No. 18-1931(L) *et al.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court for the District of South Carolina at Charleston, No. 2:16-cv-2356-RMG *et al.*
Hon. Richard M. Gergel

BRIEF FOR *AMICUS CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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October 16, 2018

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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Signature: /s/ Benjamin S. Softness Date: October 16, 2018

Counsel for: Brady Ctr. to Prevent Gun Violence

CERTIFICATE OF SERVICE

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I certify that on October 16, 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:

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INTEREST OF *AMICUS CURIAE*[1]

The Brady Center to Prevent Gun Violence is a leading nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. In support of that mission, the Brady Center files this brief as *amicus curiae* in support of Plaintiffs-Appellants.

The Brady Center has a substantial interest in ensuring that the Brady Act is not interpreted or applied in a way that would allow the government to escape accountability when the nation's gun-control laws are not properly enforced. Like the Act, the Brady Center is named for James Brady, who was shot and paralyzed for life while serving as press secretary to President Ronald Reagan. The Brady Center's predecessor organization, led by James Brady's wife, Sarah Brady, played a pivotal role in bringing about the Brady Act's passage.

The Brady Center has filed *amicus* briefs concerning the proper interpretation of federal gun-control statutes, including the Brady Act, in numerous cases including *United States v. Hayes*, 555 U.S. 415 (2009), in which the Brady Center's brief was cited (at 427), *United States v. Castleman*, 572 U.S. 157 (2014),

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[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund its preparation or submission. No person other than *amicus*, its members, and its counsel made a contribution intended to fund the preparation or submission of this brief.

and *Printz v. United States*, 521 U.S. 898 (1997). The Brady Center has also filed *amicus* briefs in numerous other cases involving the constitutionality and interpretation of firearms laws, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017).

INTRODUCTION

On June 17, 2015, Dylann Roof walked into the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, and murdered nine parishioners with a firearm he should never have been allowed to purchase under federal law. The purchase was allowed to proceed because the federal government made "a mistake" (its own words) when it failed to locate the arrest record that disqualified Roof from buying the gun he used at Emanuel A.M.E.[2] In this case, survivors and the estates of the victims of the shooting seek to hold the federal government to account for that grave and consequential error. Yet the district court granted the government a blanket immunity not found in any statute —

[2] Press Release, FBI, Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase (July 10, 2015), https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase; *see also* Ellen Nakashima, *FBI: Breakdown in Background Check System Allowed Dylann Roof to Buy Gun*, Wash. Post (July 10, 2015), https://wapo.st/2INf3sJ (quoting then-FBI Director Comey: "[T]he thought that an error on our part is connected to this guy's purchase of a gun that he used to slaughter these good people is very painful to us.").

especially not in the Brady Act, the statute the government *violated* when it failed to block the sale of the gun to Dylann Roof.

When a firearm sale is unlawfully permitted, the Brady Act immunizes certain defendants from certain types of lawsuits. 18 U.S.C. § 922(t)(6) provides that "[n]either 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 failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful." The district court ruled that this provision "obvious[ly]" blocks this lawsuit. JA1654. That conclusion was erroneous. *Amicus* submits this brief to raise two points concerning that aspect of the district court's ruling.[3]

First, as a threshold matter, the district court should not have considered the government's Brady Act immunity argument because the government waived it — that is, affirmatively abandoned it — in the court below. This Court should enforce that waiver. Accordingly, if the Court agrees with Appellants that reversal is merited under the Federal Tort Claims Act ("FTCA"), it should also reverse the

[3] The district court also ruled that the lawsuit is barred by the Federal Tort Claims Act's discretionary-function exception. *See* JA1650-54. Appellants have challenged that ruling as well, *see* Appellants' Br. 20-28, and *amicus* joins those arguments in full.

district court's Brady Act ruling on waiver grounds. Although the Court may consider any argument in its discretion, it should not exercise that discretion here. The proceedings below did not afford the issue full consideration (indeed, the district court's analysis on this point consisted of one paragraph without a single legal citation), and the interpretation of § 922(t)(6) appears to be an issue of first impression in the federal courts.

Second, the Brady Act's immunity provision, by its plain terms, does not apply here. Section 922(t)(6) applies only where *both* (1) the defendant is either a local government or an employee of the United States, a state, or a local government; *and* (2) the defendant is "responsible for providing information" to the FBI's NICS database. Here, the United States meets neither condition. It is neither a local government nor an employee of any government. And this lawsuit is about the FBI's negligent *operation* of the NICS system, and not other actors' provision of information *to* the database. Furthermore, the specificity of the Brady Act's immunity provision makes clear that, when it does not apply, Congress contemplated that the law would be enforced through damages actions. The shooting victims' claims are thus entirely consistent with the accountability built into the Brady Act and expressly conferred by the FTCA.

BACKGROUND

A. In 1993, Congress passed the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, to "prevent convicted felons and other persons who are barred by law from purchasing guns." H.R. Rep. No. 103-344, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1984. To accomplish that goal, the Brady Act requires the Attorney General to "establish a national instant criminal background check system" — known as "NICS" — from which gun dealers are required to seek approval before they may lawfully sell a firearm to a would-be purchaser. Brady Act § 103 (codified at 34 U.S.C. § 40901). Using the identity of the prospective buyer (provided by the firearm dealer), NICS runs a background check and informs the dealer whether a particular firearm sale would violate federal law. If informed that it would, the dealer *may not* complete the sale. 18 U.S.C. § 922(t)(1). In most cases, NICS is able "to respond instantly" to a background-check request, providing gun dealers "an almost immediate response."[4]

The Brady Act's background-check mechanism works by stemming the practice of "'lying and buying'" — *i.e.*, allowing gun sales under the pre-Brady regime on the basis of the buyer's say-so that he or she lacks a disqualifying

[4] FBI, *About NICS*, https://www.fbi.gov/services/cjis/nics/about-nics ("*About NICS*") (last visited Oct. 15, 2018).

condition.[5] And it has been extremely effective. Since the Act's passage, NICS has prevented more than one million unlawful gun sales, *see* FBI, *National Instant Criminal Background Check System (NICS)*, https://www.fbi.gov/services/cjis/nics (last visited Oct. 15, 2018), with unmistakable real-world results: between 1993 (the year the Act was passed) and 2006, gun murders fell by 32% and have continued to hold steady or decline since then.[6]

As relevant here, the NICS system functions primarily through the actions of three groups of stakeholders. States (and their subdivisions, *i.e.*, local law enforcement) "provide criminal records . . . to the national system." 34 U.S.C. § 40901(a)(2). Gun dealers ("licensees" in the parlance of the Act) are obligated to "contact[] the" NICS system with the identity of a prospective buyer, and are forbidden to complete a sale if the government timely responds that the sale would violate federal law. 18 U.S.C. § 922(t)(1). Lastly, the federal government is required to establish and operate the NICS system — a task the Attorney General has delegated to the FBI, *see* 28 C.F.R. § 25.3(a) — by cataloging and querying the

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[5] *See Brady Handgun Violence Prevention Act: Hearing on H.R. 1025 Before the H. Subcomm. on Crime and Crim. Justice of the Comm. on the Judiciary*, 103d Cong. 80 (1993) ("House Hr'g") (statement of Ronald K. Noble, Ass't Sec'y (Enforcement), Dep't of Treasury).

[6] *See* Brady Campaign to Prevent Gun Violence, *Brady Background Checks: The Fight to Protect 23 Years of Lifesaving Success* 5 (2016), https://bit.ly/2NBvj0R.

information provided by local law enforcement and by "suppl[ying]" responses to gun-dealer inquiries. 34 U.S.C. § 40901(b). The FBI operates the NICS through employees known as "examiners." *About NICS*.

The Brady Act also contains a cabined immunity provision that prevents damages actions against "a local government" or "an employee of the Federal Government or of any State or local government, responsible for providing information to the" NICS. 18 U.S.C. § 922(t)(6).

B. In February 2015, Dylann Roof was arrested for possession without a prescription of a narcotic (Suboxone) by the Columbia Police Department in South Carolina. *See* JA176 (Compl. ¶¶ 8-11). The Columbia PD's arrest report "noted that Roof admitted possession of a controlled substance without a prescription." *Id.* (Compl. ¶ 12). About six weeks later, on April 11, 2015, Roof attempted to purchase the gun he later used at Emanuel A.M.E. *See* JA178 (Compl. ¶ 18). The gun dealer, as required under the Brady Act, submitted a background-check request to the NICS. *See* JA443.

That background check should have resulted in a response from the NICS requiring the gun dealer to *deny* the sale. Among those to whom federal law bars the sale of a firearm are "unlawful user[s] of . . . any controlled substance." 18 U.S.C. § 922(d)(3). Roof's arrest rendered him such an unlawful user. Federal regulations define "unlawful user" as a "current user of a controlled substance" and

provide that "[a]n inference of *current* use may be drawn from evidence of a *recent* use or possession." 27 C.F.R. § 478.11 (emphases added). In turn, the FBI's "Standard Operating Procedures," or "SOPs," hold that the combination of an arrest and an admission of possession "establish recent use/possession" — and thus establish "current" use under the regulations. JA430-31 (SOP 5.4.7(A), Dkt. #43-4, Ex. 3 to U.S. Renewed Mot. To Dismiss).[7]

The SOPs governing follow-up research during background checks require NICS examiners contacting state agencies to make "[e]very effort . . . to obtain the necessary information[] in order to reach a final decision on a NICS transaction." JA549 (SOP 5.5.5). Thus, when the NICS examiner in this case learned that Roof had a "criminal history record" in South Carolina, JA445 (Dkt. #43-8, Ex. 7 to U.S. Renewed Mot. To Dismiss), and that "Columbia PD will have the [arrest] report," JA583 (Dkt. #43-22, Ex. 21 to U.S. Renewed Mot. To Dismiss), the examiner was obligated to contact the Columbia PD — because it had "the necessary information," JA549 — and to determine if the arrest report that agency possessed was of the sort that would disqualify the firearm sale.

Tragically, that is not what happened. The examiner never contacted the Columbia PD and thus never learned of Roof's "unlawful user" status. Instead, the

[7] All references to the docket ("Dkt.") are to the consolidated district court docket below in *Sanders v. United States*, No. 2:16-cv-02356 (D.S.C.).

NICS examiner contacted the *wrong* police department and, when informed of that error, *abandoned the background check*. *See* Appellants' Br. 12-13. Following that limited effort, the period during which the Brady Act requires a gun dealer to await a response from NICS lapsed. *See* 18 U.S.C. § 922(t)(1)(B)(ii). As a result, the sale was completed and, two months later, Roof used that gun to kill nine people at Emanuel A.M.E.

C. These consolidated cases against the United States were brought on June 30, 2016, by surviving victims and estates of deceased victims of the Emanuel A.M.E. shooting. In October 2016, the government moved to dismiss the complaint under the FTCA's discretionary-function and misrepresentation exceptions and under South Carolina law. *See* JA323. It did not argue that the Brady Act immunized it against Plaintiffs' claims. That motion to dismiss was denied without prejudice. *See* JA403. After jurisdictional discovery, the government again moved to dismiss in November 2017. JA404. It again did not argue for immunity under the Brady Act.

In its reply brief in support of its second motion to dismiss, the government suggested for the first time, in one paragraph, that 18 U.S.C. § 922(t)(6) provided an additional ground to dismiss the case. *See* Dkt. #50, at 9. However, at the hearing on the motion to dismiss, government counsel acknowledged that, insofar as this case is not about "improperly updat[ing]" or "chang[ing]" the NICS system,

it was *not* resting on its claim of § 922(t)(6) immunity. JA1504-05 (MTD Hr'g Tr.). Despite that concession, the government broadened the scope of its § 922(t)(6) argument in post-hearing briefing. *See* Dkt. #66, at 7-10.

D. The district court granted the government's renewed motion to dismiss, ruling both that the FTCA's discretionary-function exception applies and that the Brady Act's immunity provision applies. *See* JA1654, 1655.

ARGUMENT

I. THE COURT SHOULD NOT AFFIRM THE JUDGMENT BELOW ON BRADY ACT GROUNDS BECUASE THE GOVERNMENT WAIVED THE ISSUE

The government's first two motions to dismiss did not argue for dismissal under the Brady Act's immunity provision, 18 U.S.C. § 922(t)(6). Moreover, after belatedly invoking § 922(t)(6) in a reply brief, the government explicitly *abandoned* reliance on that provision at the ensuing motion-to-dismiss hearing:

> THE COURT: So the question is the plaintiffs argue that the immunity provision does not apply to the examiners. What's your response to that?
>
> MR. WARD: Well, my 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, and I thought that they had made that clear in their sur-reply. And so I'm not sure —
>
> THE COURT: So you don't think it applies? You don't think the immunity provision applies?
>
> MR. WARD: I think to the extent that they are making the claim that the NICS system was improperly updated or that the NICS system

> should have been changed, that it would apply. I'm not — *I don't think they're making those arguments, though*.

JA1504-05 (MTD Hr'g Tr.) (emphasis added). The exchange is clear: counsel conceded that, insofar as Plaintiffs are not "making . . . arguments" that "the NICS system was improperly updated or . . . should have been changed," § 922(t)(6) immunity does not apply.

The government's waiver is applicable here because Plaintiffs are indeed not "making the claim that the NICS system was improperly updated or that the NICS system should have been changed." This is a lawsuit about the government's negligent failure properly to operate the Brady Act's NICS system *as it existed* at the time Dylann Roof's background check was commenced. *See*, *e.g.*, JA186 (Compl. ¶ 62); JA181 (Compl. ¶ 36) (alleging that the United States already "had specific knowledge about Dylann Roof contained in a database"); *see also* Dkt. #56, at 6 (Pl.'s Sur-reply in Opp. to Def.'s Mot. To Dismiss) ("Plaintiff **does not sue** the United States for failing to provide information to the [NICS].") (bold in original). Accordingly, the government has relinquished any claim to Brady Act immunity.

Despite the government's clear concession, the district court stated that it was "disinclined to find a waiver of" what it deemed a "congressionally mandated immunity." JA1654. The court's concerns were misplaced. Some statutory immunity — for example, that granted under the Foreign Sovereign Immunities

Act — is not subject to waiver because it is jurisdictional in nature. *See*, *e.g.*, 28 U.S.C. § 1604 (except as otherwise provided, "a foreign state shall be immune *from the jurisdiction* of the courts of the United States and of the States") (emphasis added); *Rice v. Rivera*, 617 F.3d 802, 810 (4th Cir. 2010) (per curiam) ("Jurisdictional restrictions provide absolute limits on a court's power to hear and dispose of a case, and such limits can never be waived or forfeited."). Nothing in the Brady Act suggests that § 922(t)(6) grants a jurisdictional immunity. *See Hyman v. City of Gastonia*, 466 F.3d 284, 289 (4th Cir. 2006) ("We keep in mind the Supreme Court's admonition that we not loosely characterize a statute as 'jurisdictional' . . . ."). And *non*-jurisdictional immunity "*can be* waived." *In re Mills*, 287 F. App'x 273, 278 (4th Cir. 2008) (per curiam).

There is every reason to enforce the government's waiver here.[8] Beyond its express waiver in open court, the government failed to raise (before later abandoning) the issue until its district court reply brief. And the government's post-hearing brief was submitted contemporaneously with Plaintiffs', denying Plaintiffs any chance to respond to the broadened argument. What is more, the district court analyzed the issue in a single paragraph with no citations and without

[8] *Cf. United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

the benefit of full adversarial ventilating of that statute, given the way the government belatedly raised, abandoned, and then sought to raise again its § 922(t)(6) immunity claim. As far as *amicus* is aware, the decision on review is the first district court decision nationwide to consider the scope of § 922(t)(6) immunity. Sound appellate practice counsels against "reach[ing] out to decide a highly important issue without the benefit of lower court attention to the question" and "without full examination of the issues involved." *Davis v. United States*, 417 U.S. 333, 351 (1974) (Rehnquist, J., dissenting).

Accordingly, if the Court agrees with Appellants that reversal is warranted under the FTCA, the Court should reverse the district court's Brady Act ruling on waiver grounds. And it should not, in any event, affirm the district court's judgment on the basis of its Brady Act holding.

II. THE DISTRICT COURT'S BRADY ACT RULING IS CONTARY TO THE PLAIN TEXT OF THE STATUTE

If the Court reaches the merits of the district court's § 922(t)(6) ruling, it should reject that holding as contrary to the statute's plain terms. "The starting point for any issue of statutory interpretation . . . is the language of the statute itself." *Ignacio v. United States*, 674 F.3d 252, 254 (4th Cir. 2012) (quoting *United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007)). And "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry

is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Those precepts control here because the Brady Act's immunity provision explicitly states when it does and does not apply. The provision provides that:

> 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.

18 U.S.C. § 922(t)(6). As the text indicates, the provision applies to some, but not all, of the government officials and entities that undertake some, but not all, of the obligations the Brady Act creates. Immunity extends only to certain would-be defendants: "a local government" or "*an employee* of the Federal Government or of any State or local government." *Id.* (emphasis added). And it applies to those would-be defendants *only if* they are "responsible for providing information to the" NICS system. *Id.*[9] The immunity attaches only if both conditions are met. Neither is met here.

[9] As noted above, and as relevant here, the NICS system functions primarily through the actions of three groups of stakeholders. Gun dealers ("licensees" in the parlance of the Act) "contact[] the" NICS system with the identity of a

A. The United States Is Not a Local Government or a Government Employee

1. Plaintiffs have sued the federal government, not a specific federal government employee. That removes this lawsuit from the ambit of the Brady Act's immunity provision because, with respect to the federal government, the statute protects only its "employee[s]" and not the government itself.

The phrasing and structure of the immunity provision confirm that the use of the phrase "an employee" deliberately draws a distinction between government employees and governments. In addition to immunizing (in some cases) "an employee of the Federal Government or of any State or local government," the provision also immunizes "a *local* government." 18 U.S.C. § 922(t)(6) (emphasis added). Under the familiar canon of construction *expressio unius est exclusio alterius*, the specific reference to "local" governments is meaningful. The statute protects *employees* at any level of government — federal, state, and local, each of which is explicitly listed — and, in the same sentence, protects *governments* in just one of those three categories. *See POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) ("By taking care to mandate express pre-emption of some

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prospective buyer, 18 U.S.C. § 922(t)(1)(A); States (and their subdivisions, *i.e.*, local law enforcement) "provide criminal records . . . to the national system," 34 U.S.C. § 40901(a)(2); and the federal government (via the FBI) operates the NICS system by querying the information provided by local law enforcement and responding to gun-dealer inquiries, *id.* § 40901(b).

state laws, Congress if anything indicated it did not intend the FDCA to preclude requirements arising from other sources."); *United States v. Williams*, 811 F.3d 621, 624 (4th Cir. 2016) ("clear implication" of statute that "specifically prohibits appeals . . . only under" two paragraphs of a statute is that it "allow[s] such appeals" under a distinct paragraph).

Congress has shown throughout the U.S. Code that, when it *does* wish to immunize the federal government, it does so in clear terms. *See*, *e.g.*, 43 U.S.C. § 1656(b) ("[T]he United States and the several States, and political subdivisions thereof, shall not be liable under this section."); 16 U.S.C. § 583j-6 ("The United States shall not be liable for any debts, defaults, acts or omissions of the [National Forest] Foundation . . . ."). "The contrast between" these provisions and the Brady Act "makes clear that Congress knows how to impose express limits" on the federal government's liability when that is what it wants to do. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010). It has not done so here.[10]

[10] That is not surprising. Review of the legislative history of the years-long effort to pass the Brady Act indicates that the primary concern about lawsuits was focused on claims against local police. *See*, *e.g.*, 139 Cong. Rec. H9088, 9089-90 (daily ed. Nov. 10, 1993) (Rep. Solomon expressing concerns about "opening up those officials on a local level responsible for conducting the criminal checks to a large number of lawsuits"); 138 Cong. Rec. S16551, 16576 (daily ed. Oct. 5, 1992) (Sen. Metzenbaum discussing "the immunity provision for the police"); House Hr'g at 85 (then-Rep. Schumer asking, "Would the Department [of Justice] support any changes in this provision so that local law enforcement might be able to be sued if they made a mistake?"); *see also Handgun Violence Prevention Act of*

Indeed, Congress passed the Brady Act just five years after the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), which made explicit the federal government's exposure to liability in cases in which its employees are immune. *See* 28 U.S.C. § 2679. The Congress that passed the Brady Act was especially likely to have been aware of that dichotomy in federal law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("Congress is aware of existing law when it passes legislation.").

2. In one paragraph that did not even quote the statutory text (much less cite any other legal authority), the district court concluded that § 922(t)(6) applies to the federal government because "[t]he Government cannot act other than through its employees." JA1655. That may be true, but it is irrelevant.

The text of the immunity provision itself refutes the suggestion that the government and its employees are indistinguishable in this context because it explicitly distinguishes among immune local governments and immune local, state, and federal government employees. There would be no reason to draw that distinction in the statute if state and federal governments were also immune by virtue of the immunity extended to their employees. *See Discover Bank v. Vaden*, 396 F.3d 366, 369 (4th Cir. 2005) ("[C]ourts must 'give effect to every provision

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1987: A Bill To Provide for a Waiting Period Before the Sale, Delivery, or Transfer of a Handgun: Hearing on S. 466 Before the S. Subcomm. on the Const. of the Comm. on the Judiciary, 100th Cong. 123-24 (1988).

and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous.'") (quoting *United States v. Ryan-Webster*, 353 F.3d 353, 366 (4th Cir. 2003)). Indeed, federal law generally takes pains to distinguish between the amenability to suit of the federal government, on the one hand, and its employees, on the other. The FTCA, for example, provides that the "remedy against the United States" under the Act "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the [relevant federal] employee" and that any such other action "is precluded." 28 U.S.C. § 2679(b)(1).

The district court was apparently adopting the argument — advanced by the government for the first time in its district court reply brief — that "the government is entitled to . . . any defenses of the individual employees." JA1504 (MTD Hr'g Tr.) (quoting the court); *see also* Dkt. #50, at 9 (U.S. Reply in Supp. Renewed Mot. To Dismiss). The court misunderstood the doctrine to which it was apparently referring.

In FTCA cases, courts have consistently held that the government may assert *state-law* defenses available to individual defendants in the jurisdiction in which the tort arises. That doctrine flows directly from the text of the FTCA, which provides that the government in tort cases stands in the shoes of a private state-law defendant and is liable, or not, "in accordance with *the law of the place* where the

act or omission occurred." 28 U.S.C. § 1346(b)(1) (emphasis added). Nothing about that statutory scheme entitles the government to claim *federal*-law immunity that, by its terms, applies exclusively to employees and not the government.[11] Rather, "[a]s immunities and defenses are defined by the same body of law that creates the cause of action, the defenses available to the United States in FTCA suits are those that would be available to a private person *under the relevant state law*." *Vidro v. United States*, 720 F.3d 148, 151 (2d Cir. 2013) (emphasis added).

Medina v. United States, 259 F.3d 220 (4th Cir. 2001), which the government cited below, goes no further. There, this Court considered the reach of the "discretionary function exception found in § 2680(a)" to claims brought by a plaintiff who was detained ahead of deportation proceedings that the government ultimately agreed lacked a legal basis and dropped. *Id.* at 225. The case was resolved on jurisdictional grounds under the discretionary-function exception. Still, in a footnote labeled "not relevant to our resolution of this appeal," the panel

[11] The FTCA also provides that the federal government may assert "judicial or legislative immunity" available to individual defendants. 28 U.S.C. § 2674. That is not a reference to court-created and legislative *grants* of immunity, but rather to "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. No. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948. If anything, the FTCA's express recognition of these specific immunities precludes application of a distinct protection that by its terms applies only to government employees.

observed that "Virginia may well provide immunity to officers who make a mistake of law in effectuating an arrest and prosecution" and that "the United States is entitled to avail itself of any defenses its agents could raise in their individual capacities." *Id.* at 225 n.2. In the context of the observation about Virginia law, it is obvious that the "any defenses" comment applies to state-law defenses.[12]

B. The Employees at Issue in This Case Are Not "Responsible for Providing Information" to NICS

Even if, as the district court appeared to assert, the federal government could cloak itself in the immunity the Brady Act explicitly grants to federal *employees* (and it plainly cannot, *see supra* Part II.A), the immunity would not be available here for a separate reason: the federal employees that made the mistakes that allowed Roof to purchase a gun were not "responsible for providing information" to NICS. 18 U.S.C. § 922(t)(6). Those federal employees instead were responsible for *operating* the NICS system using the information it already contained. As alleged in the complaint, the FBI had "knowledge" of Roof's disqualifying arrest record, JA181 (Compl. ¶ 36); the FBI had "a duty to take affirmative action to deny the sale of the gun to Dylann Roof," *id.* (Compl. ¶ 38);

[12] *Medina* cited *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978), which addressed defenses available in *Bivens* actions. Because *Bivens* actions arise "directly under" the Constitution, *id.* at 392, and not under state law, *Norton* is largely irrelevant.

and, in failing to do so, the FBI proximately caused the tragic events at Emanuel A.M.E., JA180 (Compl. ¶¶ 30-33). Indeed, government counsel acknowledged in the district court that Plaintiffs "are not making the argument that they're suing the U.S. for failing to put the data into the NICS system." JA1504 (MTD Hr'g Tr.). That key distinction provides an independent reason to reverse the district court's Brady Act holding.

The government contended for the first time in its post-argument supplemental briefing below that NICS examiners "d[o], in fact, provide information to the NICS system," because they create transaction logs and document responses and incident reports received from state and local governments in the normal course of operating the NICS system. Dkt. #66, at 8-9.[13] This argument stretches the phrase "providing information" beyond any recognizable meaning in the context of the Brady Act. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (statutory terms must be interpreted "in their context and with a view to their place in the overall statutory scheme").

[13] The district court ignored the issue entirely. It stated, "[I]t is obvious to the Court 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 (emphasis added). It did not try to reconcile that assertion with the text of the statute, which limits immunity to those responsible for providing information to the NICS.

As noted above, the Brady Act's background-check process functions through the actions of distinct stakeholders with distinct roles. The Attorney General is charged with "establish[ing] a national instant criminal background check system," which includes "determin[ing] . . . the means by which *State* criminal records systems . . . will communicate with the national system." 34 U.S.C. § 40901(a)(1), (b) (emphasis added). By contrast, it is primarily the States (and their subdivisions, *i.e.*, local law enforcement) that are expected to "*provide* criminal records . . . to the national system." *Id.* § 40901(a)(2) (emphasis added). That division of labor illuminates the meaning of "providing information" in § 922(t)(6).

Numerous other sources confirm that commonsense dichotomy. The FBI's own website describes NICS as a "national system that *checks* available records on persons who may be disqualified from receiving firearms." *About NICS* (emphasis added). Rachel Brand, then the Assistant Attorney General for Legal Policy at the Department of Justice, testified to Congress in 2007 that "the relevant State information available for NICS checks is *provided voluntarily by the States* to the FBI and entered into one of the three information systems *checked* by the NICS." JA411 (Dkt. #43-2, Ex. 1 to U.S. Renewed Mot. To Dismiss) (emphases added). And the NICS examiner who failed to locate Dylann Roof's disqualifying arrest record, agreed in deposition testimony that her "primary responsibility is to

research" the information contained in the databases that constitute the NICS. JA643-44 (Dkt. #44-1, Conley Dep. Tr.). The statute's division between entities that "provide" information to NICS and the FBI's conducting of the background check — which consists of "checking" and "researching" information the system already contains — precludes the government's distorted interpretation of "providing."

Even setting statutory context aside, the government's examples of NICS examiners "providing information" do not in fact constitute "providing" as the term is naturally understood. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'") (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The government instead points to quintessential examples of recordkeeping. *See* Dkt. #66, at 8-9 (completing an audit log, "stor[ing] a copy of th[e] incident report," submitting denial to NICS Index).

To "provide" is to "supply or make available" something the recipient needs or wants.[14] Recordkeeping, by contrast, involves storing or recording information

[14] Merriam-Webster, https://www.merriam-webster.com/dictionary/provide.

that has already been discovered, received, or provided.[15] For example, when a teacher takes attendance in a classroom, the student *provides* information concerning her presence or absence (*e.g.*, by shouting "Here!"), and the teacher *records* that information on an attendance sheet. Few would say the teacher "provided" that information to the attendance sheet.

Similarly, the government's examples do not involve supplying information to the NICS. For example, one NICS examiner "received the incident report after the shooting from the Columbia Police Department" and "stored" — *i.e.*, recorded — "a copy of that incident report . . . in the audit log." Dkt. #66, at 9. In normal parlance, the police department is the party that *provided* that information. The NICS examiner made a record of it.[16] Because this suit concerns the behavior of federal employees responsible for researching, reviewing, and in some cases storing records, rather than providing them, § 922(t)(6) does not apply.

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[15] *Cf.* Merriam-Webster, https://www.merriam-webster.com/dictionary/record ("record": "to set down in writing"; "furnish written evidence of").

[16] That intuition is confirmed by the fact that "providing" is used in the statute as a transitive verb: the provision speaks of parties "providing information *to* the" NICS. 18 U.S.C. § 922(t)(6) (emphasis added). The provision thus clearly applies to *non*-NICS parties, because it would be quite unnatural to speak of one party "providing information to" itself.

C. The Immunity Provision's Specificity Reveals That Congress Contemplated Damages Actions in Other Circumstances

In § 922(t)(6), Congress went out of its way to define the precise circumstances in which "action[s] at law for damages" are barred. Again, applying fundamental canons of statutory construction, that means damages actions are *not* barred when those circumstances are not met. *See POM Wonderful*, 134 S. Ct. at 2238; *see also supra* pp. 15-16 (discussing the *expressio unius* canon). Indeed, it suggests that, as in other federal statutes, Congress affirmatively contemplated damages actions as one means of ensuring the government's compliance with its statutory duties. *Cf. West v. Gibson*, 527 U.S. 212, 215 (1999) (Title VII permits recovery of compensatory damages from federal government).

The structure of the statute suggests that that is precisely what Congress contemplated. In addition to § 922(t)(6), the Brady Act's waiting-period provision provides a separate carefully defined immunity against "action[s] at law for damages" to "[a] chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection." 18 U.S.C. § 922(s)(7); *see also id.* § 922(s)(8) (defining "chief law enforcement officer"). Elsewhere, federal law provides a specific non-damages remedy for the "erroneous *denial* of [a] firearm" to a prospective purchaser. *Id.* § 925A (emphasis added); *see id.* (permitting suits "against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the

transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be"). In all of those provisions, Congress either specifically eliminated certain sorts of claims against certain defendants or, as in § 925A, specifically cabined certain sorts of claims to certain sorts of relief. In those cases, it may be that the specific governs the general. In all other cases, the proper inference is that the FTCA's general liability rules apply with full force.[17]

Whatever the precise contours of the government's exposure to damages liability under the Brady Act, this is not a close case. Congress in the Brady Act charged the federal government with "prevent[ing] convicted felons and other persons who are barred by law from purchasing guns." H.R. Rep. No. 103-344, at 7, 1993 U.S.C.C.A.N. 1984. The government has *publicly admitted* that its own negligent "mistake" in permitting a firearm sale contributed to the horrific events at Emanuel A.M.E. Moreover, none of the Brady Act's specific liability limitations apply by their clear terms. If the Brady Act is interpreted to bar even a

[17] It is not surprising that Congress in the Brady Act trod a path between complete immunity and complete exposure to damages actions. The Act's legislative history reflects concerns both about too much and too little exposure to suit for law enforcement. *Compare* 139 Cong. Rec. H9089-90 (Rep. Solomon expressing concerns about "opening up [local law enforcement] officials . . . to a large number of lawsuits"), *with* 138 Cong. Rec. S16553 (Sen. Craig expressing concerns that too-broad immunity would give "law enforcement authorities unlimited and unqualified power to disapprove . . . any firearms sale to any law-abiding citizen").

suit of this nature, Congress's aims — both in preventing unlawful gun sales and in designing a careful set of liability rules that bars some lawsuits but not others — will be thwarted, and the victims of an utterly avoidable tragedy will be denied their day in court.

CONCLUSION

The order of the district court should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 18-1931(L) **Caption:** Felicia Sanders, et al. v. United States

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