

**No. 15-3047**

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**United States Court of Appeal for the Third Circuit**

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Nadine Pellegrino & Harry Waldman,

*Plaintiffs–Appellants,*

v.

United States of America  
Transportation Security Administration, et al.,

*Defendants–Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania

Case No. 2-09-cv-05505

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**BRIEF OF *AMICI CURIAE***  
**FREEDOM TO TRAVEL USA & RESTORE THE FOURTH, INC.**  
**IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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**United States Court of Appeals for the Third Circuit**

**Corporate Disclosure Statement and  
Statement of Financial Interest**

No. 15-3047

Nadine Pellegrino & Harry Waldman

v.

United States of America Transportation Security  
Administration, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Freedom to Travel USA  
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None. Freedom to Travel USA is a non-profit nonpartisan grassroots civic association. It has no parent corporation who is subject to disclosure.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None. Freedom to Travel USA is a non-profit nonpartisan grassroots civic association. It has no shareholders who are subject to disclosure.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/Mahesha P. Subbaraman  
(Signature of Counsel or Party)

Dated: 10-31-2018

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Restore the Fourth, Inc.  
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None. Restore the Fourth, Inc. is a non-profit corporation incorporated under Massachusetts law and registered under Section 501(c)(4) of the Internal Revenue Code. It has no parent corporation who is subject to disclosure.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None. Restore the Fourth, Inc. is a non-profit corporation incorporated under Massachusetts law and registered under Section 501(c)(4) of the Internal Revenue Code. It has no shareholders who are subject to disclosure.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/Mahesha P. Subbaraman  
(Signature of Counsel or Party)

Dated: 10-31-2018

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## Amicus Identity, Interest, & Authority to File

### A. Identity of the Amici

Freedom to Travel USA is a non-profit nonpartisan grassroots civic association concerned with the privacy and dignity of every American who travels by air. Freedom to Travel routinely files amicus briefs in cases that concern TSO screening procedures. *See, e.g.,* Brief of *Amicus Curiae* Freedom to Travel USA in Support of the Petition for a Writ of Certiorari, *Corbett v. TSA*, No. 14-1263 (U.S. filed May 1, 2015). In this capacity, Freedom to Travel was granted permission by the First Circuit to present oral argument in *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013).

Freedom to Travel's membership is exemplified by co-founder Wendy Thomson, who wears a prosthetic leg due to the amputation of her right leg at the age of 4. As a management consultant, Wendy used to travel by air on a regular basis. But since the mid-2000s, Wendy faced increasingly degrading TSO pat-downs because of her prosthetic. Wendy found she had no choice but to give up air travel completely – and her consulting career with it.

Restore the Fourth is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment. Restore the Fourth advances this mission by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Restore the

Fourth also files amicus briefs in significant Fourth Amendment cases. *See, e.g.,* Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, 138 S. Ct. 1663 (2018).

### **B. Interest of the Amici**

The Amici are interested in this case because they collectively believe that federal tort liability is an essential check against abusive government searches of airline passengers. The Amici also believe a plain reading of the Federal Tort Claims Act's law-enforcement proviso, 28 U.S.C. § 2680(h), establishes such liability. On rehearing en banc, the Court should adopt this conclusion.

### **C. Authority of the Amici to File**

The Amici file this brief under 3d Cir. L.A.R. 29.1, which states that "[i]n a case ordered for rehearing in which no additional briefing is directed," any "new amicus" may "file a brief within 28 days after the date of the order granting rehearing."

The Amici also affirm under Fed. R. App. P. 29(a)(4)(E) that no party, nor counsel for any party, in this case: (1) wrote this amicus brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only the Amici, including their members and counsel, have contributed money to fund the preparation and submission of this brief.

## Argument

Under the Federal Tort Claims Act (FTCA), the United States may be sued for “assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution” when these torts are committed by “**any** officer of the United States who is empowered by law to execute searches.” Act of Mar. 16, 1974, Pub. L. No 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)) (emphasis added). The question now before the Court, sitting en banc, is whether this ‘law-enforcement proviso’ covers Transportation Security Officers (TSOs) – government agents empowered to search every person who travels by air. *See* 81 Fed. Reg. 11363 (Mar. 3, 2016).

“[P]lain text ... supplies a ready answer.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). As the Supreme Court declared just this past term, “the word ‘any’ [in a statute] naturally carries ‘an expansive meaning.’” *Id.* “When used (as here) with a singular noun in affirmative contexts, the word ‘any’ ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies *every* member of the class or group.” *Id.* (italics in original) (internal punctuation omitted). The Court thus should not hesitate to hold that the FTCA’s law-enforcement proviso includes TSOs. *See id.* The Court also should not hesitate to reject contrary views that would limit the proviso based on language or concepts that appear nowhere in the proviso (e.g., any view that would limit the proviso’s scope to *criminal* law-enforcement officers).

The Amici recognize, however, that “[t]he life of the law has not been logic: it has been experience.” O. HOLMES, *THE COMMON LAW* 1 (1881). In giving “effect to ... text that actual legislators (plus one President) [have] enacted into law,” any number of experience-driven assumptions or biases may steer a court to read a statute one way versus another. *SAS Inst.*, 138 S. Ct. at 1359. With this in mind, the Amici seek to dispel certain myths about TSO screening that might otherwise cloud how this Court interprets the FTCA’s law-enforcement proviso as to TSOs. These myths are: (1) TSO screening in general entails a minimal risk of abuse; (2) even if some TSO abuses may have occurred in the past, such abuses are no longer a problem today; and (3) even if TSO abuses are still a problem today, litigation does not offer passengers any real hope of relief.

**I. This Court should reject the myth that TSO screening in general entails a minimal risk of abuse.**

There can be no doubt that countless passengers undergo TSO screening at airports every day without incident. As such, it is easy to assume that screening abuses rarely happen, especially when one has never personally experienced or witnessed this kind of abuse. But as Justice Robert Jackson observed nearly 70 years ago, search-related abuses are usually “perpetrated by surprise, conducted in haste ... and limited only by the ... moderation of officers whose own interests and records are often at stake in the search.” *Brinegar v. United States*, 338 U.S. 160, 181–82 (1949) (Jackson, J., dissenting).

As a result, “there are ... many unlawful searches ... about which we never hear.” *Id.* The “citizen’s choice” is to “submit [quietly]” or to “resist at risk of arrest or immediate violence.” *Id.*

When traveling by air, passengers face exactly this situation. “[C]oncerned about being late for their flight or about appearing uncooperative,” passengers are especially vulnerable to abusive TSO screenings (e.g., improper genital touching) and are prone to keep quiet when these abuses occur.<sup>1</sup> And this situation only gets worse when passengers are traveling in a group. No passenger wants to risk inconveniencing their family or friends, much less being separated from them. At the same time, once a passenger has entered a TSO checkpoint, the passenger has no “opportunity for injunction or appeal to disinterested intervention.” *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting). The passenger also cannot turn back, for doing so means risking prosecution and over \$11,000 in fines.<sup>2</sup> See 49 C.F.R. § 1503.401(a), (b)(1) (2017) (civil penalties).

Now factor into this equation the ever-increasing amount of power that TSOs have been granted over the bodies of passengers. The genesis of this power may be traced back to 2010, when the

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<sup>1</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-43, AIR PASSENGER SCREENING: TSA COULD IMPROVE COMPLAINT PROCESSES 23 (2012), <https://bit.ly/2MMvf2E>.

<sup>2</sup> Susanna Kim, *Airport Pat-Downs: TSA Says It Can Fine You for Backing Out*, ABC NEWS, Nov. 23, 2010, <https://abcn.ws/2yGuejT>.

government first allowed TSOs to subject passengers to “enhanced pat-downs”<sup>3</sup>—i.e., manual, intense probing of the “entire body, including the posterior, crotch, and chest.”<sup>4</sup> In the eight years since then, the government has authorized TSOs to conduct even “more involved” pat-downs,<sup>5</sup> to the point where the government has affirmatively “informed local police” to stand down “in case anyone calls to report an ‘abnormal’ ... frisking.”<sup>6</sup>

TSOs also have the power to conduct pat-downs “in a private screening location that is not visible to the traveling public.”<sup>81</sup> Fed. Reg. at 11378. This is in contrast to other well-established passenger screening methods like metal detectors where “the possibility for abuse is minimized by the public nature of the search.” *United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir. 2006) (Alito, J.). It is no surprise then that many TSO abuses have involved backroom pat-downs, during which TSOs have ordered passengers to strip<sup>7</sup> and touched passengers in ways that rise to the level of sexual assault.<sup>8</sup>

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<sup>3</sup> Transportation Security Administration, *Enhanced Pat-Downs*, THE TSA BLOG (Aug. 27, 2010), <https://bit.ly/2Q7qJcK>.

<sup>4</sup> CNN Wire Staff, *A Primer on the New Airport Security Procedures*, CNN (Nov. 23, 2010), <https://cnn.it/2OeYnvx>.

<sup>5</sup> Max Greenwood, *TSA Implementing New Pat-Down Procedures*, THE HILL, Mar. 4, 2017, <https://bit.ly/2SxgEHO>.

<sup>6</sup> Justin Bachman, *TSA Warns Local Police About Its New Airport Pat-Downs*, BLOOMBERG, Mar. 6, 2017, <https://bloom.bg/2lvHmDZ>.

<sup>7</sup> See Richard Esposito & Alicia Tejada, *Now Three Grandmas Say They Were Strip-Searched at JFK*, ABC NEWS, Dec. 6, 2011, <http://>

This leaves the general work environment in which TSOs exercise their pat-down power – a state of affairs that both increases the likelihood of TSO abuses and makes these abuses harder to detect. Two key aspects of this environment stand out:

Uncollected Complaints: TSOs are free to ignore passengers who come to them with complaints. A Government Accountability Office (GAO) study reveals that TSOs are not obligated to “collect ... the screening complaints that air passengers submit in person.”<sup>9</sup> The government also makes no effort to ensure that comment cards are made available to passengers in all airports.<sup>10</sup> Nor does the government take any steps to “monitor air passenger satisfaction with screening operations” or to “identify patterns and trends in screening complaints to help improve screening.”<sup>11</sup>

Zero Accountability: In July 2016, the Homeland Security Committee of the U.S. House of Representatives issued a report identifying many “serious examples of misconduct” by TSOs.<sup>12</sup>

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abcn.ws/2dSDiJL; see also *TSA Admits Violations in Searches of Elderly Women*, WABC 7 NEWS, Jan. 18, 2012, <https://7ny.tv/2oA4vUC>.

<sup>8</sup> See *TSA Pat-Down at DIA Leads to Sex Assault Investigation*, CBS NEWS (DENVER), Jan. 15, 2014, <http://cbsloc.al/1gNugFl> (passenger was “ushered into a small private room at the TSA checkpoint”).

<sup>9</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 1, at 23–24.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> HOMELAND SEC. COMM., U.S. HOUSE OF REPRESENTATIVES, MISCONDUCT AT TSA THREATENS THE SECURITY OF THE FLYING PUBLIC

Such misconduct included “using cocaine on the job, facilitating large scale drug and human smuggling [operations], and engaging in child pornography activities.”<sup>13</sup> But “[w]hile the number of ... misconduct complaints” involving TSOs has increased over time, the government has decided to “investigate[] fewer of them” and to impose “fewer and lesser punishments.”<sup>14</sup> A concrete illustration of this may be seen in the government’s quiet firing of – but failure to criminally charge – two TSOs who fondled multiple unsuspecting male passengers at Denver International Airport.<sup>15</sup>

So, to recap: Passengers in a rush and afraid of being detained. Nearly unlimited TSO power to pat-down passengers that TSOs may exercise in backrooms. And zero government concern for passenger complaints or TSO misconduct. The end result is a perfect storm of abuse.<sup>16</sup> TSOs have sexually victimized numerous male,<sup>17</sup>

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20 (2016), <http://bit.ly/29RVePM>; *see also id.* at 12 (citing over 44,000 misconduct allegations against TSOs between 2013 and 2015).

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 10–11.

<sup>15</sup> Alex Johnson, *No Charges for Denver TSA Screeners Accused of Groping Attractive Men*, NBC NEWS, July 7, 2015, <http://nbcnews.to/1NQ0hNN>.

<sup>16</sup> *See* Daniel Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 3 & nn.4–8 (2013) (collecting cases).

<sup>17</sup> *See, e.g.*, Jason Harrington, *Former TSA Agent: Groping Scandal Is Business as Usual*, TIME, Apr. 15, 2015, <http://ti.me/1ywhFUx>; Jeffrey Goldberg, *For the First Time, the TSA Meets Resistance*, THE ATLANTIC, Oct. 29, 2010, <https://bit.ly/2ENFzE6>.

female,<sup>18</sup> and transgender<sup>19</sup> passengers. TSOs have traumatized kids of all ages.<sup>20</sup> TSOs have humiliated seniors<sup>21</sup> and the disabled.<sup>22</sup> And TSOs have put the lives of passengers in danger.<sup>23</sup>

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<sup>18</sup> See, e.g., Jason Harrington, *Dear America, I Saw You Naked*, POLITICO MAGAZINE, Jan. 30, 2014, <https://politi.co/1cCMRnZ>; *Female Passengers Say They're Targeted by TSA*, CBS NEWS (DFW AFFILIATE), Feb. 3, 2012, <https://cbsloc.al/2PyKik7>.

<sup>19</sup> See, e.g., James Queally, *Transgender Woman Says TSA Detained, Humiliated Her Over Body 'Anomaly'*, L.A. TIMES, Sept. 22, 2015, <http://fw.to/c8PnFeL>; Letter from Adam B. Schiff, et al., Member of Congress, to Peter Neffenger, Administrator, Transp. Sec. Admin., at 1 (Oct. 8, 2014), <http://bit.ly/2cMauO4>.

<sup>20</sup> See, e.g., Elizabeth Chuck, *Father Outraged by 'Uncomfortable' TSA Pat-Down on 10-Year-Old Daughter*, NBC NEWS, Jan. 6, 2016, <http://nbcnews.to/1Ju6h0M>; Ryan Grenoble, *Video of TSA Patting Down Boy, 2, and Sister 6, Sparks Outrage*, HUFF. POST, Apr. 24, 2014, <http://huff.to/1jVEYuC>; Andrew Springer, *Parents of 6-Year-Old Girl Pat Down at Airport Want Procedures Changed*, ABC NEWS: GOOD MORNING AMERICA, Apr. 13, 2011, <http://abcn.ws/2cLjQ1n>.

<sup>21</sup> See, e.g., Esposito & Tejada, *supra* note 7 (TSO strip searches of three elderly women, ages 85, 88, and 66).

<sup>22</sup> See, e.g., Travis Andrews, *'You Cannot Touch Me There,': Breast Cancer Patient Claims TSA 'Humiliated' and 'Violated' Her*, WASH. POST, Dec. 8, 2016, <http://wpo.st/ieQP2>; *Michigan Woman Dying of Leukemia Embarrassed by TSA Pat-Down at Seattle Airport*, N.Y. DAILY NEWS, Oct. 10, 2012, <https://nydn.us/2Sy6hDG>; Jane Allen, *Prosthetics Become Source of Shame at Airport Screenings*, ABC NEWS, Nov. 24, 2010, <http://abcn.ws/2dJmIwE>.

<sup>23</sup> See, e.g., Omar Villafranca, *TSA Agents Allegedly Strip-Search Woman, Fiddle with Feeding Tube*, NBC NEWS (DALLAS), July 19, 2012, <http://bit.ly/2dk1VjL>; *Teen Blames TSA for Broken Insulin Pump*, ABC NEWS (DENVER), May 8, 2012, <http://bit.ly/2cWQbQY>.

**II. This Court should reject the myth that TSO abuses are a thing of the past and no longer an issue today.**

In considering the above list of TSO abuses, it is important to observe that what is past is prologue. Put another way, TSO abuses still take place today, regardless of the “bureaucratic kabuki dance” that the government often uses to push TSO misconduct into the past. *United States ex rel. Joslin v. Cmty. Home Health of Md., Inc.*, 984 F. Supp. 374, 381 (D. Md. 1997). One part of this dance is to cast TSO abuses as “stories” or “personal anecdotes.” (Gov’t Reh’g Opp. 11.) Another part is to spotlight token limits on the screening process.<sup>24</sup> Through this rhetoric, the government makes it easy to believe there is “nothing to see here.” *United States v. Castillo-Rivera*, 853 F.3d 218, 236 (5th Cir. 2017) (en banc) (Smith, J., dissenting). But current events tell a different tale – one that merits close attention.

Indeed, here are just a handful of TSO abuses that passengers have reported both last year (2017) and this year (2018):

- March 2017: TSOs subject Jennifer Williamson’s special-needs son Aaron to an extensive pat-down despite the fact that Aaron suffers from a “sensory processing disorder” that leaves him “oversensitive to stimulation.”<sup>25</sup>

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<sup>24</sup> See, e.g., *Screening for Passengers 75 and Older*, TRANSP. SEC. ADMIN., <http://bit.ly/1RvBBgI> (last visited Oct. 31, 2018) (establishing that seniors who are 75 or older do not need to remove their shoes or jackets during the TSO screening process).

<sup>25</sup> Eun Kim, *Mom ‘Livid’ After TSA Gives Extensive Pat Down to Special-Needs Son*, TODAY (NBC NEWS), Mar. 28, 2017, <https://on.today.com/2PEb5sF>; see also Sky McCarthy, *Mom Films TSA’s*

- April 2017: TSOs subject Jenna MacFarlane to a backroom pat-down of MacFarlane's "breasts, crotch and buttocks" that includes touching MacFarlane's "vagina four times."<sup>26</sup>
- March 2018: TSOs subject Zainab Merchant to a backroom pat-down after Merchant informs the TSOs that she is "on her period and therefore wearing a menstrual pad."<sup>27</sup> The TSOs order Merchant to "pull down her pants," forcing Merchant to "reveal[] her bloodied menstrual pad."<sup>28</sup>
- May 2018: TSOs subject Jeanne Clarkson's 96-year-old wheelchair-bound mother to a prolonged pat-down encompassing "both arms, legs, back, inner thighs" as well as "the area around her stomach and breasts."<sup>29</sup>
- August 2018: TSOs subject Heather Bowser to a backroom pat-down of her prosthetic leg, during which the TSOs force Bowser "to take [her] pants down" over her protest.<sup>30</sup>

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*'Horrible' Pat Down of Special Needs Child, Sparks Internet Outrage*, FOX NEWS, Mar. 29, 2017, <https://fxn.ws/2qi11IG>.

<sup>26</sup> Bruce Henderson, *After Intimate Pat-Down, She Wonders How Much Privacy Must We Give Up to Fly Safely*, CHARLOTTE OBSERVER, Aug. 23, 2017, <https://bit.ly/2AB5Qn>.

<sup>27</sup> Rowaida Abdelaziz, *Muslim Woman Says TSA Forced Her to Show Her Bloodied Pad During Airport Screening*, HUFF. POST, Aug. 23, 2018, <https://bit.ly/2LjzI7r>; see also Letter from Hugh Handeyside, Senior Staff Attorney, ACLU Foundation, to John V. Kelly, Acting Inspector General, U.S. Department of Homeland Security, at 5 (Aug. 14, 2018), <https://bit.ly/2EO08Ai>.

<sup>28</sup> Abdelaziz, *supra* note 27.

<sup>29</sup> Lori Aratani, *Watch the Video of TSA Officers Doing a Pat-Down of a 96-Year-Old Woman in a Wheelchair That Has People Outraged*, WASH. POST, June 12, 2018, <https://wapo.st/2Om6SFj>.

<sup>30</sup> Peggy Gallek, *I-Team: Woman With Prosthetic Leg Says She Felt Humiliated at TSA Checkpoint*, FOX NEWS 8 (CLEVELAND), Aug. 27, 2018, <https://bit.ly/2ACXBFj>.

Another recent accounting of TSO abuses may be found on Twitter,<sup>31</sup> which has become a vital forum for discussing this problem given the government's indifference to collecting passenger complaints.<sup>32</sup> It is on Twitter that U.S. Senator Claire McCaskill first reported her own experience with an abusive TSO pat-down: "Got private, more aggressive pat down. OMG."<sup>33</sup> Many passengers have followed suit. In June 2018, Elizabeth Nolan Brown tweeted about a TSO pat-down that went "under [her] waistband, between [her] thighs and all over [her] crotch."<sup>34</sup> In July 2018, Liz Groeschen tweeted that she almost missed her flight due to a TSO pat-down of her vagina.<sup>35</sup> And in August 2018, Melissa Emmal tweeted about a TSO pat-down that "[f]elt like a sexual assault" insofar as the TSO involved "made contact with [her] labia FOUR times."<sup>36</sup>

At this point, it is important to recognize that for every TSO abuse that is reported, there are many others that go unreported. Many passengers opt to suffer in silence due to fear of humiliation

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<sup>31</sup> See James Bovard, Opinion, *Believe Women: Apply Congress' Christine Blasey Ford Test to TSA's Female Victims*, USA TODAY, Oct. 15, 2018, <https://bit.ly/2yhQEHU> (collecting examples).

<sup>32</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 23–24.

<sup>33</sup> See Aaron Blake, *Sen. Claire McCaskill on TSA Pat-Down: 'OMG'*, WASH. POST, Mar. 11, 2013, <http://wapo.st/15Ic9M2>.

<sup>34</sup> Bovard, *supra* note 31.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

or antagonizing the government if they speak out. Then there are those passengers who may not even be aware that a TSO took advantage of them. As TSO-turned-whistleblower Jason Harrington puts it: “It’s difficult to tell where airport security ends and sexual assault begins these days.”<sup>37</sup> This reality then cements the essential importance of litigation in bringing TSO abuses to light.

**III. This Court should reject the myth that litigation is not a productive means of addressing TSO abuses.**

Lawsuits to redress TSO abuses are not bound to be simple, fast, or inexpensive. The United States is, after all, “the richest, most powerful, and best represented litigant” in the nation. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). But the fact that passenger litigation of TSO abuses may be difficult or generally unavailing is no excuse to read statutes like the FTCA as barring such litigation altogether. Aggrieved passengers have many good reasons to want their day in court, even if the odds are against them. These reasons include: (1) a desire to obtain compensation for their injuries; (2) a desire to secure reforms that will prevent future TSO abuses; and (3) a desire to vindicate the truth of their experience.

Compensation: Litigation affords passengers a real chance of being compensated for physical and dignitary injuries caused by TSO abuses. More often than not, such compensation is product of a

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<sup>37</sup> Harrington, *supra* note 17.

settlement. For example, in July 2012, the government agreed to pay \$225,000 to settle a lawsuit brought by passenger Tim Rasmussen based on a TSO screening that left Rasmussen with “back and hip injuries.”<sup>38</sup> A year earlier, in June 2011, the government agreed to pay \$2,350 to settle a lawsuit brought by passenger Lysie Murley “after her breasts were exposed during a vigorous [TSO] frisking at a Texas airport.”<sup>39</sup> What both of these cases ultimately demonstrate is that passengers can obtain financial compensation for TSO abuses so long as the possibility of litigation remains open to them (i.e., as a key way to bring the government to the bargaining table).

Reform: Beyond money, litigation also gives passengers a chance to secure government reforms that can help prevent certain TSO abuses from ever happening again. Consider passenger Stacey Armato, who sued the government in 2012 after TSOs detained her and refused to follow agency rules for screening breast milk.<sup>40</sup> Two years later – after a district court upheld the viability of Armato’s suit under the FTCA’s law-enforcement proviso<sup>41</sup> – the government

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<sup>38</sup> Thomas Clouse, *TSA Settles Lawsuit from Prosecutor*, SPOKESMAN-REVIEW, July 2, 2012, <https://bit.ly/2Q8KLUh>.

<sup>39</sup> *Tiny Payout in TSA Breast Exposure Lawsuit*, THE SMOKING GUN, June 1, 2011, <https://bit.ly/2qn4bJM>.

<sup>40</sup> *Woman Settles with TSA over Breast Milk Incident*, CBS NEWS, April 23, 2014, <https://cbsn.ws/2yEczcz>.

<sup>41</sup> See *Armato v. Doe*, No. 2:11-cv-02462, 2012 U.S. Dist. LEXIS 190080 (D. Ariz. May 15, 2012) (motion-to-dismiss order).

agreed to pay \$75,000 to Armato and to “retrain [TSOs] and clarify [agency] guidelines on screening breast milk.”<sup>42</sup> Other passenger lawsuits have achieved similar important reforms.<sup>43</sup>

Truth: In our judicial system, “[a] trial is supposed to involve a search for the truth.” *Neaman v. United States*, No. 2:16-cv-00217, 2018 U.S. Dist. LEXIS 20645, at \*20 (D. Nev. Feb. 7, 2018). This ideal holds special meaning to passengers abused by TSOs. In speaking out, these passengers often face reflexive government denials of any misconduct<sup>44</sup> and, in some cases, retaliation. *See, e.g., Vanderklok v. United States*, 868 F.3d 189, 193 (3d Cir. 2017) (detailing allegation that a TSO responded to a passenger complaint by falsely reporting the passenger to the police). Litigation then becomes a passenger’s

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<sup>42</sup> *Woman Settles with TSA*, *supra* note 40.

<sup>43</sup> *See, e.g., Levi Rickert, Court Settlement Targets 15 Airports Required for TSA Training on Handling of American Indian Sacred Items*, NATIVE NEWS ONLINE, Feb. 8, 2018, <https://bit.ly/2Qh7XzC> (“A recent settlement ... [requires TSOs] at 15 airports in the United States to receive added training related to the handling of American Indian sacred objects.”); *Lawsuit filed by Va. Airport Protestor Who Stripped to Underwear Settled*, STAR TRIB., July 10, 2013, <http://strib.mn/2zsaJez> (“[T]he settlement ... call[s] for Richmond airport police to take part in a two-hour training course on the First and Fourth Amendment rights of passengers and others. Airport officials also agreed to review rules affecting free speech.”).

<sup>44</sup> *See, e.g., Villafranca*, *supra* note 23 (quoting the government: “In this specific incident, an investigation was initiated and it was determined that the [TSO] followed standard operating procedures conducted in the presence of a Supervisor TSO.”).

only hope of vindication. Consider the Armato case noted above. By filing suit, Armato was able to obtain surveillance footage proving she was telling the truth about what TSOs did to her.<sup>45</sup>

Taken together, the above aspects of passenger litigation go hand-in-hand with Congress's self-stated reason for enacting the FTCA's law-enforcement proviso: "[to] submit the Government to liability whenever its agents act under color of law so as to injure the public through search[es] ... without warrants." S. REP. NO. 93-588, at 3 (1973). Congress recognized that without a guaranteed right to sue under these circumstances, victims of abusive federal searches might never be compensated, government reform might stagnate, and wrongdoing might prevail over truth.

### Conclusion

No great effort is required determine whether TSOs fall under the FTCA's law-enforcement proviso. They do. When "words are general and include various classes of persons, there is no authority which would justify ... restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all." *United States v. Hartwell*, 73 U.S. 385, 395 (1868). And by rejecting the above myths, the Court ensures the constancy of this rule.

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<sup>45</sup> *Woman Settles with TSA*, *supra* note 40 ("Armato sued ... and ... won thanks, in part, to video she obtained from the TSA.... It shows Armato detained in a glass enclosure, even after she showed a TSA supervisor a printout of TSA guidelines for breast milk.").

Respectfully submitted,

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## Certificate of Compliance

The undersigned counsel certifies:

- Per Fed. R. App. P. 32(g), this amici brief meets the formatting and type-volume requirements of Fed. R. App. P. 32(a) and 29(b)(4). This brief is printed in 14-point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains **3,485 words**. This includes headings, footnotes, and quotations, and excludes: (1) all items identified by Fed. R. App. P. 32(f); and (2) per 3d Cir. L.A.R. 29.1(b), the amicus identity statement required by Fed. R. App. P. 29(a)(4)(D) [formerly Fed. R. App. P. 29(c)(4)].
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## Certificate of Service

The undersigned counsel certifies that on October 31, 2018, he electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. The undersigned counsel further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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