RECORD NO. 18-1931(L)

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

FELICIA SANDERS,
individually and as Legal Custodian for K.M., a minor,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT CHARLESTON

CORRECTED OPENING BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-1931L Caption: Felicia Sanders v. US (and all consolidated cases)

Pursuant to FRAP 26.1 and Local Rule 26.1,

see attached
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/William W. Wilkins Date: 9/7/18

Counsel for: Appellants

CERTIFICATE OF SERVICE

****

I certify that on September 7, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/William W. Wilkins
(signature)

September 7, 2018
(date)

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(Name of party/amicus)

Felicia Sanders, individually and as Legal Custodian for K.M., a minor (18-1931 L)

Jennifer Pinckney, Personal Representative of the Estate of Clementa Pinckney (18-1932)

Jennifer Pinckney (18-1933)

Jennifer Pinckney, individually and as Parent, Natural Guardian and Next Friend of M.P., a minor (18-1935)

Tyrone Sanders, Personal Representative of the Estate of Tywanza Sanders (18-1936)

Felicia Sanders (18-1937)

Anthony Thompson, as Co-Personal Representative of the Estate of Myra Singleton Quarles Thompson; Kevin Singleton, as Co-Personal Representative of the Estate of Myra Singleton Quarles Thompson (18-1938)

Polly Sheppard (18-1939)

Walter B. Jackson, Personal Representative of the Estate of Susie Jackson (18-1940)

Laura Moore, Personal Representative of the Estate of Ethel Lance (18-1941)

Daniel L. Simmons, Jr., as Personal Representative of the Estate of Daniel L. Simmons Sr. (18-1942)

Shalisa Coleman, as Personal Representative of the Estate of Sharonda Coleman-Singleton (18-1943)

Anthony Thompson (18-1944)

Arthur Stephen Hurd, as Personal Representative of the Estate of Cynthia Graham Hurd (18-1945)

Arthur Stephen Hurd (18-1946)

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GLOSSARY OF TERMS

CJIS .....Criminal Justice Information Services, a division of the FBI that "equip[s] our law enforcement, national security, and intelligence community partners with the criminal justice information they need to protect the United States." https://www.fbi.gov/services/cjis (last visited Oct. 8, 2018).

Delayed .....“Delayed means the response given to the FFL indicating that the transaction is in an ‘Open’ status and that more research is required prior to a NICS ‘Proceed’ or ‘Denied’ response. A ‘Delayed’ response to the FFL indicates that it would be unlawful to transfer the firearm until receipt of a follow-up ‘Proceed’ response from the NICS or the expiration of three business days, whichever occurs first.” 28 C.F.R. § 25.2.

Denied .....“Denied means denial of a firearm transfer based on a NICS response indicating one or more matching records were found providing information demonstrating that receipt of a firearm by a prospective transferee would violate 18 U.S.C. 922 or state law.” 28 C.F.R. § 25.2.

FFL .....“FFL (federal firearms licensee) means a person licensed by the ATF [Bureau of Alcohol, Tobacco, Firearms and Explosives] as a manufacturer, dealer, or importer of firearms.” 28 C.F.R. § 25.2.

III .....“Interstate Identification Index System or ‘III System’ means the cooperative federal-state system for the exchange of criminal history records … .” 28 C.F.R. § 20.3(m).

LCSO .....Lexington County Sheriff’s Office.

N-DEx .....National Data Exchange system. “The N-DEx system is an unclassified national information sharing system that enables criminal justice agencies to search, link, analyze, and share local, state, tribal, and federal records.” https://www.fbi.gov/services/cjis/ndex (last visited Oct. 8. 2018).

NCIC .....“NCIC (National Crime Information Center) means the nationwide computerized information system of criminal justice data established by the FBI as a service to local, state, and Federal criminal justice agencies.” 28 C.F.R. § 25.2.

NICS .....“NICS means the National Instant Criminal Background Check System, which an FFL must, with limited exceptions, contact for information on

whether receipt of a firearm by a person … would violate Federal or state law." 28 C.F.R. § 25.2. NICS is located within CJIS. *See* https://www.fbi.gov/services/cjis/nics (last visited Oct. 8, 2018)

NICS Index .... "NICS Index means the database, to be managed by the FBI, containing information provided by Federal and state agencies about persons prohibited under Federal law from receiving or possessing a firearm. The NICS Index is separate and apart from the NCIC and the Interstate Identification Index (III)." 28 C.F.R. § 25.2.

NTN ....."NTN (NICS Transaction Number) means the unique number that will be assigned to each valid background check inquiry received by the NICS. Its primary purpose will be to provide a means of associating inquiries to the NICS with the responses provided by the NICS to the FFLs." 28 C.F.R. § 25.2.

POC ....."POC (Point of Contact) means a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. …" 28 C.F.R. § 25.2.

Proceed ....."Proceed means a NICS response indicating that the information available to the system at the time of the response did not demonstrate that transfer of the firearm would violate federal or state law. …" 28 C.F.R. § 25.2.

SOP .....Standard Operating Procedure

JURISDICTIONAL STATEMENT

This consolidated appeal arises from the dismissal of 16 consolidated complaints filed by the victims and survivors of a mass shooting at the Mother Emanuel A.M.E. Church in Charleston, South Carolina, on June 17, 2015. The district court had original subject matter jurisdiction pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) and 28 U.S.C. §§ 2671-2680.

The district court dismissed the consolidated cases on the basis that it lacked subject matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), because the Parishioners' claims were barred by the "discretionary function" exception to FTCA liability, *see* 28 U.S.C. § 2680(a). Additionally, the district court ruled that the Government was entitled to the benefit of the Brady Act's immunity provision, 18 U.S.C. § 922(t)(6). The district court entered its amended order and judgment on June 18, 2018. Appellants timely filed notices of appeal on August 10, 2018.

The district court's amended order and judgment disposed of all claims. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in granting the Government's motion to dismiss based on the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a)?

2. Did the district court err in ruling that the Government was immune from liability under 18 U.S.C. §922(t)(6)(A)?

STATEMENT OF THE CASE

On June 17, 2015, Dylann Roof entered the Mother Emanuel A.M.E. Church in Charleston, South Carolina. After pretending to participate in a prayer meeting, he murdered nine worshipers, including Senior Pastor Clementa C. Pinckney, and injured three others. Roof committed these horrific acts using a Glock firearm he was prohibited from possessing and which, but for the Government's negligence, he would not have been able to purchase.

Multiple separate actions were brought by the victims' estates, the survivors, and family members (collectively, "Parishioners"), seeking to hold the United States ("the Government") accountable for disregarding its statutory and regulatory obligations to perform background checks on would-be purchasers of firearms. Parishioners allege that the Government's negligence—both in performing the background check and in maintaining the accuracy of its data—resulted in Roof obtaining the firearm he later used to commit the Mother Emanuel massacre.

A. Roof's February 2015 Arrest and Resulting Disqualifier

On February 28, 2015, Roof was arrested for illegal possession of a controlled substance at the Columbiana Center Shopping Mall, which is located in Lexington County, South Carolina and within the city limits of Columbia, South Carolina. Although the city of Columbia is predominantly located within adjacent Richland County, the city limits encompass the area located in and around the Columbiana Center. Consequently, the Columbia Police Department ("Columbia PD") has

jurisdiction in the mall, and Roof was arrested by a Columbia PD officer. Because the arrest occurred in Lexington County, Roof was booked at the Lexington County Sheriff's Office ("LCSO"). J.A. 329-335. The following day, the Columbia Municipal Court issued an arrest warrant for Roof. J.A. 331. The warrant noted that the offense occurred within the "Municipality of the City of Columbia." *Id.* Roof was served with the arrest warrant on March 2, 2015.

The Columbia PD also prepared an incident report concerning Roof's arrest. J.A. 325-328. The incident report states that Roof was found to be in possession of Suboxone, a Schedule III controlled substance for which he did not have a prescription. *Id.* On March 6, 2015, the South Carolina Law Enforcement Division ("SLED"), on behalf of the Columbia PD, submitted the incident report on Roof's arrest to the National Data Exchange ("N-DEx"), an FBI-maintained database containing information submitted by federal, state, and local law enforcement agencies. J.A. 1079. The LCSO independently submitted the incident report to the N-DEx the following day. J.A. 442. The FBI has publicly acknowledged that the information in the incident report was sufficient to establish that Roof was prohibited from possessing a firearm on the grounds that he was "an unlawful user of or addicted to [a] controlled substance," 18 U.S.C. § 922(g)(3).

On April 11, 2015, approximately six weeks after his arrest, Roof attempted to purchase a semi-automatic Glock firearm from Shooter's Choice, a federal firearms licensee ("FFL") in Columbia. Pursuant to the Brady Handgun Violence Prevention

Act ("Brady Act"), Pub. L. No. 103-159, 107 Stat. 1536 (1993), and its implementing regulations, *see* 28 C.F.R. Part 25, Shooter's Choice contacted the Operations Center for the National Instant Criminal Background Check System (the "NICS") to initiate a background check on Roof, to determine if his receipt of the Glock would violate federal or state law. J.A. 443; *see* 28 C.F.R. § 25.6(a). South Carolina is a "non-Point of Contact" state, meaning that all FFLs in the state must contact the NICS directly to initiate a background check prior to selling a firearm. J.A. 351-352; *see* 25 C.F.R. § 25.6.

B. The National Instant Criminal Background Check System (NICS)

Federal law disqualifies certain individuals from buying, owning, or possessing a firearm, *see* 18 U.S.C. § 922(g), and likewise prohibits dealers from selling a firearm to such individuals, *see* 18 U.S.C. § 922(d). Disqualified individuals include those who have been convicted of a felony, *id.* § 922(g)(1), and anyone "who is an unlawful user of or addicted to any controlled substance," *id.* § 922(g)(3).

Despite the existence of 18 U.S.C. § 922, in the early 1990s the United States was "beset by an epidemic of gun violence," and federally disqualified individuals still had "relatively easy access to guns." H.R. Rep. No. 103-344 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985-87. By enacting the Brady Act, Congress sought to ameliorate such problems through the creation of a national system that could rapidly perform background checks and quickly provide responses to FFLs, at the point of purchase, to confirm the lawfulness of a sale. *See id.* Accordingly, the Brady Act

directed the U.S. Attorney General to develop such a system. In turn, the Attorney General tasked the FBI with the creation of the NICS as a section within the FBI's Criminal Justice Information Services ("CJIS") Division. J.A. 342-349. By passing the Brady Act, the Government voluntarily undertook the duty to conduct mandatory background checks on persons seeking to purchase firearms from FFLs.

The procedures for performance of a background check are governed by the Brady Act implementing regulations, *see* 28 C.F.R. Part 25, and by Standard Operating Procedures ("SOPs"). Under the regulations, an FFL initiates an NICS background check by contacting the NICS Operations Center and providing certain information. *See* 28 C.F.R. § 25.6(b). The Operations Center employee who takes the call must begin by confirming the FFL's identity and assigning a NICS Transaction Number ("NTN"). 28 C.F.R. § 25.6(c)(1)(i), (ii). The employee must then check the "relevant" databases for potential disqualifying factors: (1) the National Crime Information Center (NCIC) database, which contains information on various classes of individuals (such as individuals on supervised release, sex offenders, and suspected terrorists); (2) the NICS Index, an FBI-maintained database identifying individuals prohibited from possessing firearms; and (3) the Interstate Identification Index ("III System"), a "cooperative federal-state system for the exchange of criminal history records," 28 C.F.R. § 20.3(m). *See* 28 C.F.R. § 25.6(c)(1)(iii). Based on the database search, the employee must:

> (iv) Provide the following NICS responses based upon the consolidated NICS search results to the FFL that requested the background check:
>
> (A) "Proceed" response, if no disqualifying information was found in the NICS Index, NCIC, or III.
>
> (B) "Delayed" response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal or state law. …
>
> (C) "Denied" response, when at least one matching record is found in either the NICS Index, NCIC, or III that provides information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C.A. § 922 or state law.

28 C.F.R. § 25.6(c)(1)(iv).

If a background check is placed in "delayed" status based upon potentially disqualifying information, NICS has three business days to conduct additional research to arrive at a "proceed" or "denied" designation, during which time the FFL may not transfer the firearm to the prospective transferee. 28 C.F.R. § 25.6(c)(1)(iv)(B). Such additional research is performed by NICS employees designated as "legal instrument examiners." J.A. 359. Examiners are required to adhere to the SOPs in conducting additional research. J.A. 647, 649. In other words, the SOPs are mandatory. J.A. 647, 649, 815, 851-852, 854, 930-933, 1087-1088, 1090-1091. "Processing Delay Queue Transactions," directs examiners to request and review all records that match the person seeking to purchase a firearm. J.A. 472-476. Furthermore, SOP 5.0 mandates: "It is the responsibility of the NICS Section to answer all Delayed transactions within the three-business day time frame." J.A. 476.

Initially, the examiner must conduct internal research pursuant to the requirements of SOP 5.5.4. J.A. 478-489. This SOP begins with the following mandate:

> All internal automated systems (NTN Inquiry [by name, FBI, social security number], NGI, NCIC, DDF, ATFRDD, and Web sites) must be checked. The NICS Library (e.g., state information pages, terminology pages) and Westlaw, when applicable, must be researched by the Examiner. The LAT [Legal Research & Analysis Team] may then be contacted **prior** to calling or faxing any external agency to determine the level/disposition of the arrest charge.

J.A. 478 (emphasis in original). SOP 5.5.4 provides detailed instructions on how each search is to be performed. *Id.*

If the information obtained through internal research is insufficient to arrive at a "proceed" or "denied" determination, the examiner **must** perform external research in accordance with SOP 5.5.5:

> The Examiner will contact the state POC (point of contact), the courts, district attorneys, probation officers, arresting agencies, etc. for disposition, level of offense, incident report, etc. … in accordance with the preference indicated on the state Processing Page and Contact List. … **Every effort must be made to obtain the necessary information, in order to reach a final decision on a NICS transaction during the research phase**.

J.A. 549 (emphasis added). SOP 5.5.5 provides detailed requirements on how external research should be performed and documented. *Id.*

The N-DEx is also housed within CJIS. The N-DEx is a comprehensive database created after 9/11 that is intended to "provide criminal justice agencies with

a powerful new investigative tool to search, link, analyze and share criminal justice information such as incident/case reports … on a national basis to a degree never before possible." CJIS N-DEx Policy & Operating Manual § 1.1.1.[1] It is undisputed that the incident report detailing the facts and circumstances of Roof's arrest was available in the N-DEx prior to April 11, 2015. J.A. 442. However, NICS examiners do not have access to the trove of information contained in the N-DEx.

C. The Failed NICS Background Check on Roof

On Saturday, April 11, 2015, the NICS Operations Center received the request from Shooter's Choice for an NICS background check on Roof. J.A. 443. NICS's initial search of its databases revealed information in the III System regarding two potential disqualifiers, namely that he was potentially an unlawful user of or addicted to a controlled substance, *see* 18 U.S.C. § 922(g)(3), and that he may have been convicted of a felony, *see* 18 U.S.C. § 922(g)(1). Because the information available in the III System was not, by itself, a sufficient basis to issue a "denied" response, the transaction was placed into the "delayed" queue. J.A. 644, 652-654, 703. On Monday, April 13, 2015, NICS employee Jennifer Conley ("Examiner Conley") pulled the transaction from the delay queue to conduct additional research. J.A. 663. Examiner Conley's primary responsibility is to research transactions in Region II, which includes South Carolina. J.A. 643-644. NICS assigns examiners to specific regions so that they

[1] *Available at* https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view (last visited Oct. 2, 2018).

will "have in-depth knowledge of that state and their laws regarding the Brady Act." J.A. 1221-1222.

The initial course of Examiner Conley's research was internal, and thus was governed by SOP 5.5.4. J.A. 478-489. As required, Examiner Conley checked all available internal automated systems, except the N-DEx, for additional information, but found nothing beyond what was already contained in the III System. J.A. 640-647. Accordingly, Examiner Conley was required to conduct external research pursuant to SOP 5.5.5. J.A. 549-565. Specifically, Examiner Conley was required to contact **all** available sources, including the state POC, the courts, and the arresting agency, to ensure that all resources are exhausted, and to make **every** effort to obtain the information needed to reach a final decision on the transaction within three business days. J.A. 549.

Examiner Conley testified that several different NICS documents were available to her which guided her external research. J.A. 687-690. These documents include the South Carolina Processing Page, J.A. 491-494, which identified the agencies in South Carolina that examiners must contact, a South Carolina Contact List, J.A. 495-499, which identified particular agencies within each county of South Carolina that must be contacted, and a South Carolina City/County List, J.A. 500-518, which identified the county in which each city in South Carolina is located. The South Carolina Processing Page clearly and emphatically requires examiners to contact

courts, arresting agencies, and all other available agencies as part of their external research:

- **Courts and arresting agencies are the primary contact (follow Contact List).**
- **During Initial Research Please Contact ALL Available Agencies Per Contact List**.

J.A. 491 (emphasis in original). The South Carolina Processing Page also specifically identifies both sheriff's offices and police departments as the contact for a "police/incident report." Nothing contained in the Processing Page would steer the examiner away from contacting a sheriff's office or police department for an incident report.

In addition, the South Carolina Processing Page identifies the South Carolina Law Enforcement Division ("SLED") as the Point of Contact and provides SLED's address, phone number, fax number, a contact person at SLED, and hours of operation. J.A. 493. The Processing Page instructs examiners to "[c]ontact [SLED] for clarifications on SC record." J.A. 493.

The III System incorrectly listed the LCSO as the arresting agency for Roof. J.A. 450. Following the instructions of SOP 5.5.5, Examiner Conley began her external research by checking the online case index for Lexington County General Sessions Court. J.A. 682. She found a case captioned *State v. Dylann Storm Roof*, which noted a pending charge of "Drugs/Poss. of other controlled sub. in Sched. I to V – 1st offense." J.A. 521. Although this online docket did not explicitly identify the

Columbia PD as the arresting agency, the address listed was that of the Columbia PD's headquarters. J.A. 522.

Based on the information provided in the III System, Examiner Conley mistakenly sent a fax to the LCSO requesting a copy of the Roof incident report for March 1, 2015.[2] J.A. 661. The LCSO responded later that afternoon by returning the fax with a handwritten note stating,

> [N]o arrest or report for this date. The last arrest was on 2-28-15,
> Columbia PD will have the Report.

J.A. 583. Although the note from the LCSO stated plainly—and accurately—that the incident report could be obtained from the Columbia PD, Examiner Conley **never** contacted the Columbia PD. Instead, she checked the contact list for Lexington County, where she found a listing for "West Columbia PD." J.A. 497, J.A. 752. Disregarding the unavoidable fact that the LCSO's response identified "Columbia PD," not "West Columbia PD," Examiner Conley faxed an information request to the West Columbia PD. J.A. 584-585. The next morning, the West Columbia PD returned the fax with the following handwritten response:

> -- Not WCPD Warrant
> This is not a WCPD Arrest

J.A. 585. At this point, Examiner Conley had been told by the LCSO that the arresting agency was the "Columbia PD," and by the West Columbia PD that it was ***not*** the

[2] Examiner Conley also sent a fax to the Lexington County Solicitor's Office, but never received a response. J.A. 684.

arresting agency. The SOP directive to make "[e]very effort to obtain the necessary information," obliged Examiner Conley to review the City/County list included in the South Carolina processing materials. Had she done so, she would quickly have determined that Columbia is in Richland County and, referring to the Richland County contact list, she would have obtained the contact information for the Columbia PD. J.A. 698-699. Alternatively, she could have called the LCSO or the West Columbia PD for additional information. Indeed, a report by the FBI's Inspection Division concluded that either agency "would have likely assisted the Examiner [to] obtain additional information." J.A. 1429. Moreover, the SC processing materials instructed Examiner Conley to contact the state POC, in this case SLED, for clarification of the state record. The circumstances amply justified, if not required, a call to SLED, or to the Lexington County General Sessions Court, to obtain clarification as to where information could be found in the state record.

If Examiner Conley had complied with SOP 5.5.5, she would have obtained the Roof incident report and, as admitted by then-FBI Director James Comey, she would have issued a "denied" response to the NICS background check, and Shooter's Choice would not have allowed Roof to purchase the Glock. J.A. 765-766. Instead, Examiner Conley **abandoned** any further effort to obtain the information needed to reach a "proceed" or "denied" decision on Roof's background check. Consequently, when Roof returned to Shooter's Choice on the evening of April 16, 2015, he was able to obtain the firearm he used to commit the Mother Emanuel massacre.

D. The Failed Data Integrity

Federal regulations provide that the "FBI will be responsible for maintaining data integrity during all NICS Operations that are managed and carried out by the FBI." 28 C.F.R. § 25.5(a). Debra Russell was the NICS Region Coordinator in charge of managing and maintaining the Contact List for Region II, including South Carolina. J.A. 1033. She had been in charge of the South Carolina Contact List since 2006 and had access to the internet. J.A. 1038-1039. She **never** made any effort to update the Contact List. She **never** checked with any source, such as the United States Census Bureau, to determine which cities were located in more than one county. J.A. 1037-1039.

However, in conducting the NICS research after the massacre, Coordinator Russell learned that the city of Columbia is in both Richland and Lexington Counties. J.A. 1084-1085. Stephen Morris, Assistant Director of CJIS, confirmed that the South Carolina Contact List contained data used by the FBI NICS Section to carry out operations and research to facilitate the examiners' ability to contact arresting agencies. J.A. 944. Morris further confirmed that it is **mandatory** for the FBI to maintain **data integrity** during all NICS Operations managed and carried out by the FBI. J.A. 947-948. Morris further testified that keeping the Contact List up to date is **required** to maintain data integrity. J.A. 954. Coordinator Russell's failure to ensure the integrity of the South Carolina Contact List by including Columbia on the Lexington County list violated 28 C.F.R. § 25.5(a). Had the Lexington County list

properly included Columbia, Examiner Conley would have found a listing for the Columbia PD from which she could have easily obtained Roof's incident report.

In sum, the Government did not complete the background check of Roof despite knowledge that the III System contained a disqualifier that Examiner Conley was required to research. Despite the fact that Examiner Conley knew that there was a docket entry in the General Sessions Court listing an alleged drug offense committed by Roof, she failed to contact the arresting agency (the Columbia PD), SLED, or the court to determine whether any matching records demonstrated that Roof's receipt of a firearm was unlawful. The Government also failed to maintain data integrity. In all of this, the Government violated mandatory statutes, federal regulations and SOPs. As a result, the Government allowed Roof to obtain and possess a firearm that was, without question, prohibited.

E. Procedural History

In 2016, Parishioners filed 16 separate complaints, J.A. 106-322, all alleging that the Government was liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, which provides that "[t]he United States shall be liable … in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see* 28 U.S.C. § 1346(b) (providing that liability under the FTCA is governed by "the law of the place where the act or omission occurred"). Parishioners alleged that the Government (1) failed to conduct the NICS background check of Roof in accordance with the Brady Act, 28 C.F.R. Part 25, and applicable SOPs; (2)

failed to issue a denial of the firearm sale for Roof based on the information establishing that he was prohibited from receiving the firearm; and (3) failed to maintain data integrity during all NICS operations. J.A. 175-190. The district court consolidated all of the cases pursuant to Fed. R. Civ. P. 42(a). J.A. 385-389.

The Government moved to dismiss for lack of subject matter jurisdiction and failure to state a claim, asserting immunity from liability under the "discretionary function" exception to the FTCA. J.A.323-324; *see* 28 U.S.C.A. § 2680(a) (providing immunity from liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government"). Parishioners opposed the motion and, in addition, filed a motion for jurisdictional discovery. J.A. 384.

The district court denied the Government's motion to dismiss and granted Parishioners' motion for jurisdictional discovery. J.A. 390-403. Discovery proceeded, after which the Government renewed its motion to dismiss based upon a lack of subject matter jurisdiction, again invoking the discretionary function exception to FTCA liability. J.A. 404. In its reply brief, the Government included a one-sentence argument that it was also entitled to immunity under 18 U.S.C. § 922(t)(6)(A). After briefing by all parties, the court conducted a hearing which was followed by additional briefing by the parties.

On June 18, 2018, the district court granted the Government's motion to dismiss, concluding that the Government was immune from liability under the

discretionary function exception to the FTCA. J.A. 1650-1654. Alternatively, the court concluded that the Government was protected from liability for damages by the Brady Act's immunity provision, 18 U.S.C. § 922(t)(6). J.A. 1654-1655.

In its memorandum opinion, the district court expressed considerable ire over the Government's refusal to give NICS examiners access to the N-DEx, describing this refusal as one of several "abysmally poor policy choices" made by the Government. J.A. 1651. The court further rejected the Government's arguments for the correctness of this choice as "simple nonsense," *id.*, and found that there was "clear evidence of system failures in the federal background check system," J.A. 1656. The court concluded its opinion by suggesting that relief might be available to Parishioners via a private bill from Congress.[3] *Id.* (citing a 1984 act, sponsored by Senator Strom Thurmond, to benefit 16 employees of the Charleston Naval Shipyard).

Parishioners now appeal.

[3] The district court's suggestion that Parishioners pursue a private bill is somewhat ironic, in view of the fact that the FTCA was enacted to relieve Congress of the burdens imposed by the private bill process. *See Indian Towing Co. v. United States,* 350 U.S. 61, 68–69 (1955).

SUMMARY OF THE ARGUMENT

The district court erred in concluding that it lacked subject matter jurisdiction. First, the court erred in holding that the Government's negligence in conducting Roof's NICS background check was a policy choice, immunized from liability under the FTCA's "discretionary function" exception. Although the district court correctly stated the applicable law, its analysis was flawed. The district court failed to recognize that the federal regulations and mandatory SOPs prescribed--strictly and in great detail--the way background checks are to be conducted, leaving examiners with ***no*** discretion in choosing the steps to be taken, or not to be taken, when conducting background checks.

Second, federal regulation 28 C.F.R. § 25.5(a) mandates that the NICS maintain **data integrity** in its operations with no discretion to choose whether or not to do so. The NICS failed to maintain data integrity in its county lists for South Carolina by not listing the city of Columbia in Lexington County in violation of the regulatory mandate. The district court did not examine or address the Parishioners' claim for failure to maintain data integrity.

Third, the district court erred in concluding that the discretionary function exception protects the Government's refusal to give NICS examiners access to the N-DEx. While the N-DEx is a distinct database, (J.A. 904-905, 1270, 1371-1373) it clearly falls within the scope of the "NICS Index" as defined by 28 C.F.R. § 25.2.

Consequently, the Government had no discretion to exclude the N-DEx from NICS examiners.

Fourth, the district court erred in finding that the immunity provision of 18 U.S.C. § 922(t)(6) grants blanket immunity to the Government from civil suits for negligence in conducting all aspects of the NICS background checks. In fact, § 922(t)(6) provides limited immunity to government employees who are "responsible for ***providing information to***" NICS. The statute does not extend immunity to employees responsible for conducting the background check or to the federal government itself.

ARGUMENT

I. STANDARD OF REVIEW

The district court dismissed Parishioners' claims for lack of subject matter jurisdiction, under Federal Rule of Civil Procedure 12(b)(1). Consequently, this Court "review[s] the district court's factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom de novo." *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). "[W]hen a defendant challenges subject matter jurisdiction via a Rule 12(b)(1) motion to dismiss, the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.*; *see also Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (recognizing that a district

court "may consider the evidence beyond the scope of the pleadings to resolve factual disputes concerning jurisdiction").

II. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT APPLY.

Parishioners' claims are brought pursuant to the FTCA, 28 U.S.C. § 2674. "As a general matter, the United States is immune from suit unless it waives that immunity." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 341 (4th Cir. 2014). The FTCA waives the Government's immunity from tort liability under certain conditions and subject to certain exceptions. *See id.* The Government contends that it is immune from liability under the "discretionary function" exception, which immunizes the Government from liability for "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a).

Application of the discretionary function exception requires a two-step analysis. First, the court must decide whether the challenged conduct "involves an element of judgment or choice." *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988). "When a statute, regulation, or policy ***prescribes*** the employee's conduct, the conduct cannot be discretionary and thus is unprotected by the discretionary function exception." *Wood v. United States*, 845 F.3d 123, 128 (4th Cir. 2017) (emphasis in original; citing *Berkovitz*, 486 U.S. at 536). If the challenged conduct is the product of judgment or choice, the question becomes "whether that judgment is of the kind

that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. "[P]roperly construed," the discretionary function exception "protects only governmental actions and decisions based on considerations of public policy." *Id.* at 537. The overarching principle is that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984).

The United States Supreme Court has succinctly summed up the application of the discretionary function exception to governmental conduct in the regulatory context:

> Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

United States v. Gaubert, 499 U.S. 315, 324 (1991).

The district court erred in its application of the discretionary function exception and erred in its assessment of the facts leading to its erroneous dismissal. The governmental acts at issue here did not involve "the permissible exercise of

policy judgment," *Berkovitz*, 486 U.S. at 537, but rather involved a "prescribe[d]… course of action" to which Examiner Conley was required to adhere, *id.* at 536. As the Supreme Court recognized in *Berkovitz*, when "the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." *Id.* at 536.

In *Berkovitz*, a child and his parents sued the United States after the child contracted polio from an oral vaccine. The plaintiffs contended, first, that a division of the National Institutes of Health (NIH) had licensed the manufacturer to produce the oral polio vaccine without receiving certain safety data required by applicable statutes and regulation, and second, that the FDA had wrongly approved the release of the particular lot of the vaccine ingested by the child, even though it did not meet regulatory safety standards. *Id.* at 542-544. As to the first theory of liability, the Supreme Court held the discretionary function exception does not bar a claim based on an allegation that a federal agency has acted without complying with preconditions imposed by statute or regulation. As to the second theory of liability, the Court held that the discretionary function exception would not shield the United States from liability for approving a lot of vaccine without determining whether it met regulatory safety standards, or after determining that the lot did not meet such standards. *See id.* at 544.

This case is like *Berkovitz*. The failure to complete the NICS background check of Roof was contrary to previously established federal regulations requiring further

research, 28 C.F.R. § 25.6(c)(1)(iv)(B), and SOPs specifying the steps to take in conducting that research. In performing her tasks, Examiner Conley had no discretion to disregard the regulations and SOPs. J.A. 647, 649, 932-933, 1090. Specifically, examiners have no discretion as to whether they will contact the arresting agency, the state POC, and the courts to determine whether a disqualifier exists. J.A. 549-565. Here, Examiner Conley was specifically told in writing that the arresting agency was the Columbia PD. Nevertheless, she failed to contact that agency. Further, to the extent Examiner Conley was confused by the difference between "Columbia PD" and "West Columbia PD," the directive in SOP 5.5.5 to make every effort to obtain the needed information required her to simply pick up the phone and call the LCSO or the West Columbia PD for clarification of their responses to her faxed information requests, or to contact SLED or the Lexington County General Sessions Court.

The directive of SOP 5.5.5 is reinforced by the NICS South Carolina Processing Page, which instructs examiners, "***During Initial Research Please Contact ALL Available Agencies Per Contact List.***" J.A. 491 (emphasis & initial capitals in original). The South Carolina Processing Page for the arresting agency (the Columbia PD), SLED and the court contained no language prohibiting the examiner from contacting any or all of those entities. At the same time, nothing in the Brady Act regulations or the SOPs allows an examiner to just quit and abandon her research on the morning of day two of the three-day research period. To the contrary, the regulations and SOPs make clear that research of a potential disqualifier must

continue until a "proceed" or "denied" response can be issued or the three-day clock runs out, whichever comes first. J.A. 476.

Because there was no element of discretion in the Government's conduct, the second element of the discretionary function exception of whether the conduct was based on considerations of social, economic, or political policy need not be addressed. *See Berkovitz*, 486 U.S. at 536-37. Nevertheless, analyzing the Government's conduct under the second prong establishes that conducting an NICS background check does not involve the exercise of public policy decisions. The Brady Act and its implementing regulations require the performance of NICS background checks, *see* 28 C.F.R. §§ 25.2, 25.6, and the SOPs specifically delineate how the required background checks are to proceed. Examiners are told (1) what prohibits a firearm sale; (2) the required steps to find records demonstrating whether a disqualifier exists for a specific individual seeking to purchase a firearm; and (3) if a disqualifier exits, a "denied" response must be issued. NICS examiners plainly are not involved in public policy decisions in any way, and clearly are not involved in any decisions based on consideration of public policy.

In granting the Government's renewed motion to dismiss, the district court acknowledged that "[t]he examiners are governed by highly structured [SOPs], which mandate the standards for approval or denial of the firearm sale, what databases the examiners can access and who they may contact for background information." J.A. 1643. Nevertheless, the court concluded that dismissal was required because the

Government's "abysmally poor policy choices"—particularly, its refusal to give NICS examiners access to the N-DEx—were entitled to protection under the discretionary function exception.

The district court's analysis focuses on the wrong thing. The challenged conduct is the failure to perform the background check. Examiner Conley was required by the regulations and the SOPs to take certain steps in order to exhaust all avenues for obtaining information about potential disqualifiers pertaining to Roof. Examiner Conley failed miserably in meeting this responsibility. The district court erroneously found that Examiner Conley followed the "literal requirements of the NICS standard operating procedures" by "review[ing] a list in the NICS database of the law enforcement agencies operating in Lexington County." J.A. 1648. To the contrary, the "literal requirements" of SOP 5.5.5 (External Research) required Examiner Conley to contact the ***arresting agency***, *i.e.*, the Columbia PD, and further instructed her that "[e]very effort must be made to obtain the necessary information, in order to reach a final decision on a NICS transaction during the research phase," J.A. 549, including contact SLED, or the courts.

The district court was also incorrect that, after receiving the negative responses from the West Columbia PD, the SOPs did not explicitly require Examiner Conley to contact the Columbia PD. To the contrary, SOP 5.0 and 5.5.5 explicitly require further research when, as here, a potential disqualifier exists and the examiner is provided

information—the identity of the arresting agency—that would enable her to quickly obtain the information needed to reach a decision.

Based on "the NICS practice … to make a single fax inquiry to a law enforcement agency and to attempt no further follow up of any type," the district court concluded that it was "hardly surprising" that Examiner Conley abandoned her research. J.A. 1649. The district court's premise is incorrect. The record evidence shows that in 2006, the FBI instructed examiners not to send a second, follow-up fax to a state agency that did not respond to an initial request for information. J.A. 1602-1605. In accordance with that rule, Examiner Conley did not follow up with the Lexington County Solicitor's Office when it failed to respond to her initial fax. However, the 2006 rule says nothing about following up with state agencies that ***do*** respond to an initial request for information, as both the LCSO and the WCPD did. Examiner Conley's conduct after she received the response from the WCPD that it was not the arresting agency was governed by SOP 5.5.5, which instructed her to make every effort to obtain the information needed. Examiner Conley's abandonment of her efforts was not required or excused by the 2006 rule or any other policy. To the contrary, SOP 5.5.5 emphatically required Examiner Conley to pursue additional information.

Third, the district court erred in concluding that the discretionary function exception immunizes the Government's refusal to provide examiners access to the N-DEx, because the Government had no discretion to deny such access. J.A. 1651. The

Brady Act regulations require the Government to "[s]earch the relevant databases … for any matching records" regarding the prospective purchaser. 28 C.F.R. § 25.6(c)(1)(iii). The regulations specifically identify three such databases—the NICS database, the NICS Index, and the III System. The N-DEx is not listed, but this is not surprising, considering that the N-Dex was created post-9/11, long after adoption of the Brady Act implementing regulations. Nevertheless, the N-DEx is unquestionably a "relevant database," in that it contains information provided by federal and state agencies—such as the incident report regarding Roof's arrest—that may include (and in Roof's case, *did* include) information that would establish the existence of a disqualifier under 18 U.S.C. § 922(g). J.A. 1371-1372. Indeed, the N-DEx fits comfortably within the regulatory definition of the NICS Index: "the database, to be managed by the FBI, containing information provided by Federal and state agencies about persons prohibited under Federal law from receiving or possessing a firearm" that is "separate and apart from the NCIC and the Interstate Identification Index (III)." 28 C.F.R. § 25.2. There was no policy decision for NICS to not use the N-DEx; search of N-DEx is required by federal regulation.

Last, the district court did not address Parishioners' claim that the Government failed to maintain data integrity as required by 28 C.F.R. § 25.5(a): "The FBI will be responsible for maintaining data integrity during all NICS operations that are managed and carried out by the FBI." Maintaining data integrity is mandated by the regulation and provides no choice for the Government on whether to do so. The

FBI's failure to maintain data integrity in its county lists for South Carolina by not listing the city of Columbia in Lexington County violates the mandatory regulation.

In sum, the discretionary function exception does not apply to the conduct challenged by Parishioners, namely, the Government's failure (1) to perform the NICS background check of Roof in accordance with the Brady Act, its implementing regulations and the SOPs; (2) to issue a denial based on Roof's unlawful drug use, and (3) to maintain data integrity during all NICS operations. None of these failings involved the exercise of public policy judgment; rather, at all times the course of action was prescribed. Accordingly, the discretionary function exception does not require dismissal of Parishioners' claims.

III. THE GOVERNMENT'S CONDUCT IS NOT IMMUNIZED BY 18 U.S.C. § 922(t)(6).

The Government argued, and the district court agreed,[4] that Parishioners' claims are barred by the statutory immunity provision contained in the Brady Act:

> (6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages—
>
> (A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

[4] The district court chastised the Government for first raising statutory immunity in its reply memorandum, abandoning the argument during the hearing, and then asserting it again in post-hearing briefs. J.A. 1654.

> (B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

18 U.S.C § 922(t)(6). By its plain terms, the immunity conferred by § 922(t)(6) is narrow: It protects a specific set of actors—*local governments* and *employees of* federal, state and local governments—when they perform a specific function—providing information **to** the NICS. The Government is not entitled to immunity under § 922(t)(6) because it is not within the set of actors protected by the statute, and because the performance of a NICS background check is not "providing information to the [NICS]."

A. The Government's Argument Fails as a Matter of Statutory Construction.

By its plain terms, § 922(t)(6) excludes the federal government and state governments from the grant of immunity. Nevertheless, the Government contends it is entitled to immunity based on the following syllogism: Section 922(t)(6) confers immunity on federal employees; thus, if Parishioners had sued Examiner Conley individually, she would be entitled to immunity under § 922(t)(6); and, the United States is entitled to invoke any defense that is available to one of its agents, *see Medina v. United States*, 259 F.3d 220, 225 n.2 (4th Cir. 2001); therefore, the Government is entitled to immunity under § 922(t)(6). The district court erred in accepting this flawed logic and ruling that § 922(t)(6) "provides a second and independent ground to support the Government's motion" to dismiss. J.A. 1655. The Government's

argument disregards both the plain text of § 922(t)(6) and the wider context of the remedy provided by the FTCA.

Whether the Government is entitled to immunity under § 922(t)(6) is a question of statutory construction. A determination of the scope or meaning of a statute "begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241(1989). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Moreover, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). ("[A]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." (internal quotation marks omitted)).

When the language of a statute is plain, courts must not engage in an analysis of legislative history to find ambiguity. *See Ignacio v. United States*, 674 F.3d 252, 255–56 (4th Cir. 2012). Thus, it is not "permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated." *United States v. Deluxe Cleaners & Laundry, Inc.,* 511 F.2d 926, 929 (4th Cir. 1975). Instead,

"[c]ourts must construe statutes as written, [and] not add words of their own choosing." *Ignacio*, 674 F.3d at 255 (internal quotation marks omitted).

The text of § 922(t)(6) unambiguously specifies who is entitled to immunity: "a local government," "an employee of the Federal Government," and "an employee … of "any State or local government." Under "the maxim *expressio unius est exclusio alterius,* the expression of one thing implies the exclusion of another." *William v. Gonzales*, 499 F.3d 329, 340 (4th Cir. 2007) (internal quotation marks omitted). Therefore, the express grant of immunity to *local* governments and to *employees* of the federal government necessarily implies that the *federal* government is not entitled to immunity under § 922(t)(6). *See also Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (explaining that *expressio unius* doctrine applies "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence" (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

Attempting to escape the plain language of § 922(t)(6), the Government relies on the rule that "the liability of the United States under [the FTCA] is coterminous with the liability of its agents." *Norton v. United States*, 581 F.2d 390, 393 (4th Cir. 1978). The Government reasons that if Examiner Conley (or any other NICS employee) were entitled to immunity under § 922(t)(6), then the Government is also entitled to immunity. This argument fails in light of the statutory text of the FTCA, particularly the provisions added to the FTCA by the Westfall Act in 1988.

Before 1988, it was widely understood that federal employees were absolutely immune from personal liability for common law torts committed while they were acting within the scope of their employment. However, in January 1988 the Supreme Court significantly narrowed federal employees' tort immunity when it held, in *Westfall v. Erwin,* 484 U.S. 292, 298 (1988), that immunity was available only to federal employees who were acting within the scope of their employment *and* whose duties were "discretionary in nature." Congress responded to the decision in *Westfall* by passing the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), commonly known as the Westfall Act.

The Westfall Act "create[s] a statutory mechanism through which tort actions against federal employees would be transformed into actions against the federal government to be channeled through the Federal Tort Claims Act." *Springer v. Bryant*, 897 F.2d 1085, 1087 (11th Cir. 1990). "The centerpiece of the Act was § 5, which amended the FTCA to provide that an FTCA action against the United States is the sole remedy for any injury to person or property caused by the negligent or wrongful acts of a federal employee 'acting within the scope of his office or employment.'" *Jamison v. Wiley*, 14 F.3d 222, 226-28 (4th Cir. 1994) (quoting 28 U.S.C. § 2679(b)(1). Thus, the Westfall Act made it absolutely clear that plaintiffs must look to the federal government, rather than to individual employees, for recovery in tort.

The Westfall Act also addressed the question of whether the federal government—having waived its sovereign immunity in the FTCA—could avoid

liability by cloaking itself in other forms of immunity. Congress answered that question by adding the following text to the FTCA:

> With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2674. It is notable that the text of § 2674 refers specifically to "judicial or legislative immunity" and "other defenses." Section 3 of the Westfall Act expanded the FTCA's coverage to include torts committed by employees of the judicial and legislative branches. *See* Westfall Act, Pub. L. No. 100-694, § 3. As the House Report on the Westfall Act explains, this expansion of the FTCA prompted Congress to make a clear statement that the Westfall Act was not intended to abrogate the common law immunities applicable to judges and legislators when they are performing judicial or legislative functions:

> Section 4 specifically preserves the traditional immunities that have long protected the key functions of the legislative and judicial branches of the government. The United States may assert the judicial or legislative immunity of judicial and congressional employees in so far as it is recognized in the law.

H.R. Rep. 100-700, at *5, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948 (1988). With respect to the scope of the federal government's liability under the FTCA, the House Report notes:

> [O]rdinary tort defenses, such as contributory negligence, assumption of risk, estoppel, waiver, and res judicata, as

> applicable, continue to be available to the United States. The United States would also be able to continue to assert other functional immunities, such as Presidential and prosecutorial immunity, recognized in the constitution and judicial decisions.

Id. Thus, the FTCA, as amended by the Westfall Act, creates a system in which federal employees are immune from liability for their torts, and liability for employees' torts is imposed on the United States, which has waived its sovereign immunity for the express purpose of providing a remedy to citizens harmed by the actions of federal government employees.

The Brady Act was passed only a few years after the Westfall Act. It is notable, therefore, that the immunity provision of the Brady Act is wholly consistent with the FTCA as amended by the Westfall Act. *See Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 337 (4th Cir. 2005) (It is well established that "Congress is presumed to enact legislation with knowledge of the law." (internal quotation marks omitted)). Consistent with the FTCA, § 922(t)(6) immunizes federal government ***employees*** from liability but does not immunize the federal government ***itself.*** Like the FTCA, therefore, § 922(t)(6) places responsibility not on rank-and-file employees like Examiner Conley, but rather on the Government, which has the resources, policy-making power, and ultimate responsibility to train, guide, and instruct its employees to fulfill its legal obligations.

It would be patently absurd for the Government to argue that it cannot be held liable under the FTCA on the basis that it is entitled to assert the immunity provided

to its employees by the FTCA. The Government's argument for immunity under § 922(t)(6) is no less absurd. If Congress had intended to immunize the federal government from suits under the Brady Act, it could easily have done so in § 922(t)(6). Instead, consistent with the FTCA as amended by the Westfall Act, Congress elected to immunize federal employees while leaving the federal government open to liability for its employees' torts. In ruling that the Government is entitled to avoid liability by cloaking itself in its employees' immunity, the district court turned both the Brady Act and the FTCA on their heads.

B. Performing a NICS Background Check Is Not "Providing Information to the [NICS]."

Section 922(t)(6) confers immunity only on those "responsible for providing information to the [NICS]." Parishioners' claims, however, are not based on any conduct in providing, or failing to provide, information **to** the NICS. This was confirmed by counsel for the Government at the hearing on its Motion to Dismiss. As to § 922(t)(6), the Government argued:

> [M]y understanding, Your Honor, from the plaintiffs' sur-reply is that they are not making the argument that they're suing the U.S. for failing to put the data into the NICS system…
>
> …
>
> I think, Your Honor, their argument is that we failed to get the incident report, and we failed to deny Roof. I think it's as simple as that.

J.A. 1504-1505.

Parishioners' claims are based on the Government's negligence in performing the NICS background check of Roof –it's about abandonment of the work on the morning of day two, its failure to maintain data integrity, and its failure to provide examiners with access to the N-DEx. This was not a failure in "providing information to" the NICS. Neither Examiner Conley nor Coordinator Russell was "responsible for providing information to" the NICS. They were responsible for conducting and overseeing the background checks that relied, in part, on information in the NICS that had been provided by others. Thus, for example, § 922(t)(6) would immunize a sheriff's office employee who incorrectly input data into the NICS that later resulted in a qualified individual receiving a "denied" response, instead of a "proceed" response, to a NICS background check. But, absolutely nothing in the text of § 922(t)(6) immunizes NICS personnel for negligently failing to conduct a proper background check.

The Brady Act's immunity provision only applies to those responsible for providing information ***to*** the NICS. Certainly, there is no evidence that Examiner Conley was "responsible for providing information to the national instant criminal background check system." If Congress wanted to provide blanket immunity for all activities involved in conducting background checks under the Brady Act, it could simply have left out the qualifier "responsible for providing information to the [NICS]." Under the district court's interpretation of the statute, the qualifying

language is simply ignored and given no purpose whatsoever. For this reason alone, the district court's ruling should be reversed.

CONCLUSION

The Mother Emanuel massacre should not have happened. Roof was disqualified from purchasing the firearm he used to commit horrendous crimes and, were it not for the Government's failure in the performance of its non-discretionary duty to perform the NICS background check, he would not have been able to do so. Neither the discretionary function exception nor § 922(t)(6) immunizes the Government from liability. Accordingly, Parishioners respectfully ask this Court to reverse and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

Parishioners respectfully request oral argument. These appeals are not frivolous and the decisional process would be significantly aided by oral argument.

Respectfully Submitted,

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WILLIAM W. WILKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 9, 2018, I electronically filed the foregoing Opening Brief for Appellants with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify 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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