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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

BRIEF FOR APPELLEE

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INTRODUCTION

The Federal Bureau of Investigation (FBI) developed and operates a system for performing criminal background checks on individuals seeking to purchase firearms from federally licensed dealers. Plaintiffs seek to impose tort liability on the United States based on policy choices the FBI has made in implementing and operating that system. Plaintiffs argue that the system was insufficiently rigorous, citing the fact that it failed to prevent the sale of a firearm to an individual who was not legally entitled to purchase one, and who then used the weapon to commit a particularly heinous crime.

The district court correctly held that plaintiffs' claims are barred by the Federal Tort Claims Act's (FTCA) discretionary function exception, 28 U.S.C. § 2680(a), which precludes "judicial second-guessing" of decisions grounded in policy considerations "through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (quotation marks omitted). Faced with a large volume of requests and limited resources, the FBI unit charged with performing background checks has made judgments about how best to use the time and efforts of its examiners. Under the discretionary function exception, such decisions cannot give rise to tort liability. That is particularly true here because it is undisputed that the examiner performing the background check at issue was supplied with faulty information from local law enforcement that led her down the wrong investigative path.

Plaintiffs argue that the government contravened its own policies and procedures. But they do not allege the violation of any statute, and they only briefly argue that there was a violation of any of the FBI's formal regulations. Instead, plaintiffs principally argue that the background check at issue failed to comport with certain standard operating procedures that have been promulgated to guide the work of the line officials performing the criminal background checks. This Court has repeatedly questioned whether internal guidance documents of this type can give rise to FTCA liability. But even were that not the case, the district court correctly concluded that the examination at issue complied with all applicable standard operating procedures.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under the FTCA, 28 U.S.C. § 1346(b). *E.g.*, JA175. The district court granted the United States' motion to dismiss and entered final judgment on June 18, 2018. JA1657. Plaintiffs filed a timely notice of appeal on August 10, 2018. JA1658. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiffs' claims are barred by the discretionary function exception.

2. Whether plaintiffs' claims are separately barred by a statutory provision that limits the liability of those responsible for providing information to the criminal background check system.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. The Federal Tort Claims Act's Discretionary Function Exception

The FTCA effects a limited waiver of sovereign immunity and creates a cause of action for certain tort claims against the United States “where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1); *see id.* § 2674.

Several exceptions limit the FTCA's waiver of sovereign immunity. As relevant here, the discretionary function exception bars suit for any 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.” 28 U.S.C. § 2680(a). A claim falls within the scope of this exception if the conduct it challenges involves an element of judgment or choice, and the exercise of that judgment is susceptible to policy considerations. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Suter v. United*

States, 441 F.3d 306, 310 (4th Cir. 2006). “[F]ederal courts lack jurisdiction over claims falling within the discretionary function exception.” *Seaside Farm, Inc. v. United States*, 842 F.3d 853, 858 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2307 (2017).

2. The Brady Act And The National Instant Criminal Background Check System (NICS)

a. Federal law prohibits the possession of firearms by certain categories of individuals, including those with certain criminal histories and unlawful users of controlled substances. *See generally* 18 U.S.C. § 922(g). In 1993, Congress passed the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (Brady Act), which was designed to prevent the transfer of firearms to individuals who cannot lawfully possess them. To that end, Congress directed the Attorney General to establish a National Instant Criminal Background Check System (NICS) that federally licensed firearm dealers (among others) can contact for information about whether a potential recipient of a firearm can lawfully acquire that firearm. *See id.* § 103(b), 107 Stat. at 1541.¹ Congress recognized that the background check system would need to utilize state (and not just federal) criminal records, but generally delegated to the Attorney General responsibility for determining “the means by which State criminal records systems” would “communicate with the national system,” and

¹ The statute and regulations apply to “federal firearms licensees” or “FFLs,” which is a broader class than licensed dealers. *See, e.g.*, 28 C.F.R. § 25.2 (definition of “FFL”). But since this case involves a background check requested by a dealer, we use the term “dealer” as a convenient shorthand.

developing “systems to link State criminal history check systems into the national instant criminal background check system.” *Id.* § 103(a), (c), 107 Stat. at 1541.

The NICS became operative in 1998. *See National Instant Criminal Background Check System Regulation*, 63 Fed. Reg. 58,303 (Oct. 30, 1998). At that point, the Brady Act generally made it illegal for federally licensed firearm dealers to transfer firearms to individuals without first requesting a NICS background check of the potential recipient. *See* 18 U.S.C. § 922(t)(1). A dealer cannot proceed with the sale of a firearm until either: (1) the dealer receives a response from the NICS that there is no information indicating that the recipient may not lawfully possess a firearm; or (2) three business days elapse from the time the dealer contacted the NICS and the system has not notified the dealer that the proposed recipient may not lawfully possess the firearm. *Id.* § 922(t)(1)-(2). While the Brady Act allows a dealer to proceed with a sale if three business days pass without a response from the NICS stating that the transaction should not proceed, nothing in the Brady Act requires the dealer to do so.

The Brady Act also provides protection against tort liability arising from failure to prevent the sale or transfer of firearms to individuals who may not lawfully possess them. Section 102(b)(6) of the statute states: “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” for failing to prevent the sale of a firearm to a person who may not lawfully possess one. *See* 18 U.S.C. § 922(t)(6).

b. NICS is operated by the FBI pursuant to implementing regulations. *See* 28 C.F.R. §§ 25.1-25.11. Under those regulations, the FBI operates a database called the “NICS Index” which is a “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.” *Id.* § 25.2.

Generally, the FBI’s regulations provide that when a federally licensed dealer initiates a background check, a query is to be performed of three specific databases, the NICS Index and two others (the Interstate Identification Index (III) and the files of the National Crime Information Center (NCIC)), for any records matching the prospective purchaser. 28 C.F.R. § 25.6(c)(1)(iii). If no disqualifying information is found, the NICS Section provides the dealer with a response indicating that the dealer may “Proceed” with the transaction. *Id.* § 25.6(c)(1)(iv)(A). Likewise, when the search yields information that demonstrates that receipt of the firearm by the individual would violate federal or state law, the NICS Section provides a response that the transaction must be “Denied.” *Id.* § 25.6(c)(1)(iv)(C).

In some cases, however, the search returns a record that requires more research to determine whether the prospective recipient can legally possess a firearm. Under those circumstances, the NICS Section provides the dealer with a response indicating that the transaction should be “Delayed,” and the firearm transfer should not proceed

pending receipt of a follow-up “Proceed” response from the NICS Section or the expiration of three business days. 28 C.F.R. § 25.6(c)(1)(iv)(B). If this three-business-day period expires and no determination has been made as to whether the prospective purchaser’s receipt of a firearm would be unlawful, the dealer is permitted (but not required) to complete the sale and transfer the firearm to the individual. *Id.*

If it is determined that a transaction requires further research, the transaction is automatically placed in a delay queue and then assigned to a NICS legal instrument examiner (Examiner) trained to analyze criminal history and other relevant information. JA409. The Examiner then researches the transaction and attempts to obtain complete information in order to make a final determination regarding the prospective purchaser’s eligibility to purchase or possess a firearm. JA409. When this analysis requires further information or documents from state or local authorities, Examiners request that information through the means specified by the applicable state or local authority. In most cases, requests are made via fax, which is “widely accepted business practice”; Examiners do not routinely call external agencies for information. JA1429.

As discussed below, *see infra* pp. 24-29, the NICS Section has developed certain Standard Operating Procedures (SOPs), processing pages, and contact lists to assist Examiners. These materials address what kinds of information demonstrate that receipt of the firearm by the individual would violate federal or state law, when more research is needed to determine whether the prospective purchaser is disqualified

from possessing a firearm by federal or state law, how such research is to be conducted, and which state and local law enforcement and criminal justice agencies are to be contacted in an effort to obtain missing information.

While the FBI strives to resolve transactions within three business days, in approximately three percent of cases it is unable to do so. JA410 (data from 2006); JA1416 (similar numbers for 2014). One of the NICS Section's SOPs specifically addresses circumstances where a transaction has been pending longer than thirty days. JA477.

Over the past decade, the demands on the NICS Section have doubled, while available resources have remained essentially constant. JA1410. This has left the NICS Section "incredibly stressed by the huge volume of daily inquiries." JA1643; *see also* JA425 (deposition testimony that "the workload is extremely heavy in NICS"). The NICS Section has made certain management decisions in order to conserve resources. In particular, Examiners are not expected to "review the 'open' transactions in their work histories, identify outstanding requests for information" and submit follow-up requests for information when an initial request fails to yield a response. JA1602. NICS management made that decision after performing an analysis that determined that "the amount of time expended in processing" these follow-on requests was not justified by the rate at which second requests yielded further information. JA1603. NICS management decided that a "redistribution of

efforts” away from second requests would “provide the NICS Section with the ability to more efficiently process background checks.” JA1604.

c. One of the FBI’s regulations is entitled “Validation and data integrity of records in the system.” 28 C.F.R. § 25.5. The regulation states that the FBI is responsible “for maintaining data integrity during all NICS operations that are managed and carried out by the FBI.” *Id.* § 25.5(a). The regulation identifies four aspects of what this responsibility includes; all four relate to maintaining the accuracy and quality of records in the NICS Index.

3. The National Data Exchange (N-DEx)

Subsequent to the creation of the NICS, in response to the September 11, 2001 attacks, the FBI created an additional database, called the National Data Exchange (N-DEx) for sharing federal, state, local, and tribal law enforcement records. JA1652; *see generally* CJIS Div., FBI, *Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx): Policy & Operating Manual* (Jan. 26, 2016).² N-DEx was created to “improve the sharing of multiple levels of criminal justice data” for crime analysis and law enforcement purposes. *Privacy Act of 1974; System of Records*, 72 Fed. Reg. 56,793, 56,794 (Oct. 4, 2007). It is undisputed that the government has made a determination not to give NICS Examiners access to N-DEx. JA567, JA1651; *see also* JA1436 (“N-DEx was reviewed by the NICS Section in 2013” but was “not included” in the NICS

² <https://go.usa.gov/xP6Pr>.

because of a “low information return rate” and a “conflict with purging requirements”).

B. Factual Background

1. In April 2015, Dylann Roof attempted to purchase a semi-automatic pistol from a federally licensed firearms dealer. JA1645. The dealer submitted an inquiry to NICS to determine whether it would be permissible to proceed with the sale. JA1645. NICS performed an initial database search, which returned a single record stating that Roof had been arrested six weeks earlier on a felony cocaine charge and that the arresting agency was the Lexington (South Carolina) County Sheriff’s Office. JA1646. This database entry was submitted by the Lexington County Sheriff’s Office (not by a federal employee or agency). JA1646. That record contained only the summary information input by the Lexington County Sheriff’s Office, and did not include the underlying documents related to the arrest (such as the arresting officer’s incident report) or the ultimate disposition of the arrest. JA1644 (noting that the relevant database provides “abbreviated” information rather than underlying records).

Because an arrest for a drug offense *may* indicate that a person is an “unlawful user of or addicted to any controlled substance,” and thus ineligible to legally possess a firearm, *see* 18 U.S.C. § 922(g)(3), but is not disqualifying in itself, the Examiner who handled the initial inquiry placed the transaction in a delayed status and informed the firearms dealer that the sale could not proceed for three business days unless cleared

sooner by NICS. JA1646.³ The transaction was placed in a queue for further research. JA1646.

It ultimately emerged that several pieces of information in the database entry supplied by the Lexington County Sheriff's Office were inaccurate. Roof had been arrested on a misdemeanor charge related to simple possession of a Schedule III controlled substance, Suboxone, without a prescription (not a felony cocaine charge). JA1641, JA1646. And crucially, the record misidentified the local law enforcement agency that had arrested Roof; the arrest had not been made by the Lexington County Sheriff's Office, but rather by the Columbia Police Department. JA1646. This latter error was particularly significant because it wrongly led NICS to believe that documents related to Roof's arrest could be obtained from the Sheriff's Office, rather than the Columbia Police Department.

The misidentification of the agency responsible for Roof's arrest is traceable to the fact that Roof was arrested in the small portion of Columbia, South Carolina, that extends into Lexington County. JA1641. (Most of Columbia is in neighboring Richland County). In the small region of Columbia that extends into Lexington County, the Columbia Police Department has jurisdiction, but arrests are initially processed by the Lexington County Sheriff's Office and prosecutions are handled by the 11th Circuit's Solicitor's Office, which has jurisdiction over Lexington County.

³ A felony conviction is also disqualifying. *See* 18 U.S.C. § 922(g)(1).

JA1641. At the time that Roof's background check was initially proceeding, no one at NICS was aware of the inaccuracies in the database entry related to Roof.

On the business day following submission of the Roof inquiry, another NICS Examiner pulled the Roof transaction from the delay queue and began researching it. JA1647. Consistent with NICS policies, the Examiner did a further review of internal NICS databases and then checked the Lexington County Court website and discovered a then-pending case stemming from Roof's arrest. JA1647. Per NICS procedures, however, the Examiner could not make a determination of whether Roof was disqualified from possessing a firearm without further information indicating whether Roof was an unlawful drug user. JA1647 (noting that "where there is a recent drug arrest without a conviction" NICS policies require some proof that the arrestee actually was an unlawful user of a controlled substance); *see* JA432 (NICS policy). Accordingly, the Examiner sought to obtain a copy of the incident report underlying Roof's arrest. JA1647-JA1648. To that end, the Examiner sent faxes to both the Lexington Country Sheriff's Office (which had identified itself as the agency that had arrested Roof) and the 11th Circuit Solicitor's Office (which, as noted, prosecutes cases in Lexington County) requesting copies of the incident report. JA1648. The Sheriff's Office sent a brief response stating that "Columbia PD will have the report"; the Solicitor's Office never responded at all. JA1648.

Assuming that the response from the Lexington County Sheriff's Office pertained to a jurisdiction within Lexington County, the Examiner consulted a list of

Lexington County law enforcement agencies. JA1649. While there was no Columbia police department listed in Lexington County, the Examiner found a “West Columbia Police Department.” The Examiner sent a fax to the West Columbia Police Department requesting the Roof incident report, but received a reply that it was “not a WCPD arrest.” JA1649. At that point, the Examiner halted her research on the Roof transaction and “processed other inquiries while awaiting a response from the Lexington County Solicitor’s Office.” JA1419. As noted above, no such response was ever sent.

After three business days elapsed, the firearms dealer elected to proceed with the sale of the semi-automatic pistol to Roof. JA1649. Roof subsequently used that weapon to murder nine people at the Mother Emanuel A.M.E Church in Charleston. JA1649.

2. Sometime after the tragic events at Mother Emanuel Church, the NICS Section obtained a copy of the incident report underlying Roof’s Suboxone-related arrest. JA1420. The information in that report would have provided a sufficient basis for inferring that Roof was an unlawful user of a controlled substance who could not lawfully possess a firearm, and thus, for denying the transaction. JA1421.

It also later emerged that the incident report had been submitted to the N-DEx database system by the South Carolina authorities prior to the time that the NICS Examiner was researching the Roof transaction. JA1642. However, as explained previously, *supra* p. 9, the NICS Section did not have access to the N-DEx database.

In the wake of the Roof shooting, then-FBI Director James Comey directed the FBI's Inspection Division to prepare a report reviewing the NICS Section's handling of the Dylann Roof background check. JA1406-JA1441. The Inspection Division concluded that the "Examiner on the Roof Matter performed as required and in accordance with current policy and procedures." JA1410; *see also* JA1423 (finding that the Examiner showed "a clear understanding of responsibilities and [standard operating procedures]"); JA1441. The report also identified certain opportunities for improvement of NICS procedures and offered a series of policy recommendations. JA1427-JA1440.

C. Prior Proceedings

A series of lawsuits were filed against the United States by the surviving victims of Roof's attack and the estates of those he murdered. These lawsuits, which were brought pursuant to the FTCA, 28 U.S.C. §§ 2671-2680, generally alleged that the United States was liable for Roof's actions because the United States should have prevented the sale to Roof of the firearm he used in carrying out the church shooting.

The suits were consolidated (JA389), and the United States moved to dismiss (JA323). The district court generally denied that motion without prejudice, concluding that plaintiffs should be entitled to an opportunity to take jurisdictional

discovery and that the government's defenses would need to be "decided on careful review of a complete record." JA396, JA403.⁴

After "extensive jurisdictional discovery" (JA1636), the United States renewed its motion to dismiss (JA404), arguing that the court lacked subject matter jurisdiction because plaintiffs' claims were barred by the FTCA's discretionary function exception, that the claims were barred by the Brady Act's limitation on liability, and that plaintiffs failed to state a claim under South Carolina tort law. JA1635-JA1636. The court held a hearing and allowed the parties to submit further evidentiary materials in the weeks following the hearing. JA1636.

After reviewing the record compiled by the parties, the district court granted the United States' motion on two independent grounds. First, the court agreed that plaintiffs' allegations fell within the FTCA's discretionary function exception. The district court rejected plaintiffs' arguments that the government violated standard operating procedures, concluding that the SOPs for NICS Examiners impose only "modest requirements" that had been satisfied here. JA1650. The district court also rejected plaintiffs' reliance on the fact that NICS Examiners were not given access to the N-DEx database system, concluding that while it would have been better policy to

⁴ The order denied with prejudice an argument the United States made under the FTCA's misrepresentation exception. JA403; *see* 28 U.S.C. § 2680(h). We do not argue here that the misrepresentation exception provides an alternative ground for affirmance, but reserve the right to challenge that ruling at some later time should it prove necessary. *See, e.g., Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006).

grant such access, the decision to deny such access “is a policy choice and the FTCA provides the Government immunity for policy choices (even really bad policy choices) under the discretionary function exception.” JA1651. The district court leveled certain criticisms of how the background check system was designed and operated, but recognized that any weaknesses in the background check system “are the function of distinct policy choices made by the FBI, not violations of specific legal standards,” and that these policy choices “fall squarely within the discretionary function exception.” JA1654. The court also recognized that the operation of the NICS Section is bound up in the policy decision of what resources should be devoted to it. JA1654 (acknowledging that “more financial resources and staff” may be needed); *see also* JA1643 (describing the NICS as “incredibly stressed by the huge volume of daily inquiries”); JA1650 (describing NICS Examiners as “overworked and overburdened”).

The district court separately found that plaintiffs’ claims are barred by the Brady Act’s liability shield, 18 U.S.C. § 922(t)(6). The court concluded that “a claim of negligence in the operation of the NICS system resulting in a prohibited person obtaining a firearm falls plainly within the scope of the Government’s immunity.” JA1654; *see also* JA1639 (concluding that “Congress’s clear intent in enacting § 922(t)(6) was to prevent any assumption of monetary liability for the operation of the background check system”).

Having ruled that plaintiffs’ claims failed on these two grounds, the district court declined to reach the government’s additional arguments that plaintiffs failed to

state a viable claim under South Carolina law. JA1655. These timely appeals followed.

SUMMARY OF ARGUMENT

After allowing plaintiffs ample opportunity to take discovery and to assemble an evidentiary record, the district court correctly concluded that plaintiffs' challenges to the manner in which the NICS Section conducted Dylann Roof's criminal background check are barred by the FTCA's discretionary function exception. As both the Supreme Court and this Court have repeatedly recognized, the discretionary function exception preserves the government's wide latitude to make judgments regarding how federal programs should be operated. Determining the investigative steps that should be taken during a background check, and the point at which an Examiner should shift from one background check to another, are precisely the kind of policy judgments that the discretionary function exception protects. Plaintiffs claim that the government failed to adhere to its own standard operating procedures, but this Court's precedents show that internal guidance documents of the type relied upon by plaintiffs do not constitute the sorts of mandatory directives that could overcome the agency's discretion in operating a program. In any case, the district court here correctly concluded that the government complied with all of its own procedures.

The district court also correctly held, in the alternative, that plaintiffs' claims must be dismissed based on a provision of the Brady Act that bars damages claims of

the type plaintiffs have brought here. *See* 18 U.S.C. § 922(t)(6). While it should not be necessary for this Court to reach this issue, if it does, the Court should affirm on this alternative ground, which faithfully applied this Court's precedents.

STANDARD OF REVIEW

When, as here, a district court dismisses a case for want of subject matter jurisdiction after considering evidence outside the pleadings, this Court reviews “the district court’s factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom de novo.” *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014). Plaintiffs bear the burden of showing that “an unequivocal waiver of sovereign immunity exists and that none of the [FTCA’s] waiver exceptions apply.” *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005).

ARGUMENT

I. PLAINTIFFS’ SUIT IS BARRED BY THE DISCRETIONARY FUNCTION EXCEPTION

Plaintiffs seek to impose tort liability on the United States based on policy choices that the FBI has made regarding how best to perform criminal background checks of individuals seeking to purchase firearms. As the district court correctly held, the FTCA’s discretionary function exception exists to preclude precisely these sorts of attacks on governmental policymaking.

A. The Discretionary Function Exception Provides Robust Protection Against Attacks On Governmental Decisions Grounded In Public Policy

The FTCA effects a “limited waiver of sovereign immunity” that authorizes certain lawsuits against the United States under state tort law. *United States v. Orleans*, 425 U.S. 807, 813 (1976). This waiver of sovereign immunity is limited by several exceptions, including the discretionary function exception, which forecloses lawsuits “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.” 28 U.S.C. § 2680(a). The exception “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). It “prevent[s] judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” *Id.* at 814. This Court has recognized that “the discretionary function exception is driven by separation of powers concerns, shielding decisions of a government entity made within the scope of any regulatory policy expressed in statute, regulation, or policy guidance, even when made negligently.” *Wood v. United States*, 845 F.3d 123, 128 (4th Cir. 2017).

The Supreme Court has established a two-step framework to govern application of the discretionary function exception. First, courts must determine whether the conduct at issue was in fact “discretionary in nature”—that is, whether it involved “an element of judgment or choice.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991). This requirement will generally be satisfied so long as no mandatory directive bars the challenged action.⁵ A statute, regulation, or policy does not restrict an agency’s discretion unless it contains an “expressly articulated standard to limit” government discretion. *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 970 (4th Cir. 1992). “[V]ery general, sweeping language is insufficient” to impose a mandatory directive. *Baum v. United States*, 986 F.2d 716, 722 (4th Cir. 1993). Likewise, a procedure establishing a hortatory or recommendatory course of conduct is insufficient. *Indemnity Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180-81 (4th Cir. 2009). Only an “express[] proscri[ption] or prescri[ption]” that “flatly bar[s]” “a particular course of action” may eliminate an agency’s discretion to undertake that course. *Pornomo v. United States*, 814 F.3d 681, 691 (4th Cir. 2016). In assessing whether a mandatory directive exists, the Court will consider “the nature of the statutory and regulatory regime as a whole.” *Seaside Farm, Inc. v. United States*, 842 F.3d 853, 859 (4th Cir. 2016). Thus, a “lengthy and complex” “internal guidance”

⁵ If there is a mandatory directive on point and the government *complied* with that directive, “the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation.” *Gaubert*, 499 U.S. at 324.

document containing a few “select passages” that speak in mandatory terms does not constitute a mandatory directive. *Holbrook v. United States*, 673 F.3d 341, 347 (4th Cir. 2012).

Absent a clear removal of discretion, the Court proceeds to the second step of the discretionary function test, which assesses whether the discretion exercised was “of the kind that the . . . exception was designed to shield.” *Gaubert*, 499 U.S. at 322-23. In this analysis, “[t]he focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.” *Id.* at 325. If the challenged action is susceptible to policy analysis, the discretionary function exception applies and the suit is barred.

Here, the district court faithfully applied the well-established two-step framework in concluding that the discretionary function exception precludes plaintiffs’ claims. In this Court, plaintiffs press three theories of liability but each, at bottom, impermissibly challenges the government’s quintessentially discretionary choice of how to structure and perform background checks of individuals seeking to acquire firearms.

**B. The Discretionary Function Exception Bars Plaintiffs’
Second-Guessing Of The Manner In Which Dylann Roof’s
Background Check Was Conducted**

1. Plaintiffs’ principal theory of liability is that the government negligently conducted Dylann Roof’s background check and, as a result, failed to uncover an

incident report that would have demonstrated that Roof was not eligible to legally purchase a firearm.

As discussed above, *see supra* pp. 12-13, the NICS Examiner attempted to obtain that incident report. However, the Lexington County Sheriff's Office submitted an inaccurate database entry that wrongly identified the Sheriff's Office as the entity that had arrested Roof. JA1646. As a result, the NICS Examiner reached out to the Sheriff's Office, rather than the Columbia Police Department, and did not acquire the incident report. JA1648 (noting that the Examiner was "led astray by the inaccurate information" input by the Sheriff's Office).

As an initial matter, plaintiffs face a high bar in seeking to establish that the government violated any mandatory directive in the conduct of an investigation. As this Court and others have recognized, determining the scope of an investigation requires quintessentially discretionary judgments. *See, e.g., Seaside Farm*, 842 F.3d at 859 ("Discretion is necessary to evaluate available information, assess the sufficiency and reliability of evidence, resolve conflicting data . . . and ultimately settle on a course of action."); *Baer v. United States*, 722 F.3d 168, 175 (3d Cir. 2013) ("[W]hen the sole complaint is addressed, as here, to the quality of the investigation as judged by its outcome, the discretionary function [exception] should, and we hold, does apply. Congress did not intend to provide for judicial review of the quality of investigative efforts.") (alterations in original); *Alfrey v. United States*, 276 F.3d 557, 566 (9th Cir. 2002) ("[I]nvestigations by federal officers clearly involve the type of policy judgment

protected by the discretionary-function exception.”); *Tsolmon v. United States*, 841 F.3d 378, 383 (5th Cir. 2016).

Plaintiffs acknowledge that to prevail, they must identify a specific mandatory directive that was violated. They do not contend that the government contravened the Brady Act, or any other federal statute, and no such argument would be plausible. The Brady Act contains a broad grant of discretionary authority to the executive branch, providing little direction beyond a directive to the Attorney General to “establish a national instant criminal background check system” within a given time frame. Brady Act § 103(b), 107 Stat. at 1541. Congress did not impose any relevant constraints regarding how background checks are to be performed.

Plaintiffs instead seek to discover a specific, mandatory instruction in a number of provisions containing regulatory or sub-regulatory guidance. None of these contentions has merit.

Plaintiffs mistakenly claim (Pls. Br. 22-23) that the government violated 28 C.F.R. § 25.6(c)(1)(iv)(B). That regulation provides that the NICS Operations Center should provide a “Delayed” response to the dealer in cases where a “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.” *Id.* But it is undisputed that the government issued precisely such a “Delayed” response in this case. *See* JA1646 (district court op.); Pls. Br. 9. Plaintiffs criticize *how* the government chose to conduct “further research,” but nothing in the cited regulation requires the

use of any particular process; indeed, the regulation does not require that the further research be conducted at all. Because the government complied with section 25.6(c)(1)(iv)(B), that provision provides no basis for holding the discretionary function exception inapplicable. *See Gaubert*, 499 U.S. at 324.

Another subsection of the same regulation authorizes NICS to deny a transaction when a database search identifies a record containing “information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. 922 or state law.” 28 C.F.R. § 25.6(c)(1)(iv)(C). Plaintiffs argue that the government was required “to issue a denial based on Roof’s unlawful drug use” (Pls. Br. 28), but this argument fails for similar reasons. Even assuming that this authorization created a mandatory duty, it is undisputed that the only information returned during the database search was an abbreviated record that stated that Roof had been arrested (but not convicted) of a drug charge, and that this record was insufficient to “demonstrat[e]” that Roof could not lawfully possess a firearm. JA432, JA1647. Thus, the government did not have a proper basis on which to issue a denial.

Plaintiffs are on equally unfirm ground in asserting that the government violated certain Standard Operating Procedures. This Court has noted that it is “questionable . . . whether something as informal as a guidance manual can overcome a statutory consignment of agency discretion.” *Seaside Farm*, 842 F.3d at 859; *see Tiffany v. United States*, 931 F.2d 271, 279 (4th Cir. 1991) (rejecting proposition that “internal operating procedures automatically gives rise to an actionable duty in tort to

comply with them”). Thus, for example, in *Holbrook*, this Court concluded that “internal guidance” regarding the safety certification of aircraft was “insufficient to establish a mandatory requirement such that the exercise of discretion was removed,” or to overcome “the congressional delegation of discretion to the agency.” 673 F.3d at 347. Internal guidance manuals promote efficiency and uniformity in agency operations, but are not mandatory directives in the relevant sense, and the “price of circulating internal guidance should not be an exponential increase in exposure to a tort suit.” *Id.* Indeed, in this case, testimony explained that the standard operating procedures are designed to guide the discretion exercised by line Examiners, but are not intended to impose mandatory requirements in all cases because each investigation is unique. JA422-JA423; *but see* JA1650 (district court’s description of the SOPs as “rigid”).

In any case, plaintiffs’ claims fail because the district court correctly concluded that the Examiners complied with the applicable standard operating procedures. JA1650 (concluding that “little is required” under the SOPs and that “it was hardly difficult for examiners to complete the modest requirements of the NICS SOPs”). That is certainly the FBI’s understanding of its own SOPs. In the wake of Roof’s attack, prior to any litigation, then-FBI Director Comey concluded that the NICS Examiner “did what she was supposed to do and followed our protocols.” JA766. A report subsequently prepared by the FBI’s Inspection Division (also prior to this

litigation) likewise concluded that the “Examiner on the Roof Matter performed as required and in accordance with current policy and procedures.” JA1423.

In challenging that conclusion, plaintiffs principally argue that the government violated SOP 5.5.5, which states 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.” JA549. Plaintiffs insist that the NICS Examiner here could have done more to obtain a copy of the incident report from Roof’s arrest, and thus did not exert “every effort.” Pls. Br. 23. But the phrase “every effort” is far too general to provide the kind of mandatory directive that could serve as a basis for FTCA liability. *See, e.g., Baum*, 986 F.2d at 722. And the “every effort” language is tempered by other directives imposed by NICS management which are keyed to different considerations, such as maximizing the efficient use of investigative resources and managing relationships with local law enforcement. JA1602-JA1604. Plaintiffs’ specific suggestion that the Examiner should have called the Lexington County Sheriff’s Office for clarification (Pls. Br. 23), ignores the fact that NICS Examiners generally do not contact state entities by phone. JA1429 (“Due to NICS Section SOP and workloads, Examiners do not routinely call external agencies for information” and “many external agencies require fax requests”); JA1649.

Plaintiffs also point to the fact that SOP 5.5.5 directs Examiners to contact various state points of contact (courts, district attorneys, probation offices, arresting agencies, etc.) “in accordance with the preference indicated on the State Processing

Page and Contact List” in order to obtain materials such as incident reports. JA549. Plaintiffs read this SOP as imposing a mandatory requirement to contact all the entities on the state contact list. *See* Pls. Br. 23 (citing JA491). But the South Carolina State Processing Page says that arresting agencies should be “the primary contact,” particularly for “police/incident report[s].” JA491-JA492. The Examiner here contacted the entity identified in a federal database as the arresting agency, namely the Lexington County Sheriff’s Office. *See* JA1646, JA1648. She also promptly reached out to the 11th Circuit Solicitor’s Office (which is responsible for prosecutions in Lexington County). JA1648.

Plaintiffs emphasize that the Examiner never successfully contacted the entity that actually arrested Roof, which was the Columbia Police Department. Pls. Br. 25. But the NICS Examiner contacted the entity that had been identified to NICS as the arresting agency, and it was the Lexington County Sheriff’s Office itself that was responsible for the erroneous database entry. JA1646. The Examiner violated no clear and mandatory duty by acting on the basis of information provided by local law enforcement.

Plaintiffs insist that the Examiner was required to undertake further research because she was “specifically told in writing that the arresting agency was the Columbia PD.” Pls. Br. 23. That is simply incorrect. In fact, the only response the Examiner received from the Lexington County Sheriff’s Office was a cryptic, handwritten message saying: “No arrest or report for this date. The last arrest was on

2-28-15. Columbia PD will have the report.” JA583. Nor did the Examiner abandon her search at that point. She reviewed the contact list for Lexington County, noted that there was a “West Columbia Police Department,” and reached out to them as well. JA538. She testified that, based on her experience, agencies will provide responses that do not contain “a lot of information,” so she inferred that the Lexington County Sheriff’s Office was directing her to the West Columbia Police Department. JA538-JA539. The Examiner’s assumption that the Sheriff’s Office was directing her to another entity in Lexington County is particularly understandable in light of the fact that she had already seen a docket entry showing that a case against Roof was docketed in Lexington County Court. JA1647.

Moreover, when the West Columbia Police Department proved to be a dead end, the Examiner still had a separate, outstanding request for the incident report to the 11th Circuit’s Solicitor’s Office. Consistent with NICS Section practice, she turned to researching other transactions while she waited for a response from the Solicitor’s Office (which never came). JA1648-JA1649. It is undisputed that NICS policies do not require Examiners to “review the ‘open’ transactions in their work histories, identify outstanding requests for information” and submit follow-up requests for information when an initial request fails to yield a response. JA1602; *see also* JA1650 (“[T]he SOPs require the Examiner only to send a single automated fax to a law enforcement agency with no expectation or requirement that follow up work be

done if the necessary records are not obtained.”). Thus, the Examiner fully complied with NICS policies. JA1423.

Plaintiffs also assert that the government failed to comply with SOP 5.0, which includes a statement that “[i]t is the responsibility of the NICS Section to answer all Delayed transactions within the three-business-day time frame.” JA476. It has long been understood, however, that in some percentage of cases, research of “Delayed” transactions cannot be completed within the three day window. *See, e.g.*, JA410 (testimony from 2007 explaining that about 3% of transactions remain open after three business days); JA1416 (data from 2014). FBI regulations specifically contemplate that some transactions will remain “Open” after three days have elapsed. *See* 28 C.F.R. § 25.2. And an entire SOP is devoted to the proper treatment of “expired” transactions (*i.e.*, transactions that have been open for more than thirty days). *See* JA477, JA1416. In context, the SOP 5.0 statement that research should be completed within three business days cannot be read as anything more than aspirational.⁶ Simply put, no mandatory directive was violated.

⁶ In fact, the government considered adopting a regulation that would have directed the government to provide the dealer with a “follow-up” response of “Proceed” or “Denied” “before the expiration of three business days,” but ultimately did not adopt that approach. *Compare National Instant Criminal Background Check System Regulations*, 63 Fed. Reg. 30,430, 30,437 (June 4, 1998) (proposed rule that would have incorporated this requirement into 28 C.F.R. § 25.8(g)(2)), *with National Instant Criminal Background Check System Regulation*, 63 Fed. Reg. 58,303, 58,310 (Oct. 30, 1998) (final version of rule that omitted this requirement).

2. Plaintiffs argue that even if no mandatory directive was violated, the discretionary function exception is inapplicable because line Examiners do not engage in policymaking. Pls. Br. 24. Plaintiffs thus seek to resurrect the “operational” and “planning level” distinctions flatly rejected by the Supreme Court in *Gaubert*. See 499 U.S. at 324-25; see also *id.* at 324 (“When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.”). Thus, for example, in *Varig Airlines*, the discretionary function exception precluded suit based not only on the agency’s spot-checking safety policy, but on the asserted negligence of the spot-checkers. 467 U.S. at 820; see also *Gaubert*, 499 U.S. at 323-24; *Wood*, 845 F.3d at 128 (“The analysis also does not depend on whether the conduct was that of a high-level agency official making policy or a low-level employee implementing policy.”).

Decisions regarding whether an Examiner should keep pursuing one investigation as opposed to moving on to the next one is “at bottom a question of how best to allocate resources.” *Baum*, 986 F.2d at 724; see *Varig Airlines*, 467 U.S. at 820 (recognizing the discretionary function exception protects governmental “balancing [of] the objectives sought to be obtained against such practical considerations as staffing and funding”). It is thus “inherently bound up in considerations of economic and political policy, and accordingly is precisely the type

of governmental decision that Congress intended to insulate from judicial second guessing through tort actions for damages.” *Baum*, 986 F.2d at 724.

Such concerns are particularly salient here. The NICS Section has been tasked with performing more than 8 million checks each year and has been forced to make choices about how best to deploy its limited resources. JA425 (testimony that Examiners have heavy workloads); JA1410 (“While demand doubled over the last 10 years, resources remained essentially the same within the NICS Section.”); JA1602-JA1604 (NICS management has made decisions to limit investigative follow-up so as not to “utilize[] valuable time that could otherwise be expended to more efficiently and effectively provide resolution to other delayed transactions waiting in queue for review and research.”); JA1643 (noting that in 2014 NICS received 8.2 million inquiries or an average of 22,000 per day).

In structuring the review protocols, the FBI also has to account for other significant questions of public policy. The NICS functions through cooperative efforts between federal and local authorities, and NICS management appropriately considers the preferences of local law enforcement entities. *See* JA411 (noting that no federal law requires state and local authorities to submit information to NICS and the government depends on voluntary cooperation); JA1603 (altering policy partially in response to complaints from external agencies). Likewise, the FBI must make policy judgments about the quantum of evidence needed to deny a transaction. In establishing procedures for assessing whether someone should be deemed an unlawful

user of a controlled substance (JA432, JA1647), the FBI permissibly sought to strike a balance between keeping firearms from those who cannot lawfully possess them and avoiding unnecessarily burdening the rights of citizens who seek to lawfully acquire such weapons. And the FBI was required to account for privacy and security concerns regarding information in the NICS. JA345. The FBI's balancing of all of these considerations falls within the heartland of the types of policy judgments the discretionary function exception is designed to protect.

C. The Discretionary Function Exception Protects The Government's Discretion To Select Which Government Databases Should Be Searched During Background Checks

Plaintiffs also argue that the government can be held liable for declining to provide NICS Examiners access to an additional law enforcement database known as N-DEx. Pls. Br. 26-27. N-DEx is a database containing law enforcement records (including offense and case reports) collected from Federal, state, local and tribal law enforcement agencies and is used to “improve the sharing of multiple levels of criminal justice data” for crime analysis and law enforcement purposes. *Privacy Act of 1974; System of Records*, 72 Fed. Reg. at 56,794. The district court found that copies of the Roof incident report had been submitted to N-DEx by the local South Carolina authorities (JA1642), but it is undisputed that the government has made a determination not to give NICS Examiners access to N-DEx. JA567, JA1651; *see also* JA1436 (“N-DEx was reviewed by the NICS Section in 2013” but was “not included” because of a “low information return rate” and a “conflict with purging

requirements.”). Although plaintiffs insist that the government had no discretion to deny NICS Examiners access to N-DEx, the district court correctly recognized that the decision regarding which federal databases should be made available for particular investigative purposes is a quintessential “policy choice” protected under the discretionary function exception. JA1651.

In challenging this determination, plaintiffs purport to find a relevant mandatory directive in 28 C.F.R. § 25.6(c)(1)(iii), which provides that upon the receipt of a request for background check, the NICS Operations Center will: “Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records.” Plaintiffs argue that the N-DEx database is a “relevant database,” and therefore had to be checked. Pls. Br. 26-27. But the very provision they cite defines the relevant databases as limited to the NICS Index, NCIC, and III databases. And its use of the signal “i.e.,” which stands for “id est” or “that is,” indicates that the list of relevant databases is exclusive rather than exemplary. *See New v. Department of Veterans Affairs*, 142 F.3d 1259, 1265 (Fed. Cir. 1998) (distinguishing “i.e.” from “e.g.”); *Ferguson v. Barnhart*, 52 F. App’x 112, 115 (10th Cir. 2002) (unpublished) (same). This reading is also confirmed by 28 C.F.R. § 25.6(c)(1)(iv)(C), which provides that a “Denied” response is to be issued specifically based on a matching record found “in either the NICS Index, NCIC, or III”—not those databases *or* any other potentially relevant databases that may come to exist. Plaintiffs argue that the absence of any reference to N-DEx is explained by the fact that N-DEx was created well after the regulation was

adopted (Pls. Br. 27). But the agency amended 28 C.F.R. § 25.6 in 2014, *see National Instant Criminal Background Check System Regulation*, 79 Fed. Reg. 69,047 (Nov. 20, 2014), yet did not modify the list of relevant databases. The existing regulation, by its terms, cannot be read to require searches of the N-DEx database.

Plaintiffs also argue that the N-DEx database is itself a component of the NICS Index (Pls. Br. 27), noting that the NICS Index is defined as: “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,” 28 C.F.R. § 25.2. Plaintiffs argue that N-DEx falls within that description. But the NICS Index is not defined to include every FBI database with information that is potentially relevant to whether a person is prohibited from possessing a firearm; rather, it refers to a single, specific database that was created in response to a statutory mandate, Brady Act § 103(b), 107 Stat. at 1541, and was established through a specific regulation, 28 C.F.R. § 25.3; *see also* 63 Fed. Reg. at 30,431 (providing additional background on the NICS Index). Specifically, the NICS Index is a database devoted to information about persons ineligible to possess a firearm; N-DEx, by contrast, contains a far more diverse array of law enforcement records that have been assembled for a much broader purpose. Plaintiffs cannot override FBI’s designations of its own databases.

Plaintiffs correctly do not argue that the choice of databases fails to satisfy the second step of the *Gaubert* inquiry. Indeed, as the district court recognized, deciding

which databases should be utilized for particular investigative purposes is a quintessential exercise of policymaking. JA1651.

D. The Discretionary Function Exception Bars Plaintiffs’ “Data Integrity” Claim

Finally, plaintiffs argue that the government violated a mandatory directive requiring the maintenance of “data integrity” during NICS operations. *See* 28 C.F.R. § 25.5(a). Plaintiffs urge that the government violated that duty when it prepared a contact list that identified the city of Columbia as falling in Richland County (where the overwhelming majority of the city is located), while not also listing Columbia as falling within Lexington County. Pls. Br. 28; *see also* JA496-JA498. This claim is entirely without merit. The cited regulation relates to maintenance of records in the NICS Index database maintained by the FBI. The regulation’s title is “Validation and data integrity *of records in the system.*” 28 C.F.R. § 25.5 (emphasis added). The regulation describes four aspects of the responsibility to maintain data integrity, and all four relate to the accuracy and upkeep of records in the NICS Index. *Id.* § 25.5(a). Nothing in the regulation suggests that every error or omission in guidance material used by the NICS Section constitutes a regulatory violation that could give rise to an FTCA claim.

Here, too, plaintiffs make no argument with respect to the second step of the *Gaubert* analysis. Deciding how to maintain agency guidance materials is inherently discretionary.

II. THE DISTRICT COURT CORRECTLY HELD IN THE ALTERNATIVE THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE BRADY ACT'S LIMITATION ON LIABILITY

The district court separately held that plaintiffs' claims are foreclosed by a provision of the Brady Act that bars certain tort claims based on the "failure to prevent the sale or transfer of a firearm" to a person who could not lawfully possess that firearm. JA1638-JA1639, JA1654-JA1655; *see also* 18 U.S.C. § 922(t)(6). Plaintiffs' amici urge this Court not to reach the merits of this holding, asserting that the issue was decided without adequate briefing below and that the argument should be deemed waived. *See generally* Br. of Brady Center 10-13. The district court concluded, however, that "[p]laintiffs fully briefed this issue and addressed it at the evidentiary hearing" (JA1654), and the court thus acted well within its discretion in reaching the merits of the argument. That said, given that this case can be readily resolved on discretionary function grounds, and because no court of appeals has previously construed section 922(t)(6), this Court may well find it unnecessary to reach this issue.

If, however, the Court concludes otherwise, it should affirm on this alternative ground, which faithfully applied this Court's precedents. Section 922(t)(6) provides "employee[s] of the Federal Government" who are "responsible for providing information to the national instant criminal background check system" with a shield from liability that might otherwise stem from a "failure to prevent the sale or transfer of a firearm" to a person who could not lawfully possess that firearm. 18 U.S.C. § 922(t)(6). The district court correctly concluded that plaintiffs' "claim of negligence

in the operation of the NICS system resulting in a prohibited person obtaining a firearm falls plainly within the scope” of this provision. JA1654. Plaintiffs challenge that conclusion on two grounds, but both lack merit.

First, plaintiffs argue that the United States cannot invoke the Brady Act’s shield because the provision refers to “employee[s] of the Federal Government,” and not the United States itself. 18 U.S.C. § 922(t)(6); *see* Pls. Br. 29-35. But as the district court understood (JA1639), this Court has recognized that “the United States is entitled to avail itself of any defenses its agents could raise in their individual capacities.” *Medina v. United States*, 259 F.3d 220, 225 n.2 (4th Cir. 2001); *see Norton v. United States*, 581 F.2d 390, 395 (4th Cir. 1978); *see also Knowles v. United States*, 91 F.3d 1147, 1150 (8th Cir. 1996) (concluding the United States is entitled to statutory protections “to the same extent the individual[] [employees] would if they were sued directly”).

Plaintiffs argue at length that Section 922(t)(6) should be construed narrowly (Pls. Br. 29-35), based on statutory text and the backdrop of the Westfall Act. But plaintiffs never grapple with the fact that their argument is directly contrary to this Court’s post-Westfall Act statement in *Medina* that the United States can invoke the defenses available to its employees. And in context, Section 922(t)(6) is best understood to establish that claims arising out of the operations of the NICS are not cognizable. *See* JA1638-JA1639.

Second, plaintiffs argue that the NICS Examiners whose conduct they have challenged were not “responsible for providing information to the national instant criminal background check system,” 18 U.S.C. § 922(t)(6), and thus, do not fall within the scope of the Brady Act’s protection. Pls. Br. 35-37. Plaintiffs’ factual assertion is wrong and, at a minimum, plaintiffs cannot show that the district court’s contrary conclusion was clearly erroneous. When an Examiner determines that a transaction should be denied, she must submit that transaction to the NICS Index. JA1611. Indeed, on plaintiffs’ theory of liability, the Examiner here was required to determine that Roof could not lawfully possess a firearm and to deny the transaction, whereupon she would have been responsible for inputting that denial into the NICS Index. Thus, Section 922(t)(6) was an applicable defense and the United States was entitled to its protection.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,226 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua M. Salzman
Joshua M. Salzman

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Joshua M. Salzman

Joshua M. Salzman

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18 U.S.C. § 922**§ 922. Unlawful Acts**

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall--

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

(A)(i) such other person has presented to the licensee a permit that--

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to

such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than \$5,000.

(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

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

28 U.S.C. § 2680

§ 2680. Exception

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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.

28 C.F.R. § 25.2

§ 25.2 Definitions.

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. § 25.3

§ 25.3 System information.

(a) There is established at the FBI a National Instant Criminal Background Check System.

(b) The system will be based at the Federal Bureau of Investigation, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306–0147.

(c) The system manager and address are: Director, Federal Bureau of Investigation, J. Edgar Hoover F.B.I. Building, 935 Pennsylvania Avenue, NW, Washington, D.C. 20535.

28 C.F.R. § 25.5

§ 25.5 Validation and data integrity of records in the system.

(a) The FBI will be responsible for maintaining data integrity during all NICS operations that are managed and carried out by the FBI. This responsibility includes:

(1) Ensuring the accurate adding, canceling, or modifying of NICS Index records supplied by Federal agencies;

(2) Automatically rejecting any attempted entry of records into the NICS Index that contain detectable invalid data elements;

(3) Automatic purging of records in the NICS Index after they are on file for a prescribed period of time; and

(4) Quality control checks in the form of periodic internal audits by FBI personnel to verify that the information provided to the NICS Index remains valid and correct.

(b) Each data source will be responsible for ensuring the accuracy and validity of the data it provides to the NICS Index and will immediately correct any record determined to be invalid or incorrect.

28 C.F.R. § 25.6

§ 25.6 Accessing records in the system.

(a) FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act. FFLs are strictly prohibited from initiating a NICS background check for any other purpose. The process of accessing the NICS for the purpose of conducting a NICS background check is initiated by an FFL's contacting the FBI NICS Operations Center (by telephone or electronic dial-up

access) or a POC. FFLs in each state will be advised by the ATF whether they are required to initiate NICS background checks with the NICS Operations Center or a POC and how they are to do so.

(b) Access to the NICS through the FBI NICS Operations Center. FFLs may contact the NICS Operations Center by use of a toll-free telephone number, only during its regular business hours. In addition to telephone access, toll-free electronic dial-up access to the NICS will be provided to FFLs after the beginning of the NICS operation. FFLs with electronic dial-up access will be able to contact the NICS 24 hours each day, excluding scheduled and unscheduled downtime.

(c)(1) The FBI NICS Operations Center, upon receiving an FFL telephone or electronic dial-up request for a background check, will:

(i) Verify the FFL Number and code word;

(ii) Assign a NICS Transaction Number (NTN) to a valid inquiry and provide the NTN to the FFL;

(iii) Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and

(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. A “Delayed” response to the FFL indicates that the firearm transfer should not proceed pending receipt of a follow-up “Proceed” response from the NICS or the expiration of three business days (exclusive of the day on which the query is made), whichever occurs first. (Example: An FFL requests a NICS check on a prospective firearm transferee at 9:00 a.m. on Friday and shortly thereafter receives a “Delayed” response from the NICS. If state offices in the state in which the FFL is located are closed on Saturday and Sunday and open the following Monday, Tuesday, and Wednesday, and the NICS has not yet responded with a “Proceed” or “Denied” response, the FFL may transfer the firearm at 12:01 a.m. Thursday.)

(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. 922 or state law. The “Denied” response will be provided to the requesting FFL by the NICS Operations Center during its regular business hours.

(2) None of the responses provided to the FFL under paragraph (c)(1) of this section will contain any of the underlying information in the records checked by the system.