officers" like TSOs and complement the *Bivens* remedy.

Hot on the heels of *Bivens*, Congress amended the FTCA's intentional-torts exception in 1974 to permit a third remedy for federal search-and-seizure abuses. Through language known as the "law enforcement proviso," 28 U.S.C. § 2680(h), Congress accepted the federal government's vicarious liability for intentional torts committed by federal "investigative or law enforcement officers." After the amendment, victims of wrongful federal searches and seizures could bring tort claims against individual officers under state tort law, against individual officers under *Bivens*, and against the United States under the FTCA.

Congress was motivated to adopt the law enforcement proviso by a spate of search and seizure abuses committed by federal officers in the early 1970s. *See* Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment*, 54 N.C. L. Rev. 497, 500–05 (1976). Importantly, however, Congress did not amend the FTCA to the exclusion of *Bivens* (or state-law tort claims). Although the Department of Justice had proposed legislation to make the FTCA an exclusive remedy and displace *Bivens* liability, Congress rejected that proposal. *Id.* at 507, 510–13. Instead, Congress acknowledged the availability of *Bivens* and amended the FTCA to permit additional claims for abusive searches and seizures. An Act to Amend Reorganization Plan No. 2 of 1973, Pub. L. No. 93-253, 88 Stat. 50 (1974). The law enforcement proviso transformed the FTCA into "a counterpart to the *Bivens* case and its progen[]y," "mak[ing] the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)." S. Rep. No. 93-588, at 3 (1973).

Through the amendment, Congress added language to the FTCA's intentional torts exception, permitting claims against the federal

government for "acts or omissions of investigative or law enforcement officers of the United States . . . arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h). And to ensure the FTCA swept in claims against the many, growing varieties of federal agents with search-and-seizure powers (and thus the ability to abuse them), Congress defined "investigative or law enforcement officer" expansively: "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*

The Supreme Court addressed the law enforcement proviso in *Carlson v. Green*, which permitted Eighth Amendment *Bivens* claims against prison officials. 446 U.S. at 16–18. There, the government argued vigorously that the FTCA displaced *Bivens*, but the Court explained it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action," entitling victims of federal abuse to two independent federal remedies. *Id.* at 19–20. Accordingly, *Carlson* noted that the FTCA "contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the

United States as well as a *Bivens* action against the individual officials . . . ." *Id.* at 20.[9]

As Leuthauser's case proves, TSOs have federal authority to, and do, "execute searches" that may injure the public. *See also* note 4, *supra.* Those are precisely the sort of injuries that motivated Congress to amend the FTCA in 1974 and broadly permit a remedy against "investigative or law enforcement officers" complementary to *Bivens*.[10]

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[9] Confirming the breadth of the law enforcement proviso, in *Millbrook v. United States*, 569 U.S. 50 (2013), the Supreme Court again approved intentional tort claims against federal prison officials. *Millbrook* rejected a requirement adopted by this Court and the Third Circuit that the proviso applies only to tortious conduct occurring during law enforcement activities. *Id.* at 56–57 (overruling *Orsay v. U.S. Dep't of Just.*, 289 F.3d 1125, 1136 (9th Cir. 2002); *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986)). The Court explained that the dispositive question is whether the federal officer's status provides the legal authority to search, seize, or arrest. *Millbrook*, 569 U.S. at 56–57.

[10] And contrary to the government's argument, accepted by the district court below, ER-A019–22, neither *Bivens* nor the FTCA limits claims to "traditional" law enforcement practices. Indeed, *Carlson* and *Millbrook* involved claims against prison officials—hardly the beat cops conjured by the phrase "traditional law enforcement officers." *See also* note 6, *supra.*

c. In 1988, Congress confirmed the parallel availability of FTCA and *Bivens* claims for rights violations committed by federal officers.

Congress again confirmed the parallel availability of claims against federal officers under *Bivens* and claims against the United States under the FTCA in 1988. Following the Supreme Court's approval of state-law tort claims against federal employees in *Westfall v. Erwin*, 484 U.S. 292, 296 (1988), Congress amended the FTCA once more. This time, it foreclosed state-law tort claims, exchanging them for FTCA claims, and explicitly acknowledged *Bivens* in statute.

Through the Westfall Act, Congress slammed shut the historically open state courthouse doors, making the FTCA the exclusive remedy for claims against federal officials with a major exception: "a civil action against an employee of the Government . . . brought for a violation of the Constitution of the United States." Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564 (codified at 28 U.S.C. § 2679(b)) (Westfall Act); 28 U.S.C. § 2679(b)(2)(A).[11] With this exception, Congress made explicit in statute

[11] 28 U.S.C. § 2679(b)(2)(B) provides a second exception for federal statutory claims.

what had only been implicit in the law enforcement proviso—that *Bivens* claims are available independent of and parallel to claims under the FTCA. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 122–23, 134 (2009).

As it had in 1974, the Department of Justice again lobbied Congress in 1988 to make the FTCA exclusive of *Bivens*. *Id.* at 135 n.100. Congress declined for a second time. As one legislator put it, "We make special provisions here to make clear that the more controversial issue of constitutional torts is not covered by this bill. If you are accused of having violated someone's constitutional rights, this bill does not affect it. You might be individually sued." 134 Cong. Rec. 15963 (1988) (statement of Rep. Frank).[12]

[12] *See also* H.R. Rep. No. 100-700, at 6 (1988) (citation omitted):

> Since the Supreme Court's decision in *Bivens*, the courts have identified this type of tort as a more serious intrusion of the right of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.

The Westfall Act textually, structurally, and jurisprudentially confirmed what was already true after 1974: the FTCA and *Bivens* provide complementary causes of action that are both available to remedy federal search-and-seizure violations. Textually, the Act explicitly acknowledges the general availability of constitutional claims against federal officials. 28 U.S.C. § 2679(b)(2)(A). Structurally, it foreclosed the historical remedy in state court against federal officials, thereby promoting the importance of the remedies under *Bivens* and the FTCA. Pfander & Baltmanis, *supra*, at 134. And jurisprudentially, Congress enacted the Westfall Act at a time when the sorts of "civil action[s]" available against federal officials for "violations of the Constitution" were robust. Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz v. Economou, 126 Dick. L. Rev. 719, 755 n.206 (2022).

The Supreme Court has repeatedly acknowledged that the Westfall Act confirmed the availability of *Bivens*. "By enacting [the Act], Congress made clear that it was not attempting to abrogate *Bivens*" but that the Act "left *Bivens* where it found it" in 1988. *Hernandez v. Mesa*, 140 S. Ct.

735, 748 n.9 (2020).[13] In 1988, Congress found a very broad version of *Bivens*, which presumed the general availability of constitutional claims. Indeed, by that time the Court had carved just three limited exceptions into the rule from *Bivens* "that a citizen suffering a compensable injury to a constitutionally protected interest could . . . obtain an award of monetary damages against the responsible federal official."[14] *Butz v.*

[13] *See also Tanzin*, 141 S. Ct. at 491 ("In 1988 the Westfall Act foreclosed common-law claims for damages against federal officials, but it left open claims for constitutional violations . . . ."); *United States v. Smith*, 499 U.S. 160, 166–67, 173 (1991) (noting that through the Westfall Act Congress expressly "preserv[ed] employee liability for *Bivens* actions"); *id.* at 182 (Stevens, J., dissenting) (quoting the Department of Justice's explanation that, through the Westfall Act, Congress "ma[d]e explicit what it had assumed all along: that victims of constitutional violations would remain free to pursue a remedy against the individual employee[.]"). James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 474 (2011) ("[T]o the extent Congress has spoken in the succeeding years, its enactments in 1974 and 1988 seek to preserve and accommodate the *Bivens* action rather than displace it.").

[14] *See Schweiker v. Chilicky*, 487 U.S. 412 (1988) (excluding claims related to welfare benefits); *Chappell v. Wallace*, 462 U.S. 296 (1983) (excluding claims relating to military policy); *United States v. Stanley*, 483 U.S. 669 (1985) (same); *Bush v. Lucas*, 462 U.S. 367 (1983) (excluding claims relating to federal employment); *see also* Jaicomo & Bidwell, *supra*, at 753–56 & n.206 (explaining the limited exceptions).

Economou, 438 U.S. 478, 504 (1978). None of the limited exceptions available in 1988 would apply even remotely to TSOs.

Through the Westfall Act, just as it had with the law enforcement proviso, Congress confirmed the parallel availability of search-and-seizure claims against federal officials. Considering the great steps taken by Congress to provide relief for such claims in 1974 and 1988, Leuthauser should have been permitted to proceed under the FTCA and *Bivens* against the United States and the TSO whose abusive search violated her rights. The availability of relief under the FTCA is all the more important now that her *Bivens* claim is no longer before this Court. *See* note 7, *supra*.

II. The district court's dismissal of Leuthauser's claims reveals a broader accountability problem in the United States.

The district court acknowledged that it left Leuthauser with "no judicial recourse" for the violation of her rights.[15] ECF No. 97 at 11. That

[15] Presumably to soften the blow of its decisions, the district court sought to shift the blame to Leuthauser for her lack of relief. It claimed that "although the FTCA precludes an action against a TSA screener . . . nothing prevented Leuthauser from availing herself of the FTCA administrative claim process . . . . 28 U.S.C. § 2672. Under this statutory regime, the agency can settle with claimants for money damages up to $25,000, or

jarring observation did not give the court pause; it should have. Aside from violating congressional intent, as explained above, the district court's judgment reflects the sad reality that rights often have no remedies in the United States today.

One of this nation's founding guarantees was that all rights under American law have remedies in American courts. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). As Justice Story famously wrote in *The Apollon*, 22 U.S. (9 Wheat) 362, 366 (1824), courts "must administer the laws as they exist, without straining them to reach public mischiefs." The judiciary, Justice Story explained, "can only look

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higher if approved by the Attorney General." ECF No. 97 at 11 n.11 (emphasis omitted) . But the district court failed to appreciate that the presentment of such an administrative claim is a prerequisite to Leuthauser having filed her FTCA claim in the first place. 28 U.S.C. § 2675. Thus, Leuthauser's lawsuit is evidence that she "availed herself of the FTCA administrative claim process," and TSA denied Leuthauser's claim. Far from mitigating the injustice of the situation in which Leuthauser now finds herself, the district court's observation makes it worse.

to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *Id.* at 367. Today, however, a tangle of judicially created immunity doctrines obstruct that fundamental judicial task.

As Fifth Circuit Judge Ho recently wrote in a case involving the misconduct of a state prosecutor, "Worthy civil rights claims are often never brought to trial. That's because an unholy trinity of legal doctrines—qualified immunity, absolute prosecutorial immunity, and *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978)—frequently conspires to turn winnable claims into losing ones." *Wearry v. Foster*, ___ F.4th ___, 2022 WL 1315479, at *13 (5th Cir. May 3, 2022) (Ho, J., dubitante). The situation is even bleaker when the misconduct of a federal officer is at issue. "[I]ndividuals whose constitutional rights are violated at the hands of federal officers are essentially remedyless" in "today's rights-without-remedies regime." *Byrd v. Lamb*, 990 F.3d 879, 884–85 (5th Cir. 2021) (Willett, J., concurring). Judge Willett asked, "Are all courthouse doors—both state and federal—slammed shut? If so, and leaving aside the serious constitutional concerns that would raise,

does such wholesale immunity induce impunity, giving the federal government a pass to commit one-off constitutional violations?" *Id.* at 884.

Although the district court disagreed, the answer is no: those doors are not shut; they should not be shut; and, if the Constitution means anything, they cannot be shut. Here, it is abundantly clear from the history of the FTCA and Congress's repeated amendment of the Act that the federal courthouse doors are open to claims like Leuthauser's. The district court was wrong to shut them. This Court should throw them back open.

CONCLUSION

This Court should reverse the judgment of the district court.

Dated: May 25, 2022

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UNITED STATES COURT OF APPEALS
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