No.

In the Supreme Court of the United States

RANDALL L. SPADE, PETITIONER,

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq., establishes a system of compensation for federal employees who sustain work-related injuries. Where FECA applies, it provides the federal government's "exclusive" liability with regard to an employee's injury, *id.* § 8116(c), and the Secretary of Labor's decision "in allowing or denying a payment" under FECA is "not subject to review * * * by a court," *id.* § 8128(b)(2).

The question presented is:

Whether federal courts have subject-matter jurisdiction to address what injuries fall within the scope of FECA's statutory scheme.

PARTIES TO THE PROCEEDING

Petitioner, plaintiff in the district court, is Randall L. Spade.

Respondent, defendant in the district court, is the United States Department of Justice. Pursuant to 28 U.S.C. § 2679(d)(1), the United States of America should be substituted for the United States Department of Justice.

RELATED PROCEEDINGS

United States Court of Appeals for the Third Circuit:

Randall L. Spade v. *United States Department of Justice*, No. 21-1865 (Feb. 14, 2022).

Randall L. Spade v. *United States of America*, No. 18-2478 (Mar. 26, 2019)

United States District Court for the Middle District of Pennsylvania:

Randall L. Spade v. *United States of America*, No. 4:15-cv-02513 (Mar. 31, 2021)

Randall L. Spade v. *United States Department of Justice*, No. 4:15-cv-2513 (May 8, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Randall L. Spade respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App., *infra*, 1a-8a) is unreported but available at 2022 WL 444259. The opinion of the United States District Court for the Middle District of Pennsylvania (App., *infra*, 9a-21a) is reported at 531 F. Supp. 3d 901.

JURISDICTION

The United States Court of Appeals for the Third Circuit issued its opinion on February 14, 2022. On May 5, 2022, Justice Alito extended the deadline for a certiorari petition to and including June 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. §§ 8102(a), 8116(c), 8128 and 8145 are set out in the appendix to the petition. App., *infra*, 30a-32a.

INTRODUCTION

In establishing a workers' compensation scheme for federal employees, Congress provided that "[t]he action of the Secretary [of Labor] * * * in allowing or denying a payment is * * * not subject to review * * * by a court." 5 U.S.C. § 8128(b)(2). In this case, the Third Circuit held that this statutory language strips federal courts of jurisdiction to review not only claim-

specific agency actions "allowing or denying a payment," but also divests courts of jurisdiction to address basic threshold questions about the scope of that statutory scheme. The panel so held, even though questions about the scope of the federal workers' compensation scheme affect the operation and scope of *other* federal statutes outside the Secretary's ken (such as the Federal Tort Claims Act), and also, as here, can determine the jurisdiction of federal courts themselves. In the Third Circuit's view, however, questions about the scope of the Federal Employees' Compensation Act ("FECA") are committed to the Secretary of Labor, and "unreviewable by any court." App., *infra*, 6a.

The counterintuitive and troubling notion that the Executive Branch would have unreviewable discretion to determine the scope of a federal statutory scheme lacks a sound basis in statutory text, context, structure, purpose, or history, and cannot be reconciled with the presumption favoring judicial review of agency action. The Third Circuit's decision cements a longstanding circuit split on whether the judiciary retains a meaningful role in interpreting FECA's scope. And while Congress vested broad authority in the Secretary of Labor to adjudicate workers' compensation claims, the Third Circuit's decision to strip courts of jurisdiction to address the scope of a key federal administrative scheme gets a foundational question squarely wrong. See *Chevron, U.S.A., Inc.* v. *Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("[t]he judiciary is the final authority on issues of statutory construction"). This Court's review is urgently warranted.

STATEMENT

1. Factual Background

Petitioner Randall L. Spade is a corrections officer at the U.S. Penitentiary in Lewisburg, Pennsylvania. App., *infra*, 2a. In September 2011, petitioner was escorting a prisoner to his assigned cell in the Special Housing Unit when another prisoner said, "Hey Randy, how's Richfield?," referencing petitioner's first name and town of residence. *Id.* at 3a, 24a. The prisoner then recited petitioner's social security number. *Id.* at 3a. A subsequent investigation revealed that, in response to a Freedom of Information Act request, the Department of Justice had mistakenly given petitioner's unredacted personal information to an inmate—including his social security number, date of birth, home address, and work history with the Bureau of Prisons. *Id.* at 3a, 24a.

Other Lewisburg corrections officers subsequently overheard inmates reciting or claiming to have memorized petitioner's sensitive personal information. App., *infra*, 3a. One prisoner, for example, told another that "[Petitioner] better stop f * * * ing with me, he don't even know I can recite his social security number and home address by heart. I have all of that memorized." *Id.* at 26a. The prisoner warned that Mr. Spade "needs to stop messing with somebody that has connections on the street." *Ibid.*; see also *Spade* v. *United States*, 763 F. App'x 294, 294 (3d Cir. 2019) (inmates "threatened to use the information gleaned from [petitioner's] personnel file to harm him and his family"). Inmates privy to petitioner's personal information were housed in the prison's Special Management Unit, reserved for

those "deemed to be among the worst in the Bureau of Prisons." App., *infra*, 26a.

Due to the government's negligent release of his personal information, petitioner "alleges that he suffers extreme emotional distress, fears for his and his family's safety, and has experienced detrimental effects on his work environment." App., *infra*, 3a.

2. Legal Background

The Federal Tort Claims Act ("FTCA"), enacted in 1946, creates a cause of action for damages for certain torts committed by federal employees "under circumstances 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 *Brownback* v. *King*, 141 S. Ct. 740, 745 (2021).[1] Thus, if recognized by state law, a claim of negligent infliction of emotional distress caused by a federal employee's tortious actions may be pleaded under the FTCA. See, *e.g.*, *Prado* v. *Perez*, 451 F. Supp. 3d 306, 318-319 (S.D.N.Y. 2020).

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[1] The FTCA waives the sovereign immunity of the United States, sets the terms of the FTCA's cause of action, and gives federal courts exclusive jurisdiction over FTCA claims. 28 U.S.C. § 1346(b); *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994). A "claim is actionable [under § 1346(b)]] if it alleges" a claim "[1] against the United States, [2] for money damages, * * * [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances 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." *Brownback*, 141 S. Ct. at 746 (quoting *Meyer*, 510 U.S. at 477).

Petitioner, however, is a federal employee. Because of this, another statute potentially comes into play: FECA, which establishes a "system of compensation for federal employees who sustain [certain] work-related injuries." *United States* v. *Lorenzetti*, 467 U.S. 167, 168 (1984).

With certain exceptions, FECA provides that the United States "shall pay compensation * * * for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102(a). Originally enacted in 1916, FECA "provide[s] federal employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States." *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 601 (1963).

For claims that fall within the scope of FECA, the benefits provided under that statute are an injured federal employee's "exclusive" remedy against the United States. See *Weyerhaeuser*, 372 U.S. at 601. In particular, the "liability of the United States [under FECA] * * * with respect to the injury or death of an employee" is "exclusive and instead of all other liability of the United States * * * under a workmen's compensation statute" or "Federal tort liability statute." 5 U.S.C. § 8116(c). Congress added the exclusive liability provision in 1949 to adopt "the principal compromise * * * commonly found in workers' compensation legislation": for injuries covered by that scheme, "employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and

without need for litigation, but in return they lose the right to sue the[ir employer, i.e., the] Government." *Lockheed Aircraft Corp*. v. *United States*, 460 U.S. 190, 194 (1983).

Thus, when a federal "employee sustains an injury covered by FECA, her exclusive remedy is to seek compensation under the Act; she may not sue the United States for damages under any other provision of law, including the FTCA." *Hawkins* v. *United States*, 14 F.4th 1018, 1020 (9th Cir. 2021); accord, *e.g.*, *Williamson* v. *United States*, 862 F.3d 577, 580 (6th Cir. 2017); *Southwest Marine, Inc*. v. *Gizoni*, 502 U.S. 81, 90 (1991). This is so even though FECA may provide a smaller measure of damages for a covered "injury" than might have been obtained in a tort action under the FTCA. *E.g.*, *Noble* v. *United States*, 216 F.3d 1229, 1234 (11th Cir. 2000) (FECA forecloses FTCA action even for "losses * * * not compensated under FECA").

FECA further states that the Secretary of Labor "shall administer, and decide all questions arising under" the statute. 5 U.S.C. § 8145. Congress provided that the Secretary's "action * * * in allowing or denying a payment" to an injured employee is "final and conclusive for all purposes and with respect to all questions of law and fact" and is "not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. § 8128(b). FECA thus "contains an unambiguous and comprehensive provision barring any judicial review," *Sw. Marine*, 502 U.S. at 90 (internal quotation marks omitted), of the Secretary of Labor's determination in "allowing or denying a [FECA] payment," see 5 U.S.C. § 8128(b).

3. Procedural Background

In December 2015, petitioner filed suit under the FTCA, alleging, in pertinent part, negligent infliction of emotional distress for the mistaken disclosure of his sensitive personal information. App., *infra*, 3a. The district court initially held that petitioner failed to state a claim under the FTCA because he had not cited Pennsylvania authority creating liability for an employer's negligent handling or disclosure of personal information. See *Spade* v. *U.S. Dep't of Justice*, No. 4:15-cv-02513, 2018 WL 2113888, at *2 (M.D. Pa. May 8, 2018).

While petitioner's appeal was pending, the Pennsylvania Supreme Court held that an employer owes a duty of reasonable care to its employees when collecting and storing employees' data. App., *infra*, 4a (citing *Dittman* v. *UPMC*, 196 A.3d 1036, 1048 (Pa. 2018)). While briefing the relevance of *Dittman*, the Government raised, for the first time, the possibility that FECA might be a jurisdictional bar to petitioner's claim. *Id*. at 10a. The Third Circuit vacated and remanded to allow petitioner to seek a determination from the Department of Labor as to whether FECA covers his claims. *Id*. at 4a.

In July 2019, petitioner filed a claim with the Department of Labor's Office of Workers' Compensation Programs, alleging that he had sustained an injury or medical condition as a result of his federal employment and that the injury or condition resulted from his employer's negligence. App, *infra*, 4a, 15a. The Department found that petitioner was a "Federal civilian employee who filed a timely claim" and that the evidence supported that "the injury and/or events

occurred as described" and "within the performance of duty." *Id.* at 4a. But the Department denied petitioner's claim, on the ground that he had not submitted certain medical evidence. *Ibid.*

The District Court subsequently dismissed petitioner's complaint under Rule 12(b)(1). App., *infra*, 4a. Petitioner had argued in district court that his emotional-distress claim was not covered by FECA, citing to Ninth Circuit precedent. *Id.* at 14a-15a. The district court acknowledged a circuit split on that question. *Id.* at 16a. But the district court did not reach the issue. It construed the Department's denial as an implicit finding that petitioner's claimed injuries were covered by FECA. *Id.* at 16a-18a. And under controlling Third Circuit precedent, "the decision of the Secretary of Labor on whether FECA covers the alleged injury * * * is final, and review of any kind by a court is absolutely barred." *Id.* at 17a. "[B]ecause FECA applied, * * * [the district court] lacked subject matter jurisdiction over the case." *Id.* at 4a.

The Third Circuit affirmed. App., *infra*, 8a. That court explained that FECA "operates as a jurisdictional bar." *Id.* at 6a. If a federal employee's claim is covered by FECA, that remedy is exclusive, and federal courts lack subject-matter jurisdiction to consider a claim pleaded under the FTCA. *Id.* at 5a (citing *Heilman* v. *United States*, 731 F.2d 1104, 1109 (3d Cir. 1984)). When even a "substantial question" of FECA coverage exists, the Third Circuit explained, "courts should not hear that claim." *Id.* at 6a.

The Third Circuit acknowledged a circuit split on whether federal courts retain jurisdiction to address even the threshold issue of whether a particular

claimed injury falls within the *scope* of FECA. App., *infra*, 6a. The panel explained, however, that in prior published opinions, the Third Circuit "has taken the position that the Secretary's determinations regarding FECA coverage and scope are final and unreviewable by any court." *Ibid.* (citing *Heilman*, 731 F.2d at 1109). As the Third Circuit noted, this is "a position held by many of [its] sister Courts of Appeals." *Id.* at 6a-7a (citing *Mathirampuzha* v. *Potter*, 548 F.3d 70, 82 (2d Cir. 2008); *Swafford* v. *United States*, 998 F.2d 837, 841 (10th Cir. 1993); *McDaniel* v. *United States*, 970 F.2d 194, 197 (6th Cir. 1992) (per curiam)). By contrast, the panel acknowledged, the Ninth Circuit has adopted a contrary position, holding that although FECA bars judicial review of the Department's decision to award or deny FECA compensation, federal courts retain jurisdiction to address "the threshold question whether the type of injury alleged falls within the scope of FECA coverage." *Id.* at 6a (quoting *Mathirampuzha*, 548 F.3d at 82 (discussing Ninth Circuit precedent)).

The Third Circuit held that FECA divested the district court of jurisdiction to decide whether petitioner's emotional injury claims fall within the scope of FECA's statutory scheme.[2] In the Third Circuit's view, the fact that the Secretary "reached the issue of the sufficiency" of petitioner's medical evidence reflected an implicit determination that "FECA applied." App., *infra*, 7a. "At a minimum," the panel reasoned,

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[2] The fact that petitioner "may have [had] remaining administrative appeals" was "of no relevance" to the Third Circuit's conclusion that the district court lacked jurisdiction. App., *infra*, 8a.

petitioner's claim presented a "substantial question" of FECA coverage, "which would also divest the District Court of subject matter jurisdiction." *Id.* at 7a-8a.[3]

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Squarely Split Over Whether Federal Courts Have Jurisdiction to Address the Scope of FECA.

FECA provides that the Secretary of Labor's decision "in allowing or denying a payment under this subchapter" is "not subject to review * * * by a court." 5 U.S.C. § 8128(b)(2). But the circuits are squarely and concededly split about whether federal courts have jurisdiction to address even the threshold legal question of what claims fall "under this subchapter," § 8128(b)—i.e., what claims are within FECA's scope. Compare *Sheehan* v. *United States*, 896 F.2d 1168, 1174 (9th Cir.), as amended, 917 F.2d 424 (9th Cir. 1990) (holding that federal courts have jurisdiction), with *Mathirampuzha* v. *Potter*, 548 F.3d 70, 82 (2d Cir. 2008) (holding that Secretary of Labor has unreviewable discretion to make scope determinations, and noting that "[o]nly the Ninth Circuit has taken the position * * * that a federal court decides the threshold

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[3] Having concluded the district court lacked jurisdiction, the Third Circuit did not address whether Petitioner's claims fell within FECA's scope. The panel acknowledged, however, that the Ninth Circuit has held—consistent with petitioner's position in this case—that FECA does *not* encompass claims for emotional distress "divorced from any claim of physical harm." App., *infra*, at 6a (citing *Sheehan* v. *United States*, 896 F.2d 1168, 1174 (9th Cir.), as amended, 917 F.2d 424 (9th Cir. 1990); *Moe* v. *United States*, 326 F.3d 1065, 1068 (9th Cir. 2003)).

question whether the type of injury alleged falls within the scope of FECA coverage").

A. Most Circuits Hold That Federal Courts Lack Jurisdiction to Address What Claims Fall Within the Scope of FECA.

Most circuits to consider the question have concluded that federal courts lack jurisdiction to address whether a particular type of claim falls within the scope of FECA's statutory scheme. According to those circuits, the "[r]esolution of the coverage question has been entrusted to the Secretary of Labor." *Bruni* v. *United States*, 964 F.2d 76, 79 (1st Cir. 1992). Thus, if a federal employee brings suit under the FTCA, but the Secretary of Labor has determined that the employee's claim is covered by FECA, including through a decision to grant or deny compensation, a district court will dismiss the FTCA claim for lack of subject-matter jurisdiction. And the court will not review the Secretary's determination about the scope of FECA. See *Spinelli* v. *Goss*, 446 F.3d 159, 161-162 (D.C. Cir. 2006) (dismissing FTCA claims because Secretary of Labor's decision that FECA covered plaintiff's emotional injury "settles the matter"); *Bennett* v. *Barnett*, 210 F.3d 272, 277 (5th Cir. 2000) (holding that district court lacks jurisdiction over FTCA claim where Secretary has concluded that plaintiff's emotional distress claim is covered by FECA).

Indeed, many circuits disclaim subject-matter jurisdiction where there is even a "substantial question" about FECA coverage. In those circuits, a "substantial question exists unless it is *certain* that the Secretary would not find coverage." *Bruni*, 964 F.2d at 79. In

other words, federal courts in these circuits disclaim jurisdiction to address whether certain kinds of injuries fall within the scope of FECA, whenever there is even a *possibility* that the Secretary would view the claim as within FECA. See *White* v. *United States*, 143 F.3d 232, 234 (5th Cir. 1998) ("Only if we are certain that the Secretary of Labor would conclude that the employee's injuries do not present a substantial question of coverage under FECA may we entertain the employee's FTCA claim without the employee first submitting the claim to the Secretary of Labor.").

Gill v. *United States*, 471 F.3d 204 (1st Cir. 2006), is illustrative. There, a federal employee sued the Navy under the FTCA, alleging claims for emotional distress but no physical injuries. The plaintiff argued that emotional-distress claims divorced from physical injury fall outside the scope of the "personal injur[ies]" covered by FECA, and therefore that his claims could be pleaded under the FTCA. The district court dismissed the complaint and the First Circuit affirmed, holding that "[f]ederal courts have subject matter jurisdiction over federal tort claims only when it is *certain* that the Secretary would not find coverage" under FECA. *Id.* at 207 (citation omitted). Put differently, so long as there is any question as to whether FECA covers a particular claim, "[t]hose questions are left to the Secretary" and federal courts lack jurisdiction to address the issue. *Id.* at 208.

Similarly, a federal employee in *Mathirampuzha* v. *Potter* pleaded claims under the FTCA, contending (as in *Gill*) that FECA did not cover her emotional distress claims. The Second Circuit held that "[i]f there is a substantial question of FECA coverage, only the

Secretary of Labor or her delegate may decide whether the FECA applies." *Mathirampuzha*, 548 F.3d at 81. In doing so, the Second Circuit followed the First Circuit's framing of the "substantial question" inquiry, reasoning that "unless it is certain that the FECA does not cover the type of claim at issue," federal courts "may not entertain the FTCA claim." *Ibid.* The Second Circuit "agree[d] with the majority of circuits to have addressed this question." *Ibid.* (collecting cases). That court acknowledged, but squarely rejected, the Ninth Circuit's contrary approach, under which federal courts retain jurisdiction to address "the threshold question whether the type of injury alleged falls within the scope of FECA coverage, whereas the Secretary of Labor decides the unreviewable question whether the claimant is to receive compensation." *Id.* at 82. In the Second Circuit's view, the Secretary of Labor has "unreviewable" discretion to "determine what types of claims fall within the scope of FECA," and "because liability under the FECA is exclusive, [the court's] subject-matter jurisdiction ends where FECA coverage begins." *Id.* at 82-83 & n.13.

The Seventh Circuit has followed the same approach, including in the context of an employee's emotional distress claim. That court held that federal courts may exercise jurisdiction over claims pleaded under the FTCA, only when it "is certain as a matter of law that the Secretary would find the claim outside the scope of [FECA]." See *Fuqua* v. *U.S. Postal Serv.*, 956 F.3d 961, 964 (7th Cir. 2020). The Fourth, Sixth, and D.C. Circuits have taken a similar approach, concluding that the Secretary of Labor is to decide questions of scope under FECA. See, *e.g.*, *Wallace* v.

United States, 669 F.2d 947, 951 (4th Cir. 1982) (following "most federal circuit courts" in holding that "a federal employee cannot file an action under the [FTCA] if there is a 'substantial question' whether FECA applies, or unless his injuries are 'clearly not compensable' under FECA") (citations omitted); *McDaniel* v. *United States*, 970 F.2d 194, 196 (6th Cir. 1992) ("[T]he Secretary of Labor, not the Sixth Circuit, has the final say as to the scope of FECA."); *Daniels-Lumley* v. *United States*, 306 F.2d 769, 770 (D.C. Cir. 1962) ("Decision of * * * all questions under [FECA] is committed by the Act to the Secretary of Labor, and his decision is not subject to review by any court.").

In other words, the majority-view circuits read FECA to delegate unreviewable interpretive authority to the Secretary of Labor, even over the threshold question of how far that statutory scheme should extend. See *Fuqua*, 956 F.3d at 964 ("The Secretary of Labor has exclusive authority * * * to decide * * * whether a claim is covered."); *Swafford* v. *United States*, 998 F.2d 837, 841 (10th Cir. 1993) ("The Secretary of Labor, not the Tenth Circuit, has the final say as to the scope of FECA."); *DiPippa* v. *United States*, 687 F.2d 14, 16 (3d Cir. 1982) ("Only the Secretary of Labor or his designee may determine the scope of FECA coverage.").

In so holding, the majority-view courts have relied, among other things, on FECA's statement that "[t]he action of the Secretary * * * in allowing or denying a payment under this subchapter is * * * not subject to review * * * by a court by mandamus or otherwise." 5 U.S.C. § 8128(b). And some circuits have drawn an analogy to *Chevron* deference, reasoning that a

renunciation of jurisdiction is supported by the proposition that courts "defer to agencies' reasonable interpretations of ambiguous language in the statutes they administer." *Mathirampuzha*, 548 F.3d at 82. Those courts have not, however, explained why § 8128(b) should apply to threshold questions about FECA's scope, as distinct from decisions "allowing or denying a payment." Nor have they specified what aspects of *Chevron* justify stripping courts of subject-matter jurisdiction altogether, rendering an agency decision categorically "unreviewable," *id.* at 82 & n.13; *Swafford*, 998 F.2d at 831 & n.3, rather than reviewable under a deferential standard.[4]

B. The Ninth Circuit Holds That Courts Retain Jurisdiction to Address Whether a Claim Falls Within FECA's Scope.

In sharp conflict with the majority approach, the Ninth Circuit has distinguished questions about whether a particular type of claim falls "within the scope of FECA" (which courts retain jurisdiction to

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[4] Several majority-view circuits have invented a procedure to facilitate the Secretary making a coverage determination, if it is unclear at the time a complaint is filed whether the Secretary would find coverage. In the Tenth Circuit, for instance, if "a claim is presented to the court without having first been submitted to the Secretary * * * the court must permit the Secretary to evaluate the claim if there is a substantial question that FECA coverage exists." *Tippetts* v. *United States*, 308 F.3d 1091, 1094 (10th Cir. 2002). Similarly, the Seventh Circuit instructs district courts to stay a federal-court case "pending the Secretary of Labor's resolution of the issue," if a "substantial question" of coverage exists. *Fuqua*, 956 F.3d at 964; accord *Noble* v. *United States*, 216 F.3d 1229, 1235 (11th Cir. 2000).

address) from questions about whether a particular "plaintiff [is] entitled to compensation under the facts of her case" (which are committed to the Secretary's discretion). *Moe* v. *United States*, 326 F.3d 1065, 1068 (9th Cir. 2003)

At the first stage of the inquiry, the Ninth Circuit asks whether a plaintiff's claim falls within the "scope of coverage" of FECA. *Figueroa* v. *United States*, 7 F.3d 1405, 1407-1408 (9th Cir. 1993); accord *Moe*, 326 F.3d at 1068. The scope of coverage question, in the Ninth Circuit's view, "must be answered by the federal courts." *Moe*, 326 F.3d at 1068. If a court determines that a claim falls outside FECA's scope, the court can exercise jurisdiction under the FTCA. But if the claimed injury falls within FECA's scope, the Secretary of Labor has unreviewable discretion to determine "whether a plaintiff is entitled to compensation under the *facts* of a particular event." *Figueroa*, 7 F.3d at 1408. Thus, the Secretary has unreviewable authority to decide questions such as "whether the injury had occurred while the [plaintiff] was on the job"—i.e., what the Ninth Circuit characterizes as questions of "coverage in and of itself." *Sheehan*, 896 F.2d at 1173-1174 (citation omitted). But courts in the Ninth Circuit retain jurisdiction to address whether the scope of FECA's statutory scheme extends to a particular type of claim, even if "decision[s] by the Secretary 'allowing or denying a payment,' * * * [are] not subject to judicial review." *Id.* at 1173 (quoting 5 U.S.C. § 8128(b)).

The facts and reasoning of the leading Ninth Circuit cases help illustrate the distinction. Sheehan, a federal employee, was sexually harassed by her

government employer and consequently suffered humiliation and emotional distress. *Sheehan*, 896 F.2d at 1169. The Secretary of Labor "concluded FECA extended to such claims, but that Sheehan's injury was not causally related to her employment." *Id.* at 1173. On that basis, the Secretary declined to award compensation under FECA. *Ibid.* The district court concluded that it lacked jurisdiction to review the Secretary's determination of FECA's scope, and dismissed Sheehan's FTCA claim for negligent infliction of emotional distress. *Id.* at 1173-1174. The Ninth Circuit reversed, holding that federal courts retain jurisdiction to address the threshold question of whether emotional distress claims fall within FECA's scope. *Id.* at 1174. Indeed, after correcting the district court's jurisdictional error, the Ninth Circuit disagreed with the Secretary about whether FECA applied to those kinds of emotional distress claims; the appellate court held that FECA does not cover claims for "emotional distress * * * divorced from any claim of physical harm." As a result, the district court had jurisdiction to adjudicate the employee's FTCA claim. *Ibid.*

This understanding that courts retain a role in interpreting the scope of FECA's statutory scheme is well settled in the Ninth Circuit. In addition to *Sheehan*, Ninth Circuit panels have repeatedly upheld and exercised a role for federal courts in addressing FECA's scope.[5] Indeed, in *Moe* v. *United States*, the

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[5] *E.g.*, *Guidry* v. *Durkin*, 834 F.2d 1465, 1471-1472 (9th Cir. 1987) (concluding that emotional distress claims fall outside the scope of FECA); *Figueroa*, 7 F.3d at 1408 (holding that emotional distress claims tied to physical harms fall under FECA, and therefore district courts lack jurisdiction to hear FTCA claims for

Ninth Circuit addressed whether claims for emotional distress manifesting in physical injury fall within FECA's scope. The plaintiff there suffered severe emotional distress when her federal workplace was the site of a mass shooting. *Moe*, 326 F.3d at 1067. Her emotional distress manifested itself in stress-related physical injuries, for which she sought damages under the FTCA. *Id.* at 1069. Moe argued that her claims fell outside the scope of FECA. *Ibid.* The Ninth Circuit did not suggest that the Secretary would have unreviewable discretion to determine the FECA-coverage issue. Instead, the Ninth Circuit addressed that issue, considering (among other things) the statutory text and precedent. *Ibid.* As the panel underscored, "we must decide if Moe's injury is of the 'type' covered by FECA." *Id.* at 1068.

The same approach is reflected in *Figueroa* v. *United States*, which explains that "in cases where FECA is an issue, the court must determine whether the 'type' of injury claimed is statutorily covered by FECA, and anything beyond the question of scope, such as compensation, should be left to the Secretary of Labor to determine." *Moe*, 326 F.3d at 1068 n.9 (interpreting *Figueroa*). The *Figueroa* plaintiff sought damages for injuries tied to physical harm. *Figueroa*, 7 F.3d at 1408. The Ninth Circuit distinguished

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those injuries); *Lance* v. *United States*, 70 F.3d 1093, 1095 (9th Cir. 1995) (per curiam) (similar, for medical malpractice claims); *Moe*, 326 F.3d at 1068 (similar, for claims of physical injury stemming from emotional harms); cf. *Porter* v. *United States*, 735 F. App'x 929, 929-930 (9th Cir. 2018) (mem.) (exercising jurisdiction and determining that claims for injuries sustained off-duty fall outside the scope of FECA).

Sheehan as having involved emotional distress claims unrelated to physical injury, and concluded that claims of injury tied to physical harm would fall within FECA's scope. Accordingly, the Ninth Circuit referred the claim to the Secretary to determine whether to allow or deny compensation. *Ibid.*

C. The Third Circuit's Decision Squarely Conflicts With the Ninth Circuit.

The Ninth Circuit's approach cannot be reconciled with the Third Circuit's decision to disclaim subject-matter jurisdiction to address questions of FECA's scope. See App., *infra*, 5a-8a (panel decision noting split of authority with Ninth Circuit but siding with the majority view that federal courts lack jurisdiction).

The facts and outcome of this case underscore the conflict. Petitioner filed a complaint under the FTCA. He asserts that federal courts have jurisdiction to address the threshold question of whether his emotional distress claim falls within the scope of FECA. App., *infra*, 6a-7a, 15a-16a. The Third Circuit rejected that argument, and affirmed the dismissal of petitioner's complaint for lack of subject-matter jurisdiction. The Third Circuit acknowledged and endorsed the majority-view approach: "Where there is a 'substantial question' as to whether FECA covers the claim, courts should not hear that claim. A 'substantial question' exists unless it is certain that the Secretary would find no coverage." *Id.* at 6a (citing *Heilman*, 731 F.2d at 1110). Because, in the Third Circuit's view, the Secretary had implicitly determined that petitioner's claim falls within FECA's scope, the Secretary's determination was "final and unreviewable by any court." *Id.* at 7a-8a, 6a. By contrast, if petitioner worked in a federal

penitentiary in California and brought suit in that state, a district court would have had subject-matter jurisdiction to address the threshold question of FECA coverage. Indeed, under Ninth Circuit precedent, a district court would have been obligated to agree with petitioner not only that it had jurisdiction to address the threshold question of statutory scope, but also that claims of emotional distress untied to physical injury (like petitioner's) fall outside of FECA. See *Id.* at 6a-7a. In short, the split is acknowledged, sharp, and leads to diametrically opposed outcomes in the Ninth versus other circuits.

II. The Decision Below Is Wrong.

The Third Circuit erred in holding that federal courts lack subject-matter jurisdiction to address FECA's scope. That court, like others in the majority, improperly conflated the threshold question of whether a particular injury falls within the scope of FECA's statutory scheme, with the subsequent question of whether to award compensation under FECA. Congress expressly committed the latter decision—i.e., a decision "allowing or denying a payment under [FECA]," 5 U.S.C. § 8128(b)—to the agency's discretion. But FECA does not strip federal courts of jurisdiction over the first question. To the contrary, reading FECA to prohibit any judicial role in addressing the statute's scope (whenever there is even a "substantial question" of coverage) runs contrary to longstanding rules of statutory interpretation. Nor can that position be reconciled with the presumption favoring judicial review of agency action, or the judiciary's constitutional role in interpreting federal law.

A. FECA Should Be Interpreted In Light Of the Presumption Favoring Judicial Review

When interpreting an agency's organic statute, this Court begins with the "familiar * * * presumption favoring judicial review of administrative action." *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020) (citation omitted). Judicial review of agency decisionmaking "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). That rule reflects the foundational principle that a litigant should have recourse in the courts when an executive officer has misinterpreted the law. See *United States* v. *Nourse*, 34 U.S. 8, 28-29 (1835) (Marshall, J.). Courts presume that Congress legislates with this presumption in mind. See *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010).

Indeed, the presumption favoring judicial review of agency decisions is "so embedded in the law" that it applies no less to "statutory provisions specifically designed to limit judicial review." *Make The Rd. N.Y.* v. *Wolf*, 962 F.3d 612, 624 (D.C. Cir. 2020); see also *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 273 (2016). Thus, even where Congress has enacted a law restricting judicial review, the government bears a "heavy burden" in showing that Congress immunized particular agency action from judicial oversight. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). This Court will foreclose access to judicial review only with "clear and convincing evidence" that Congress so intended. *E.g.*, *Abbott Laboratories*, 387 U.S. at 141 (citation omitted); see also *Barlow* v. *Collins*, 397 U.S.

159, 167 (1970) (only a "clear command of the statute will preclude [judicial] review"). Although FECA's carefully crafted judicial review provision divests courts of jurisdiction to review an "action of the Secretary * * * allowing or denying a payment under [FECA]," 5 U.S.C. § 8128(b), the Third Circuit gave that provision far broader effect. That position is wrong as a matter of statutory text, context, history, and purpose. That conclusion is further strengthened by reference to the presumption favoring judicial review.

B. FECA Does Not Disable Federal Courts From Addressing the Scope of Their Own Jurisdiction

Interpreting the scope of a federal statutory scheme is a paradigmatic question of law over which federal courts have subject-matter jurisdiction. See 28 U.S.C. § 1331. The Third Circuit and other circuits, however, read FECA to strip federal courts of jurisdiction to address that question—depriving courts of power, in almost all instances, to interpret an important federal statute. See App., *infra*, 5a-6a. Properly construed, the statutory text, context, purpose, and history do not compel that conclusion—and certainly not with the clarity required to overcome a presumption favoring judicial review.

FECA's judicial review provision states, in pertinent part:

> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is—

> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b).

By its terms, the restrictive language in subsections (1) and (2) is most naturally read to apply to the category of actions identified in the prefatory text—i.e., to an "action of the Secretary * * * allowing or denying a payment under [FECA]." *Ibid.* In turn, the phrase "action of the Secretary * * * allowing or denying a payment" refers most naturally to an order awarding or denying compensation, not to threshold legal questions about FECA's statutory scope. *Ibid.*

As a matter of ordinary meaning, "payment" refers to the "[a]ct of paying, or giving compensation." See *Webster's New International Dictionary of the English Language* 1585 (1930) (defining "payment"). By contrast, deciding whether a particular "injury" falls within the scope of FECA's remedial scheme is not naturally understood as an "action * * * allowing or denying a payment." 5 U.S.C. § 8128(b). While threshold questions about FECA's scope may be logically antecedent to a later agency action "allowing or denying a payment," determinations about the scope of FECA should not be considered an "action * * * allowing or denying a payment" within the meaning of § 8128(b). See *Sheehan* v. *United States*, 896 F.2d 1168, 1173-1174 (9th Cir. 1990).

Indeed, this case highlights the difference between questions about the scope of FECA, and an "action of the Secretary" "allowing or denying a payment." 5 U.S.C. § 8128(b). In pursuing his claims below, petitioner challenged whether "FECA covere[d] [his] emotional distress claims." App., *infra*, 6a. That argument is distinct from the question of whether, if FECA does apply, petitioner was entitled to compensation. The Third Circuit held that the Secretary had implicitly determined that FECA covers claims for emotional distress, before denying compensation on this record. *Ibid.* FECA may strip federal courts of jurisdiction to review the second question, but not the first.

Context supports this conclusion. Section 8128(a) states that the "Secretary of Labor may review an award for or against payment of compensation at any time * * * in accordance with the facts found on review." 5 U.S.C. § 8128(a). In that review, the Secretary may nullify, decrease, or increase a prior award, or "award compensation previously refused or discontinued." *Ibid.* Subsection (b) follows immediately after that provision, specifying the availability of judicial review for "[t]he action of the Secretary * * * in allowing or denying a payment under this subchapter." In this context, subsection (b) is best understood to refer to, and impose limitations on judicial review of, the Secretarial actions described in subsection (a). Put differently, § 8128(a) authorizes certain actions by the Secretary, and § 8128(b) limits judicial review of those actions. Section 8128(b) should not be read as stripping federal courts of jurisdiction over fundamental questions about the scope of FECA.

In holding otherwise, some circuits have given weight to § 8128(b)(1)'s statement that the Secretary's action is "final and conclusive for all purposes and with respect to all questions of law and fact." That approach again overreads the statutory text by divorcing it from context. FECA does not say that all legal and factual conclusions of the Secretary, of whatever nature, are immune from judicial review. Rather, it says that "[t]he action of the Secretary or his designee in allowing or denying a payment under this subchapter is * * * final and conclusive * * * with respect to all questions of law and fact." 5 U.S.C. § 8128(b)(1). The legal and factual questions encompassed by this provision are those involved in the Secretary's "action * * * allowing or denying a payment" of compensation, *id.* § 8128(b), such as calculating damages or establishing legal and factual causation. See 5 U.S.C. § 8102(a).[6]

The threshold question of whether FECA applies at all in a particular context—i.e., the scope of the statutory scheme—should not be shoehorned into § 8128(b)(1). That question will control whether FECA or another statutory framework governs a claim—a question that also ultimately affects the subject-matter jurisdiction of federal courts. See *Sheehan*, 896

[6] Nor can a broader preclusion of review be justified by FECA's statement that the Secretary "shall administer" FECA and "decide all questions" arising under the statute. 5 U.S.C. § 8145. Language in an agency's organic statute delegating administrative and interpretative authority to an Executive Branch official does not impliedly strip federal courts of jurisdiction. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 432-434 (1995) (statute giving the Attorney General authority to make "conclusive" determinations does not bar judicial review of those decisions).

F.2d at 1173 ("FECA is the exclusive remedy for * * * injuries within FECA's coverage and preempts any claim for such injuries under FTCA.").

Retaining a judicial role in interpreting the scope of FECA's statutory scheme is consistent with this Court's precedent. In *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), this Court addressed the scope of another provision of FECA: its exclusive-liability provision, 5 U.S.C. § 8116(c). This Court held that § 8116(c) did not prohibit a third party from seeking indemnity from the Government for its tort liability to a federal employee, even where the United States had already paid FECA benefits to the employee. 460 U.S. at 197-198. In answering that question, this Court undertook its own interpretation of § 8116(c), in light of text, history, and precedent. The Court did not suggest that the question—"arising under [FECA]," see 5 U.S.C. § 8145—could be committed to the Secretary's discretion.[7]

This Court has read comparable jurisdiction-stripping statutes with similar precision. For example, in

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[7] In *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81 (1991), this Court did state that FECA "contains an unambiguous and comprehensive provision barring any judicial review of the Secretary of Labor's determination of FECA coverage." 502 U.S. at 90 (internal quotation marks omitted) (citing 5 U.S.C. § 8128(b)). However, that case did not present any questions about the operation of FECA. Rather, the question presented involved the interaction between the Longshore and Harbor Workers' Compensation Act and the Jones Act. Nor did this Court in *Southwest Marine* engage with the text of FECA, or address the distinction between threshold questions of statutory scope, on the one hand, and actions of the Secretary "allowing or denying a payment under [FECA]," 5 U.S.C. § 8128(b), on the other.

Traynor v. *Turnage*, this Court confronted a decision by the Veteran's Administration ("VA") which prevented two veterans from extending their GI Bill benefits. 485 U.S. 535, 537 (1988). The statute at issue in *Traynor* provided that "the decision of the Administrator on any question of law or fact under any law administered by the [VA] * * * shall be final and conclusive and no * * * court of the United States shall have power or Jurisdiction to review any such decision." 38 U.S.C. § 211(a) (1982). This Court held that § 211(a) only barred judicial review of legal questions arising purely under VA-administered statutes. *Traynor*, 485 U.S. at 543-544. Section 211(a), this Court concluded, did not prevent courts from addressing the interaction between VA-administered laws and other federal statutes. *Id*. at 545. Addressing the interaction in scope between two statutory regimes, this Court explained, would neither enmesh the courts in "technical and complex determinations * * * connected with * * * benefits decisions" nor burden the courts or agency with "expensive and time-consuming litigation." *Id.* at 544 (citation omitted). Stressing the presumption of judicial review, this Court reasoned that reading the jurisdiction-stripping statute according to its plain terms (but no further) was necessary to preserve the judiciary's role in reviewing executive action. *Id*. at 542. A similarly disciplined and textual approach is warranted here. Section 8128(b)(1) limits judicial review of questions of law or fact involved in "action[s] of the Secretary * * * in allowing or denying a payment," not questions about the scope of FECA versus the FTCA, or about the subject-matter jurisdiction of federal courts.

The limited scope of FECA's bar on judicial review is confirmed by statutory history. FECA originally contained no express provision authorizing judicial review. See *Czerkies* v. *U.S. Dep't of Labor*, 73 F.3d 1435, 1440 (7th Cir. 1996). At the time, judicial review was presumed to be available through traditional equitable remedies. See *Abbott Laboratories*, 387 U.S. at 142-143. FECA's current provision limiting the scope of judicial review was added to the statute only after World War II. See Act of July 28, ch. 328, § 4, 59 Stat. 503, 504 (1945). At that time, the government was struggling to handle a large volume of compensation claims asserted by noncitizens who had been employed by the United States overseas during the war effort. See *Lepre* v. *Dep't of Labor*, 275 F.3d 59, 68 (D.C. Cir. 2001). The 1945 amendment sought to streamline those claims by providing guidance on how to determine amounts of recovery according to local custom in the regions where an employee had worked, and making the agency's compensation awards final. The 1945 amendments were intended to prevent disputes about the proper amount of compensation—disputes which sometimes turned on legal questions about the measure of recovery in overseas jurisdictions. *Czerkies*, 73 F.3d at 1441. This history is fully consistent with reading § 8128(b) as precluding judicial review of the Secretary's ultimate compensation decisions. *Ibid.* But nothing in that history suggests that Congress intended to bar the judiciary from considering threshold questions about the scope of FECA's statutory scheme, even when necessary to resolve lawsuits brought under *other* federal statutes, such as the FTCA.

The Third Circuit, like other courts in the majority, has improperly expanded § 8128(b)'s reach beyond the plain statutory language. That position is wrong as a matter of ordinary meaning, context, and history, and conflicts with the bedrock principle that courts are presumed to have authority to interpret federal statutes. Certainly nothing in the statutory text speaks with the clarity necessary to warrant such a counterintuitive outcome. Cf. *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968) (courts should construe jurisdictional statutes "with precision and with fidelity to the terms by which Congress has expressed its wishes").

C. The Majority View Rests on a Misguided Extension of *Chevron*

Some courts on the majority side of the split have cited the *Chevron* doctrine as somehow justifying their disclaimer of jurisdiction. See, *e.g.*, *Mathirampuzha*, 548 F.3d at 82 (citing *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984)); *White* v. *United States*, 143 F.3d 232, 237 (5th Cir. 1998) (same). Noting the familiar rule that courts defer to certain agency interpretations of ambiguous statutes that they are charged with administering, these courts have jumped to the far broader conclusion that they lack jurisdiction to review (deferentially or otherwise) the Secretary's determination about FECA's scope. But that reasoning sweeps far beyond *Chevron*, which does not strip federal courts of jurisdiction to review agency actions (let alone strip them of power to interpret agency-administered statutes at all). Rather, *Chevron* speaks to the standard of review that a court should apply in exercising its jurisdiction. *Chevron*, 467 U.S. at 842-843. Nothing in *Chevron* justifies

giving the Executive Branch unreviewable discretion to determine the scope of a federal statute—even where the agency's interpretation may be contrary to plain statutory text or unreasonable.

Although agencies may receive *Chevron* deference when they interpret the bounds of their own jurisdiction, see *City of Arlington* v. *FCC*, 569 U.S. 290, 297-298 (2013), *Chevron* "does not apply to an agency's interpretation of a *federal court's* jurisdiction." *Shweika* v. *Dep't of Homeland Sec.*, 723 F.3d 710, 718 (6th Cir. 2013) (emphasis added); accord *City of Arlington*, 569 U.S. at 302 n.3; *Murphy Expl. & Prod. Co.* v. *U.S. Dep't of Interior*, 252 F.3d 473, 478-480 (D.C. Cir. 2001). The majority-view circuits contravene that basic principle by giving the Secretary unreviewable authority to determine the scope of FECA—a question which necessarily affects the scope of federal-court jurisdiction over claims pleaded under the FTCA. See *Mathirampuzha*, 548 F.3d at 82-83 ("[B]ecause liability under the FECA is exclusive, our subject-matter jurisdiction ends where FECA coverage begins"); cf. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1629 (2018) ("courts must exercise independent interpretive judgment" in reconciling distinct statutory regimes).

III. The Question Presented Is Important and Recurring.

The question presented is critically important to the scores of federal employees who are injured each year. FECA establishes a workers' compensation scheme that covers nearly every civilian employee of the federal government. See 5 U.S.C. § 8101(1) (defining "employee"). Its coverage extends to nearly two million people, including full- and part-time federal

employees, jury members, federal volunteers, and state and local law enforcement personnel acting in a federal capacity. See Office of Personnel Mgmt., Policy, Data, Oversight, https://bit.ly/39bn5O4; see also Cong. Research Service, *The Federal Employees' Compensation Act (FECA): Workers' Compensation for Federal Employees* (2022), https://bit.ly/3zrbZyR.

In fiscal year 2021 alone, over 96,400 FECA claims were filed, and the program provided nearly $3 billion in benefits to more than 183,000 workers and survivors for work-related injuries or illnesses. See U.S. Dept. of Labor, *Federal Employees' Compensation Act (FECA) Claims Administration*, https://bit.ly/3tq1fgw.

The importance of the question presented is heightened by Congress's instruction that when FECA applies, it is an injured employee's "exclusive" remedy against the United States. See *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 601 (1963); 5 U.S.C. § 8116(c). Thus, where a federal employee's injury is found to fall within FECA's scope, the employee may not seek damages under the FTCA or other remedies against the United States. See *Lockheed*, 460 U.S. at 192-194. This exclusivity bar applies even though FECA may provide a smaller recovery than would have been available under the FTCA. See *Fuqua*, 956 F.3d at 964; accord *Figueroa*, 7 F.3d at 1408. Unsurprisingly, then, threshold questions about whether a particular claim of injury falls within the scope of FECA arise frequently. See, *e.g.*, *Hawkins* v. *United States*, 14 F.4th 1018 (9th Cir. 2021); *Fuqua*, 956 F.3d 961; *Mathirampuzha*, 548 F.3d 70; *Swafford*, 998 F.2d 837; *McDaniel*, 970 F.2d 194. Those cases involve a range of scope-related questions beyond the specific

issue pressed by petitioner below—emotional harms unrelated to physical injury. *E.g.*, *Hawkins*, 14 F.4th at 1020 (whether FECA covers claims of medical malpractice arising out of non-job-related injury); *Tippetts* v. *United States*, 308 F.3d 1091, 1095-1096 (10th Cir. 2002) (alleged defamation and invasion of privacy). The question presented—whether courts have subject-matter jurisdiction to address the scope of FECA—is implicated in all of these cases.

This case is an excellent vehicle to decide the question presented. The issue is squarely presented, and the Third Circuit's resolution of the question was the basis for its judgment that the district court lacked jurisdiction to adjudicate petitioner's FTCA claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2022

APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 21-1865

RANDALL L. SPADE,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE

On Appeal from the United States District Court for
the Middle District of Pennsylvania
(D.C. Civil No. 4:15-cv-02513)
District Judge: Honorable Matthew W. Brann

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
January 24, 2022

BEFORE: CHAGARES, Chief Judge; McKEE and MATEY, Circuit Judges.

(Filed: February 14, 2022)

OPINION*

CHAGARES, Chief Judge.

Appellant Randall Spade brought this action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), and the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. §§ 8541, et seq. Spade alleges that the Bureau of Prisons ("BOP") negligently provided his personal information to inmates at the prison where he worked as a corrections officer. The District Court concluded that it did not have subject matter jurisdiction over Spade's claims because the Federal Employees' Compensation Act ("FECA") provided the exclusive remedy for injuries sustained by a federal employee acting in the scope of his employment. The District Court accordingly dismissed the amended complaint under Federal Rule of Civil Procedure 12(b)(1). For the reasons that follow, we will affirm the order of the District Court.

I.

We write primarily for the parties and recite only the facts essential to our decision. At all relevant times, Spade served as a corrections officer at the United States Penitentiary in Lewisburg, Pennsylvania. In September 2011, as Spade was escorting an inmate to his cell, the inmate suggested

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

that he knew that Spade resided in Richfield, Pennsylvania with his family. The same inmate began to recite Spade's social security number. Spade reported this interaction to a federal official, and a subsequent investigation revealed that Spade's unredacted personal information had been mistakenly provided to the inmate in response to a Freedom of Information Act request.

Other corrections officers at the Lewisburg prison overheard inmates reciting Spade's personal information or claiming to have such information memorized between November and December 2011. As a result, Spade alleges that he suffers extreme emotional distress, fears for his and his family's safety, and has experienced detrimental effects on his work environment. Spade also incurred, and continues to incur, medical costs associated with his injury.

In December 2015, Spade filed this action bringing claims for negligent infliction of emotional distress under the FTCA and the Pennsylvania Political Subdivision Tort Claims Act, a Pennsylvania state statute that operates similarly to the FTCA. Spade filed an amended complaint in November 2017. The District Court dismissed that complaint for failure to state a claim and held that Spade's claims must be dismissed because Spade failed to identify "any Pennsylvania authority creating liability for the negligent handling or disclosure of personal information[.]" Spade v. U.S. Dep't of Just., 2018 WL 2113888, at *2 (M.D. Pa. May 8, 2018) ("Spade I"), vacated and remanded sub nom. Spade v. United

States, 763 F. App'x 294 (3d Cir. 2019) ("Spade II"). Spade appealed that dismissal.

While the appeal was pending, the Pennsylvania Supreme Court issued a decision holding that employers had a duty of care to employees when collecting and storing employees' personal information. See Dittman v. UPMC, 196 A.3d 1036, 1048 (Pa. 2018). This Court remanded the case to the District Court with instructions that the District Court obtain a determination from the Department of Labor ("DOL") as to whether FECA barred Spade's claims, and, if not, that the District Court address the effect of Dittman. Spade II, 763 F. App'x at 295–96.

Spade then pursued his claims before the DOL, which denied Spade's claims. The DOL determined that Spade "established that [he was] a Federal civilian employee who filed a timely claim," and that the evidence supported that the events happened as described and "within the performance of duty." D.C. Doc. No. 32-1, Attach. B ("DOL Op.") at 2. Spade's claims were nevertheless denied because he failed to submit to the DOL the requested medical evidence.

Following the DOL's denial, the Government moved to dismiss the amended complaint. The District Court granted that motion pursuant to Rule 12(b)(1), finding that it lacked subject matter jurisdiction. That order forms the basis for this appeal. The court reasoned that the DOL had rendered a decision on the merits of Spade's claims and determined that the claims were covered by FECA. The court held that because FECA applied, the District Court lacked subject matter jurisdiction over the case. Spade timely appealed.

II.[1]

Spade invoked the District Court's jurisdiction under 18 U.S.C. §§ 1331, 1343 and 1367, but the District Court held that it lacked subject matter jurisdiction because the DOL had determined that FECA covered Spade's emotional distress claims.

FECA provides federal employees with a comprehensive remedy for injuries sustained "in the performance of duty." 5 U.S.C. § 8102(a). FECA guarantees federal employees "the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government." Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 194 (1983). FECA is thus the exclusive remedy for federal employees seeking compensation for covered injuries. 5 U.S.C. § 8116(c). Whether a claim is covered by FECA is a determination made by the Secretary of Labor (the "Secretary"). See Heilman v. United States, 731 F.2d 1104, 1109 (3d Cir. 1984). The Secretary's coverage determination, as well as the amount of any award, "is final, and review of any kind by a court is absolutely barred." Id. (citing 5 U.S.C. § 8128(b)(2)).

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[1] We have appellate jurisdiction over the District Court's dismissal of the complaint under 28 U.S.C. § 1291. We exercise plenary review over a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). Ellison v. Am. Bd. of Orthopaedic Surgery, 11 F.4th 200, 205 n.2 (3d Cir. 2021). In assessing a factual attack on the District Court's subject matter jurisdiction, we may consider evidence outside the amended complaint. See Gotha v. United States, 115 F.3d 176, 178–79 (3d Cir. 1997).

FECA operates as a jurisdictional bar. This Court has explained that if "a claim is covered under FECA, then the federal courts have no subject matter jurisdiction to entertain the action, since the United States has not otherwise waived its sovereign immunity to suit." Id. Where there is a "substantial question" as to whether FECA covers the claim, courts should not hear that claim. Id. at 1110. "A 'substantial question' exists unless it is certain that the Secretary would find no coverage." Id.

Spade makes three arguments that FECA does not bar his claims. First, he argues that there is a Circuit split as to whether FECA covers emotional distress claims that are not associated with a physical injury. The Court of Appeals for the Ninth Circuit has indeed held that FECA does not cover emotional distress injuries that are "divorced from any claim of physical harm." Sheehan v. United States, 896 F.2d 1168, 1174 (9th Cir.), as amended, 917 F.2d 424 (9th Cir. 1990); see also Moe v. United States, 326 F.3d 1065, 1068 (9th Cir. 2003). But as the District Court noted, this is a minority position. This Court has taken the position that the Secretary's determinations regarding FECA coverage and scope are final and unreviewable by any court, see Heilman, 731 F.2d at 1109, a position held by many of our sister Courts of Appeals, see, e.g., Mathirampuzha v. Potter, 548 F.3d 70, 82 (2d Cir. 2008) ("Only the Ninth Circuit has taken the position . . . that a federal court decides the threshold question whether the type of injury alleged falls within the scope of FECA coverage. . . ."); Swafford v. United States, 998 F.2d 837, 841 (10th Cir. 1993) ("The Secretary of Labor, not the Tenth

Circuit, has the final say as to the scope of FECA."); McDaniel v. United States, 970 F.2d 194, 197 (6th Cir. 1992) (same). We are bound by the Secretary's determination as to whether FECA covers Spade's emotional distress claims.

Second, Spade argues that the Secretary did not deny his claims on the merits and therefore that the Secretary did not determine that FECA applied to his claims. The District Court concluded that, although the Secretary declined to award Spade compensation, the Secretary nevertheless found that FECA applied to Spade's claims. We agree. The DOL found that: (1) Spade was a federal employee; (2) the emotional distress injuries occurred as Spade claims; and (3) Spade's injuries occurred in the course of Spade's employment. The DOL clarified that Spade's claims were denied because Spade "did not submit any medical evidence containing a medical diagnosis in connection with the injury and/or event" as the DOL requested. DOL Op. 2. Spade's claims were not denied for lack of coverage but because he failed to submit the requested medical documentation of his diagnosis. That is a question of sufficiency of Spade's medical evidence, not a question of FECA coverage. That the Secretary reached the issue of the sufficiency of Spade's medical evidence indicates that the Secretary found that FECA applied. As the District Court explained, this holding is in line with courts examining similar denials for failure to submit sufficient evidence. See, e.g., Fuqua v. U.S. Postal Serv., 956 F.3d 961, 964 (7th Cir. 2020) (holding that denials for insufficient evidence show that the Secretary thought that coverage existed); Bennett v.

Barnett, 210 F.3d 272, 277 (5th Cir. 2000) (same). At a minimum, it presents a substantial question of FECA coverage, which would also divest the District Court of subject matter jurisdiction.

Finally, Spade argues that his case should not be dismissed because he still has avenues to appeal the Secretary's decision. But again, the District Court correctly held that it must dismiss the case because it lacks subject matter jurisdiction. That Spade may have remaining administrative appeals is of no relevance.[2]

III.

For the foregoing reasons, we will affirm the order of the District Court.

[2] Because the District Court dismissed for lack of subject matter jurisdiction, it did not analyze the effect of Dittman on Spade's claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

RANDALL L. SPADE, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

No. 4:15-CV-02513

(Judge Brann)

MEMORANDUM OPINION

MARCH 31, 2021

I. BACKGROUND

On December 31, 2015, Randall Spade filed a complaint against the United States of America.[1] An amended complaint was filed on November 6, 2017, raising claims under the Federal Tort Claims Act ("FTCA") and a similar Pennsylvania statute. At all relevant times, Spade was employed as a correctional officer at the United States Penitentiary in

[1] Spade initially filed the complaint against the Department of Justice, but the caption has since been modified.

Lewisburg, Pennsylvania.[2] In 2011, Spade learned that the Government had inadvertently divulged Spade's personal information when responding to an inmate's Freedom of Information Act request.[3] This Court granted the Government's motion to dismiss the amended complaint on May 8, 2018, finding that Spade had failed to identify any duty under Pennsylvania tort law that applied to his case. Spade appealed. After his appeal was filed, the Pennsylvania Supreme Court issued an opinion in a case titled *Dittman v. UPMC*.[4] *Dittman* held that an employer owes a duty of reasonable care to its employees "in collecting and storing [e]mployees' data on its computer systems."[5] The United States Court of Appeals for the Third Circuit alerted the parties to *Dittman* and asked for letter briefs regarding the case.[6] Then, while briefing any impact *Dittman* may have on Spade's case, the Government realized that the Federal Employees' Compensation Act ("FECA") might be a jurisdictional bar to Spade's claim in the first instance. The Third Circuit subsequently vacated this Court's initial ruling and directed me to allow Spade to seek a determination from the Secretary of Labor as to whether FECA covered his claims.[7] The Third Circuit further instructed that if

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[2] Doc. 11 ¶ 2.
[3] *Id*. ¶¶ 11-33.
[4] 196 A.3d 1036 (Pa. 2018).
[5] *Id*. at 1047.
[6] *Spade v. United States*, 763 Fed.Appx. 294 (3d Cir. 2019).
[7] *Id.*

FECA *did not* bar Spade's claims, this Court should consider *Dittman*'s impact on the case.[8]

This Court allowed Spade to pursue his administrative remedies. On June 9, 2020, Spade informed the Court that his claim to the Department of Labor was denied (the "FECA Decision").[9] The Government, upon review of the FECA Decision, indicated that it planned to file a motion to dismiss with this Court. On July 2, 2020, the Government brought this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.[10] The motion is now ripe for disposition; for the reasons that follow, it is granted.

II. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) attacks the Court's subject matter jurisdiction over the case before it. "At issue . . . is the court's 'very power to hear the case.'"[11] An evaluation under 12(b)(1) "may occur at any stage of the proceedings, from the time the answer has been served until after the trial has been completed."[12] And "the person asserting jurisdiction bears the burden of

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[8] *Id.* at 296.

[9] *See* Doc. 30. The Department of Labor's Office of Workers' Compensation Programs ("OWCP") is the specific office that reviewed Spade's claim.

[10] *See* Doc. 35.

[11] *Judkins v. HT Window Fashions Corp.*, 514 F.Supp.2d 753, 759 (W.D. Pa. 2007) (quoting *Mortensen v. First Fed. Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

[12] *Mortensen*, 549 F.2d at 891-92.

showing that the case is properly before the court at all stages of the litigation."[13]

Courts must determine whether a jurisdictional challenge is facial or factual. When reviewing a facial 12(b)(1) motion, a court must "consider the allegations of the complaint as true."[14] In contrast, when reviewing a factual 12(b)(1) motion, a court has "substantial authority" to "weigh the evidence and satisfy itself as to the existence of its power to hear the case."[15] "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims."[16]

III. DISCUSSION

The Government asserts that this Court lacks jurisdiction because FECA preempts Spade's claims. FECA "provides an exclusive and comprehensive compensation scheme to federal employees for injuries that are 'sustained while in the performance of [their] duty.'"[17] FECA "was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to

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[13] *Packard v. Provident Nat. Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993), cert. denied, 510 U.S. 964 (1993) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

[14] *Mortensen*, 549 F.2d at 891.

[15] *Id.*

[16] *Id.*

[17] *Horton v. United States*, 144 Fed.Appx. 931, 932 (3d Cir. 2005) (quoting 5 U.S.C. § 8102(a)).

waive the Government's sovereign immunity."[18] FECA represents the quid pro quo "commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government."[19]

To this end, FECA is the exclusive remedy for injuries or death suffered by a federal employee while acting in the scope of employment.[20] Consequently, if injuries are found to be covered by FECA, then "federal courts have no subject matter jurisdiction to entertain the action, since the United States has not otherwise waived its sovereign immunity to suit."[21] The Secretary of Labor has full discretion to determine whether particular injuries are covered by FECA.[22] Such decisions are "absolutely immune from judicial review, whether or not a particular determination is grounded in logic or precedent."[23]

These decisions are binding, "regardless of whether compensation is actually awarded."[24] Thus, if a party submits injuries to the Secretary to determine FECA

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[18] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193-94 (1983).
[19] *Id.* at 194.
[20] *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 599 (1963) (quoting 5 U.S.C. § 757(b)).
[21] *Heilman v. United States*, 731 F.2d 1104, 1109-10 (3d Cir. 1984) (citing *Joyce v. United States*, 474 F.2d 215, 219 (3d Cir. 1973)).
[22] *Id.* at 1109.
[23] *DiPippa v. United States*, 687 F.2d 14, 17 (3d Cir. 1982) (internal citations omitted).
[24] *McDaniel v. United States*, 970 F.2d 194, 198 (6th Cir. 1992).

coverage, that party will be bound even if the Secretary determines that FECA applies but that compensation is not warranted.[25] The Government asserts that this is exactly what happened; Spade's claim was denied after a determination that FECA covered the injury he suffered.

There is no dispute over where Spade's FECA proceedings currently stand. Spade submitted his claim to the Department of Labor, and it was denied. He currently has two administrative appeals pending.[26]

Spade raises three reasons why his claim should not be barred by FECA, despite the Secretary's denial of it. First, he believes that the injuries allegedly suffered in the amended complaint are not covered by FECA.[27] He claims there is a circuit split on whether FECA covers claims for emotional distress. Second, Spade asserts that his claim was not denied on its merits, and therefore, this Court still has jurisdiction.[28] Third, Spade suggests that because he still has administrative appeals pending, this Court should deny the motion to dismiss as premature.[29] I address each of Spade's theories in turn.

The Third Circuit has noted that "[t]he threshold requirement for determining FECA coverage is that the injuries alleged must be sustained while in the

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[25] *See id.*; *Spinelli v. Goss*, 446 F.3d 159, 160 (D.C. Cir. 2006).
[26] *See* Doc. 42.
[27] *See* Doc. 37 at 5.
[28] *See Id.* at 7.
[29] *See Id.*

performance of [the employee's] duty."[30] The Secretary determined that Spade suffered his injury in the course of his employment. Spade alleges that he suffered extreme emotional distress as a result of the negligent release of his personal information.[31] The FECA Decision clearly states that Spade established that he was a "Federal civilian employee who filed a timely claim, and the evidence support[s] that the injury and/or events occurred as described."[32] The FECA Decision goes on to note that the "evidence supports that the events that [Spade] described occurred *within the performance of duty*."[33] These concessions by the Secretary suggest that Spade's injury was covered by FECA.

Spade points to case law from the Ninth Circuit to suggest that there is a circuit split on the question of whether or not emotional distress injuries are covered by FECA. Spade's attempt to point out this perceived deviation in the law is unconvincing and also misses the broader point: at least within this Circuit, the Secretary's decision on the question of coverage is final and unreviewable by this Court.

To be sure, courts have recognized for decades that emotional distress claims are covered by FECA.[34]

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[30] *Heilman v. United States*, 731 F.2d 1104, 1110 (3d Cir. 1984) (internal quotation marks omitted).

[31] Doc. 11 ¶ 31.

[32] Doc. 32 Ex. 1 (Attachment B, FECA Decision).

[33] *Id.* (emphasis added).

[34] *See Volpini v. Resolution Trust Corp.*, 1997 WL 476347 at * 4 (E.D. Pa. Aug. 19, 1997) ("Recent cases hold that emotional distress is covered under FECA."); *see also Spinelli v. Goss*, 446 F.3d 159, 160-162 (D.C. Cir. 2006); *Swafford v. United States*,

Spade's reference to Ninth Circuit case law is a minority position, and this Court is not bound by that Circuit's precedent. Indeed, at least one other Circuit has noted that only the Ninth Circuit has taken the position "that a federal court decides the threshold question whether the type of injury alleged falls within the scope of FECA coverage."[35]

More importantly, the Secretary denied Spade's claim for lack of evidence. That is a decision on the merits. The Department of Labor informed Spade that his case was denied specifically because he "did not submit any medical evidence containing a medical diagnosis in connection with the injury. . ."[36] "By ruling on the sufficiency of the evidence, the Secretary thought coverage existed."[37] This decision is in line with the multitude of courts that have found that denials of claims based on evidence constitute a finding that the injury at issue is covered under FECA.[38]

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998 F.2d 837, 839-40 (10th Cir. 1993); *McDaniel v. United States*, 970 F.2d 194, 195–197 (6th Cir. 1992).

[35] *Mathirampuzha v. Potter*, 548 F.3d 70, 82 (2d Cir. 2008).

[36] Doc. 32 Ex. 1 (Attachment B, FECA Decision).

[37] *Bennett v. Barnett*, 210 F.3d 272, 277 (5th Cir. 2000).

[38] *See Fuqua v. United States Postal Service*, 956 F.3d 961, 964-65 (7th Cir. 2020) ("The Secretary then exercised jurisdiction over Fuqua's claim and denied it for lack of evidence. The denial was based on lack of proof, not lack of coverage."); *Hawkins v. United States*, 418 F.Supp.3d 636, 641-42 (W.D. Wash. 2019) (finding no jurisdiction where the Secretary denied a claim "because the evidence is insufficient to establish that a medical condition arose during the course of employment and within the scope of compensable work factors"); *Johle v. United States*, 2016 WL 9021836 (D. N.M. Dec. 7, 2016) (finding no jurisdiction where claim was denied "because there was insufficient evidence

As noted above, the Third Circuit, whose precedent this Court is obligated to follow, has made clear that "the decision of the Secretary of Labor on whether FECA covers the alleged injury, and on the amount of compensation, if any, to be awarded, is final, and review of any kind by a court is absolutely barred."[39] In other words, even if this Court believed that emotional distress claims like Spade's were not covered by FECA's text, the Secretary's determination to the contrary is final, and I would have no authority to overrule that decision. Again, I emphasize that this ruling by the Secretary, dismissing Spade's claim specifically for a lack of medical evidence, is an acknowledgement that Spade's injury was otherwise covered by FECA.

Furthermore, though not strictly necessary to my decision, I note that the Government has provided a declaration from the Deputy Director for Program & System Integrity Federal Employees' Compensation, Officer of Workers' Compensation Programs. The Deputy Director's declaration summarizes the

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to prove that the injury occurred as stated"); *Gonzalez v. United States*, 2016 WL 11468593, at *3 (E.D.N.Y. Aug. 31, 2016) ("[T]he OWCP denied Plaintiff's administrative complaint for insufficient evidence. Such a denial was a determination on the merits, and, therefore, the OWCP determined that Plaintiff's claim was within the FECA's coverage. Accordingly, this Court is deprived of subject matter jurisdiction to adjudicate this claim."); *Borden v. United States*, 2011 WL 4060227, at *2 (S.D. Miss. Aug. 26, 2011) (finding that "[the Secretary's] dismissal for lack of sufficient proof of a compensable injury was a dismissal on the merits, and is fatal to his federal court action") (cleaned up).

[39] *Heilman v. United States*, 731 F.2d 1104, 1109 (3d Cir. 1984) (citing 5 U.S.C. § 8128(b)(2)).

Secretary's decision on the claim. Her declaration states that Spade's injury "would be covered under FECA if he submitted medical evidence establishing that he sustained a medical condition as a result of his federal employment."[40] To the extent the FECA Decision itself was unclear, the Deputy Director's declaration is helpful to explain the rationale behind the determination. Again, this additional piece of evidence, while helpful, only serves to buttress my decision that Spade's claim was denied for lack of evidence rather than because the injury itself was not covered by FECA.[41]

Besides being plainly inconsistent with the Third Circuit's approach, an alternative holding would lead to untenable results. Allowing a plaintiff to proceed on FTCA claims after he failed to provide evidence to the Secretary "would effectively permit him to circumvent the exclusivity provisions of FECA."[42] A plaintiff could file a claim with the Secretary, "forc[e] the Department of Labor to deny it by failing to submit any evidence," and after his claim was denied, return to federal court, bringing an action under the FTCA, where he could potentially receive a greater damages award than under FECA.[43]

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[40] Doc. 32 Ex. 1 (Declaration of Jennifer Valdivieso ¶ 6).

[41] Spade acknowledges that the Deputy Director's declaration is relevant and may "go toward the weight of evidence which this Court must consider in determining whether to grant or deny Defendant's Motion." Doc. 37 at 7.

[42] *Gagliardi v. United States*, 1991 WL 9361 at *4 (E.D. Pa. Jan. 28, 1991).

[43] *Id.* (citing *Avasthi v. United States*, 608 F.2d 1059 (5th Cir. 1979)).

The Department of Labor advised Spade "of the deficiencies in [his] claim and provided [him] the opportunity to submit additional evidence."[44] Spade failed to provide the medical evidence that the Department of Labor asked for.[45] "The Court will not set the precedent that, to circumvent FECA, all a plaintiff must do is fail to provide the requested information."[46]

Spade's final argument against dismissal is that the Government's motion is premature.[47] This Court, however, has determined that it does not have subject matter jurisdiction over this claim. The fact that Spade still has administrative appeals pending does nothing to change this fact. Spade points to no authority to the contrary, and therefore, his claim cannot stay here.

Lastly, I reiterate a point from an earlier decision in this matter: the claim under the Pennsylvania Political Subdivision Tort Claims Act cannot survive either. That statute waives *Pennsylvania's* sovereign immunity for certain claims brought against "local agenc[ies]."[48] A local agency is a "*government unit*

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[44] Doc. 32 Ex. 1 (Attachment B, FECA Decision).

[45] *Id.*

[46] *Johle v. United States*, 2016 WL 9021836 at *17 (D. N.M. Dec. 7, 2016); see also *Fuqua v. Brennan*, 2018 WL 11215319 at *2 (N.D. Ill. June 18, 2018) ("Plaintiff's failure to present sufficient evidence to the Department of Labor does not entitle him to sidestep the FECA's exclusivity provision and pursue his FTCA claims in this Court.") *aff'd sub nom. Fuqua v. United States Postal Serv.*, 956 F.3d 961 (7th Cir 2020).

[47] Doc. 37 at 7.

[48] 42 Pa. C.S. § 8542(a).

other than the Commonwealth government."[49] A government unit, in turn, is defined as the "General Assembly and its officers and agencies, any *government agency* or any court or other officer or agency of the unified judicial system."[50] And finally, a government agency is defined as any "Commonwealth agency or any political subdivision or municipal or other local authority, or any officer or agency of any such political subdivision or local authority."[51] The United States is not a local agency, and therefore, Spade's claim under that statute will also be dismissed again.

IV. CONCLUSION

As I noted at the outset, FECA is the exclusive remedy for injuries suffered by a federal employee while acting in the scope of employment.[52] Because Spade's injury is covered by FECA, this Court has no jurisdiction to hear his FTCA claim. The Court is sympathetic to Spade's situation; what happened to him was clearly unfortunate, and he should pursue his administrative appeals to the fullest extent possible. Having said that, this Court can do nothing else for him.[53] Defendant's motion to dismiss pursuant to Rule 12(b)(1) is granted.

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[49] 42 Pa. C.S. § 8501 (emphasis added).

[50] 42 Pa. C.S. § 102 (emphasis added).

[51] *Id.*

[52] *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 599 (1963) (quoting 5 U.S.C. § 757(b)).

[53] Because I find that FECA preempts Spade's claims, and that therefore I do not have subject matter jurisdiction, I do not reach the question of whether the Pennsylvania Supreme Court's

An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge

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decision in *Dittman* would have any impact on the analysis of Spade's claims.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RANDALL L. SPADE,	:	
Plaintiff	:	
	:	
vs.	:	NO.: 4:15-CV-2513
	:	
UNITED STATES DEPARTMENT OF JUSTICE	:	Judge Brann
	:	
	:	
Defendant	:	

AMENDED COMPLAINT

1. At all times relevant hereto, Plaintiff, Randall L. Spade, is an adult individual who currently resides at 780 Horning Road, Richfield, Union County, Pennsylvania 17086.

2. At all times relevant hereto, Plaintiff, Randall L. Spade, has been employed by the Department of Justice as a correctional officer, GS-7, at the US Penitentiary in Lewisburg, Pennsylvania.

3. Defendant is the Department of Justice ("Department"), by and through the acts of its agency, to wit, the US Bureau of Prisons, said agency having headquarters at 950 Pennsylvania Avenue,

Northwest, Civil Division, NALC Building, Room 409, Washington, D.C. 20530.

4. This Court has jurisdiction over this matter pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b).

5. On or about March 5, 2012, Plaintiff, in compliance with the provisions of the Federal Tort Claims Act, 28 U.S.C. §2675(a), filed a claim with the Department for damages arising from negligence committed by agents, servants, or employees of the Department.

6. On or about October 2013, Plaintiff received notice from the Department that Plaintiff's claim was denied.

7. On April 1, 2014, Plaintiff filed a request for reconsideration of the tort claim.

8. On July 6, 2015, Plaintiff received notice from James G. Touhey, Jr., Director, Torts Branch, Civil Division, United States Department of Justice, that Plaintiff's claim was denied.

9. This complaint is filed within the six (6) month time period from the date of denial of the claim by the Department, pursuant to 28 U.S.C. §2401(b).

10. Venue is proper in the Middle district of Pennsylvania, as Plaintiff resides in said district, and the acts or omissions at issue occurred within the Middle District of Pennsylvania. 28 U.S.C. §1402(b).

11. On or about September 12, 2011, while Plaintiff was working as a Correctional Officer, GS-7, at the United States Penitentiary in Lewisburg,

Pennsylvania, Plaintiff had occasion to escort inmates to their assigned cell in the special housing unit.

12. At that time, inmate Wallace Mitchell #51443-060 stated "hey Randy, how's Richfield?"

13. Plaintiff was stunned that this inmate knew where he lived, however, Plaintiff continued to walk past the inmate's cell door to avoid having any further contact.

14. As Plaintiff was approaching the end of the range, he then heard inmate Mitchell recite Plaintiff's social security number.

15. Plaintiff immediately emailed SIA Fosnot regarding the aforesaid issue.

16. Subsequently, on or about September 16, 2011, Plaintiff received a phone call from SIA Fosnot informing Plaintiff that his personal information had been discovered in inmate Mitchell's cell.

17. Somewhere between September 19, 2011 and September 21, 2011, Plaintiff viewed the information which was confiscated from Inmate Mitchell's cell and it appeared that inmate Mitchell filed a Freedom of Information Request to the Department, and through the negligence of the Department, the inmate received original copies of Plaintiff's information which included Plaintiff's social security number, date of birth, home address, and work history with the Bureau.

18. On or about September 22, 2011, Plaintiff was assured by the Department that an investigation was being conducted into specifically how inmate Mitchell was able to obtain the aforesaid information.

19. On or about November 15, 2011, Lieutenant R. Johnson informed Plaintiff that inmate Mitchell was removed from his cell for a cell search and staff had heard inmate Mitchell passing Plaintiff's personal information to another inmate by yelling the information down the range.

20. Officers Shuman and Clark conducted a search of the various inmates cells which revealed that other inmates had written down Plaintiff's information.

21. On or about November 17, 2011, Warden Bledsoe, along with SIA Fosnot, explained to Plaintiff that the Department's Office of Internal Affairs (OIA) had sent Plaintiff's personal information to the Department's Ofice of Inspector General (OIG) and OIG in turn mistakenly sent Plaintiffs information to inmate Mitchell.

22. Plaintiff was told that "there are two piles, the original copy and the redacted copy, the piles got mixed and the inmate received the originals".

23, On or about November 16, 2011, Officer Brininger informed Plaintiff that inmate Mitchell had spoken with him personally and described Plaintiff's house and the surrounding area to him.

24. Officer Brininger emailed said information to SIA Fosnot.

25. In response to Plaintiff's Complaint, the Department directed Plaintiff to a website for breach procedures and told Plaintiff "we believe the breach you described has been reported by BOP through the appropriate channels within the Department and is in the evaluation process".

26. Subsequently, on December 20, 2011, Officer Lutz overheard inmate Cole #06421-010 tell another inmate "Officer Spade better stop fucking with me, he don't even know I can recite his social security number and home address by heart. I have that all memorized".

27. Officer Lutz also overheard inmate Cole state "he needs to stop messing with somebody that has connections on the street and start messing with somebody that doesn't".

28. Plaintiff made the Department aware of the aforesaid information.

29. On or about December 23, 2011, Plaintiff received an email from the Department confirming that "the inmate received information that was intended for delivery to the BOP for further processing under the Freedom of Information Act.

30. Plaintiff again was directed to a website for the Federal Trade Commission ID Theft.

31. Plaintiff has suffered extreme emotional stress as a result of the negligent release of his personal information.

32. Specific inmates who now know Plaintiff's personal information are part of the Special Management Unit as USP Lewisburg, and are deemed to be among the worst in the Bureau of Prisons.

33. Plaintiff fears for his family's safety, Plaintiff fears for his own safety and it has detrimentally affected his work environment.

COUNT I - NEGLIGENCE

34. Plaintiff incorporates the previous averments of this Amended Complaint as fully as if said averments were restated at length herein.

35. The carelessness and negligence of Defendant, acting by and through its agents, servants, or employees, consisted of the following:

35.1 the failure of the OIA in sending Plaintiff's personal information to the OIG;

35.2 the failure of the OIG in mixing up the original copy of Plaintiff's personal information and the redacted copy of Plaintiff's information;

35.3 the failure of the Department in providing the original information to inmate Mitchell as part of his Freedom of Information Act request;

35.4 the failure of the Department to remedy the mistake;

35.5 the failure of the Department to render a remedy to Plaintiff for their negligence; and

35.6 such other acts and/or omissions, constituting carelessness and/or negligence, as may be evidence during the course of discovery or at the trial of this action.

36. As a direct and proximate result of the Department's negligence, Plaintiff has suffered extreme emotional stress, anguish, humiliation and duress.

37. As a direct and proximate result of the Department's negligence, Plaintiff has incurred and

will continue to incur pain and suffering, humiliation, embarrassment, emotional distress, past and future medical costs, and such other damages as may become apparent, all of which will continue into the future.

WHEREFORE, Plaintiff demands judgment in his favor and against Defendant for a sum in excess of $50,000, exclusive of interest and costs of prosecution.

COUNT II - POLITICAL SUBDIVISION TORT CLAIMS ACT
42 Pa.C.S. §8541-8564

38. Plaintiff incorporates the previous averments of this Amended Complaint as fully as if said averments were restated at length herein.

39. The OIA is a Governmental agency and its employee was acting within the scope of his office or employment when he sent Plaintiff's personal information to the OIG.

40. The OIG is a Governmental agency and its employee was acting within the scope of his office or employment when he mixed up the original and redacted copies of Plaintiff's personal information and provided Plaintiff's original information to an inmate as part of the inmate's FOIA request.

41. As a direct and proximate result of the OIA's and OIG's aforesaid negligence, Plaintiff has been injured and has suffered extreme emotional distress, anguish, humiliation and duress.

42. The Agencies are liable for damages on account of the aforesaid injury to Plaintiff and the damages

are recoverable under Pennsylvania common law and the statute.

43. Plaintiff's injury was caused by the negligent acts of the OIA and the OIG and any employees thereof acting within the scope of his office or duties with respect to the care, custody and control of Plaintiff's personal property.

44. Plaintiff's personal property includes his Social Security number, date of birth, home address, and work history with the Bureau.

45. Because said information was shared, the losses suffered with respect to the personal property in possession of the OIA and the OIG is in excess of $50,000 and will continue to cause injury to Plaintiff such as pain and suffering, humiliation, embarrassment, emotional distress, past and future medical costs, and such other damages as may become apparent, all of which will continue into the future.

WHEREFORE, Plaintiff demands judgment in his favor and against Defendant for a sum in excess of $50,000, exclusive of interest and costs of prosecution.

By: /S/ Christian A. Lovecchio

Christian A. Lovecchio
Attorney ID No.: 85505
Attorney for Plaintiff
602 Pine Street, Williamsport, PA 17701
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APPENDIX D
STATUTORY PROVISIONS

1. 5 U.S.C. § 8102(a) provides:

(a) The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is--

(1) caused by willful misconduct of the employee;

(2) caused by the employee's intention to bring about the injury or death of himself or of another; or

(3) proximately caused by the intoxication of the injured employee.

2. 5 U.S.C. § 8116(c) provides:

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's

compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

3. 5 U.S.C. § 8128 provides:

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may--

(1) end, decrease, or increase the compensation previously awarded; or

(2) award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is--

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Credit shall be allowed in the accounts of a certifying or disbursing official for payments in accordance with that action.

4. 5 U.S.C. § 8145 provides:

The Secretary of Labor shall administer, and decide all questions arising under, this subchapter. He may--

(1) appoint employees to administer this subchapter; and

(2) delegate to any employee of the Department of Labor any of the powers conferred on him by this subchapter.