

THE SCOPE OF EMPLOYMENT REQUIREMENT OF THE
FEDERAL TORT CLAIMS ACT: THE IMPROPRIETY AND
IMPLICATIONS OF THE *MONTEZ* DECISION, AND THE
SUPERIOR JURISDICTIONAL PRIMA FACIE APPROACH

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INTRODUCTION

Imagine that you are an officer in the U.S. Army serving as a supervisor in the Pennsylvania readiness command center, which is involved in preparation for national emergencies. You issue travel orders for one of your civilian staff members, Jessica, to attend a three-day conference in Annapolis, Maryland. The orders instruct Jessica to fly commercially to Maryland and take a taxi to the conference hotel, where she will be staying. The orders also state that Jessica is not authorized to obtain a rental car for the trip. Jessica arrives at the Baltimore-Washington International Airport the night before the conference. She decides to rent a car on her personal credit card to visit old friends in Fort Meade, Maryland, and to do some shopping at the Post Exchange on the Fort Meade Army base before heading to the hotel in Annapolis. As she is leaving Fort Meade, Jessica makes a quick left turn across oncoming traffic without looking carefully. She strikes and kills a man on a motorcycle.

The victim's wife, Debra, sues Jessica for negligently killing her husband. When Debra realizes that Jessica was on a business trip to Maryland, and that Jessica works for the Army, Debra instead sues the government as Jessica's employer. Debra can successfully sue the government only if Jessica was acting within the scope of her employment at the time of the accident, but when in the course of her tort claim should Debra have to prove this fact—at the outset in order to get to trial, or at trial with the other tort elements?¹

The Federal Tort Claims Act ("FTCA") acts as a limited waiver of the federal government's sovereign immunity and grants exclusive subject mat-

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¹ This hypothetical is generally based on the factual setting of *Kerns v. United States*, 534 F. Supp. 2d 633 (D. Md. 2008), *vacated and remanded*, 585 F.3d 187 (4th Cir. 2009), which is discussed in more detail *infra* Part II.B.

ter jurisdiction to the federal courts in certain tort cases.² The statute allows a tort victim to sue the government in place of the tortfeasor if, among other requirements, the tortfeasor was acting within the scope of his or her employment with the government at the time of the tort.³ This scope of employment question comes into play at two stages. First, it must be answered in the affirmative for a federal court to have jurisdiction to hear the case, and second, it also is an element the plaintiff must prove to succeed on the merits in the underlying tort cause of action.

A circuit split has developed regarding the proper way to handle a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, which the government often files immediately in FTCA cases. The circuits are divided as to whether the scope of employment question is properly treated as a jurisdictional issue pursuant to a Rule 12(b)(1) motion,⁴ or whether it is too intertwined with the merits of the underlying action and instead should be converted to a Rule 12(b)(6) motion for failure to state a claim⁵ or a Rule 56 motion for summary judgment.⁶ A ruling pursuant to a 12(b)(1) motion is merely a jurisdictional determination,⁷ while a ruling on a 12(b)(6) or 56 motion is a judgment on the merits of the plaintiff's claim.⁸

The Fifth Circuit Court of Appeals handed down a decision on November 30, 2004, in *Montez v. Department of Navy*.⁹ It joined the Fourth,¹⁰ Ninth,¹¹ and Eleventh¹² Circuits in holding that the scope of employment

² 28 U.S.C. §§ 1346(b), 2401(b), 2671-80 (1976).

³ 28 U.S.C. § 1346(b)(1).

⁴ See FED. R. CIV. P. 12(b)(1).

⁵ See FED. R. CIV. P. 12(b)(6).

⁶ See FED. R. CIV. P. 56.

⁷ Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 *FORDHAM L. REV.* 2859, 2868 (1999) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (“[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” (alteration in original))).

⁸ See *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) (explaining that a Rule 12(b)(6) motion assesses the merits of the case as opposed to the court's jurisdiction, as a Rule 12(b)(1) motion does); *Jama v. INS*, 22 F. Supp. 2d 353, 361 (D.N.J. 1998) (stating that a complaint must be dismissed under 12(b)(6) if the court finds “beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief”); Colella & Bain, *supra* note 7, at 2868 (“Unlike a Rule 12(b)(6) motion, a summary judgment motion does not simply test the sufficiency of the complaint; it involves an examination of the material outside the complaint, and determines whether on the undisputed facts presented in that material, the movant is entitled to judgment as a matter of law.” (quoting *Kunkes v. United States*, 78 F.3d 1549, 1550 n.2 (Fed. Cir. 1996)) (internal quotation marks omitted)).

⁹ 392 F.3d 147 (5th Cir. 2004).

¹⁰ See *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009).

¹¹ See *Augustine v. United States*, 704 F.2d 1074, 1079 (9th Cir. 1983).

¹² See *Lawrence v. Dunbar*, 919 F.2d 1525, 1530 (11th Cir. 1990).

question is too intertwined with the merits to be decided on a Rule 12(b)(1) motion at the jurisdictional stage. Instead, the court should convert the inquiry into a motion for failure to state a claim or a motion for summary judgment, and make a determination on the merits.¹³ This approach has important implications. Not only does the *Montez* reasoning run contrary to the structure of the FTCA statute itself, it also results in an improper allocation of the burden of establishing jurisdiction and strips the judge of the important duty to determine whether the court has jurisdiction at the outset of litigation prior to any consideration of the merits.

This Note argues that the proper approach is to treat the scope of employment question as jurisdictional, handling it pursuant to a Rule 12(b)(1) motion, which is the approach that the Second¹⁴ and Third¹⁵ Circuits take. Further, it argues that courts should require less in the way of proof of this element than would be necessary to succeed at a trial, specifically a prima facie showing (the “jurisdictional prima facie approach”). Part I discusses the factual background of the *Montez* case and the legal background of the FTCA. Part II addresses the Fifth Circuit’s reasoning in *Montez*, the circuit split, and ramifications of the *Montez* approach. Part III details the jurisdictional prima facie approach, which comports with the jurisdictional focus of the FTCA and properly allocates the burden of proof. It also requires only a prima facie showing at the jurisdictional stage, a much lesser burden than the preponderance standard used at trial. Thus, it addresses a major concern of the opposing side of the circuit split, which is that a plaintiff needs more protection than a 12(b)(1) motion traditionally affords due to the overlap between jurisdictional and merits issues in this context. Part III also provides an example of how this approach would be applied, and predicts that the Supreme Court would likely resolve the current circuit split in favor of the jurisdictional approach.

I. BACKGROUND

A. *Legal Background of the Federal Tort Claims Act*

Sovereign immunity operates as a shield from lawsuits for the federal government and its agencies.¹⁶ The Supreme Court first applied the doctrine

¹³ *Montez*, 392 F.3d at 150.

¹⁴ *Hamm v. United States*, 483 F.3d 135, 136 (2d Cir. 2007).

¹⁵ *CNA v. United States*, 535 F.3d 132, 145 (3d Cir. 2008).

¹⁶ *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citing *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 244 (1940)); *see also Montez ex rel. Montez v. Dep’t of Navy*, 392 F.3d 265 F. Supp. 2d 750, 753 (N.D. Tex. 2003), *rev’d sub nom. Montez v. Dep’t of Navy*, 392 F.3d 147 (5th Cir. 2004) (citing *Davis v. United States*, 961 F.2d 53, 56 (5th Cir. 1991)); *Williamson v. Dep’t of Agriculture*, 815 F.2d 368, 373 (5th Cir. 1987) (“The doctrine of sovereign immunity . . . renders the

of sovereign immunity in 1846.¹⁷ In 1882, in *United States v. Lee*,¹⁸ Justice Miller discussed the origin of the doctrine, observing that despite its common application, the “principle has never been discussed or the reasons for it given, but it has always been treated as established doctrine.”¹⁹

Sovereign immunity was a part of English common law.²⁰ Although the doctrine may have been originally carried over to the United States in its English version, it did not stay in that form for long.²¹ The doctrine in its American form does not follow the English model, because the principle underlying the latter was that the King, as sovereign, could do no wrong.²² Abolition of the monarchy rendered the English version inapplicable in the United States.²³

In its original iteration in the United States, the doctrine of sovereign immunity completely barred any suit against the federal government.²⁴ Courts began recognizing the need for exceptions to the doctrine in certain circumstances in order to ease some of the obvious harshness resulting from a total bar.²⁵ Thus, the courts began allowing ultra vires actions against public officials, where a plaintiff claiming that the official’s illegal actions violated his rights was allowed to sue the official if the court found that the official was acting outside the scope of his authority.²⁶

Since this type of lawsuit was not always adequate to redress the grievances of citizens, Congress began enacting legislation authorizing suits against the government as specific needs arose.²⁷ The first of these statutes was the Court of Claims Act of 1855.²⁸ The Act created the Court of Claims, and authorized it to hear cases against the United States arising out of government contracts and to award damages if appropriate.²⁹ In 1887,

United States, its departments, and its employees in their official capacities as agents of the United States immune from suit except as the United States has consented to be sued.”).

¹⁷ Sharon J. Kronish, Comment, *Sovereign Immunity: A Modern Rationale In Light of the 1976 Amendments to the Administrative Procedure Act*, 1981 DUKE L.J. 116, 116 (citing *United States v. McLemore*, 45 U.S. 286 (1846)).

¹⁸ 106 U.S. 196 (1882).

¹⁹ Kronish, *supra* note 17, at 117-18 (quoting *Lee*, 106 U.S. at 207).

²⁰ *Id.* at 118.

²¹ *Id.*

²² *Id.* (citing Clark Byse, *Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484 (1962)).

²³ *Id.*

²⁴ *Id.* at 121.

²⁵ Kronish, *supra* note 17, at 121.

²⁶ *Id.* at 121-22 (citing Byse, *supra* note 22, at 1481, 1485; ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 46-47 (1955)).

²⁷ *Id.* at 122.

²⁸ Court of Claims Act, ch. 122, 10 Stat. 612 (1855).

²⁹ Kronish, *supra* note 17, at 122.

Congress passed the Tucker Act,³⁰ which expanded the Court of Claim's jurisdiction and also granted concurrent jurisdiction to the U.S. district courts in certain cases.³¹

The development of these statutes established the principle that, despite the doctrine of sovereign immunity, the government may consent to being sued through a so-called waiver of sovereign immunity.³² These waivers are limited, in that they operate only in specific circumstances or for a limited category of cases. Such a waiver or consent is necessary before a federal court may entertain a suit against the United States, since otherwise the doctrine of sovereign immunity bars such claims.³³ Thus, sovereign immunity is jurisdictional in character and the terms of the government's specific consent to be sued defines the court's jurisdiction.³⁴

After the Tucker Act, the next major statute providing an exception to the traditional bar on suits against the United States came nearly sixty years later. Congress passed the Federal Tort Claims Act³⁵ in 1946.³⁶ In its current form, §1346(b)(1) of the FTCA provides:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.³⁷

Section 1346(b)(1) operates to grant the federal district courts jurisdiction over certain tort claims against the United States.³⁸ For these claims, the federal government has given consent to be sued.³⁹ Thus, the FTCA acts as one of the limited waivers of sovereign immunity discussed above.⁴⁰

If an individual may bring suit under § 1346(b)(1), the statute provides the person's exclusive remedy. Neither the specific federal agency involved nor the individual tortfeasor may be sued in their respective names or ca-

³⁰ Tucker Act, ch. 359, 24 Stat. 505 (1887) (current version at 28 U.S.C. §§ 507, 1346, 1402, 1491, 1486-97, 1501, 1503, 2071-72, 2501, 2512 (1976)).

³¹ Kronish, *supra* note 17, at 122.

³² *Id.* at 116.

³³ *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also* *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

³⁴ *FDIC*, 510 U.S. at 475 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

³⁵ 28 U.S.C. §§ 1346(b), 2401(b), 2671-80 (2000).

³⁶ *FDIC*, 510 U.S. at 475.

³⁷ 28 U.S.C. § 1346(b)(1) (2000).

³⁸ *FDIC*, 510 U.S. at 477 (citing *Richards v. United States*, 369 U.S. 1, 6 (1962)).

³⁹ *Id.* (citing *Richards*, 369 U.S. at 6).

⁴⁰ *See id.* (citing *Richards*, 369 U.S. at 6); *Kerns v. United States*, 534 F. Supp. 2d 633, 636-37 (D. Md. 2008), *vacated and remanded*, 585 F.3d 187 (4th Cir. 2009).

pacities.⁴¹ In other words, a plaintiff who brings suit under the FTCA may only sue the federal government. The government replaces the agency or the individual whom the plaintiff would have otherwise sued and is the only proper defendant in a suit brought pursuant to the FTCA.⁴²

According to the statute, there are six conditions that must be met in order for a claim to fall into this limited category for which sovereign immunity is waived and for a federal court to have jurisdiction.⁴³ The claim must be: (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.⁴⁴

The analysis of the fifth condition is the focus of this Note. With regard to the sixth, the Supreme Court has consistently held that the “law of the place” refers to the law of the state where the tort occurred.⁴⁵ State law is “the source of substantive liability under the FTCA.”⁴⁶ Thus, in determining whether the fifth condition is satisfied, whether the employee was acting within the scope of his or her employment, the federal court will look to the vicarious liability or respondeat superior law of the relevant state.⁴⁷ The court will also apply state law in reaching a decision on the merits of the underlying tort cause of action.

⁴¹ *FDIC*, 510 U.S. at 476; *see also* *Montez ex rel. Montez v. Dep’t of Navy*, 265 F. Supp. 2d 750, 753 (N.D. Tex. 2003), *rev’d sub nom. Montez v. Dep’t of Navy*, 392 F.3d 147 (5th Cir. 2004) (“The FTCA is the exclusive remedy for torts committed by federal employees . . . acting within the scope of their employment.” (citing 28 U.S.C. § 2674; *McGuire v. Turnbo*, 137 F.3d 321, 324 (5th Cir. 1998))).

⁴² *CNA v. United States*, 535 F.3d 132, 138 n.2 (3d Cir. 2008).

⁴³ *FDIC*, 510 U.S. at 477.

⁴⁴ *Id.* (quoting 28 U.S.C. § 1346(b)).

⁴⁵ *Id.* at 478 (citing *Miree v. DeKalb County*, 433 U.S. 25, 29 n.4 (1977)).

⁴⁶ *Id.* (citing *Miree*, 433 U.S. at 29 n.4).

⁴⁷ *Hamm v. United States*, 483 F.3d 135, 138 (2d Cir. 2007); *see also* *CNA*, 535 F.3d at 146 (“[T]o answer such scope-of-employment questions, we have applied the closely related doctrine of respondeat superior . . . under [state] law, rather than using a federal definition.”); *Kerns v. United States*, 534 F. Supp. 2d 633, 637 (D. Md. 2008) (turning to a discussion of Maryland’s respondeat superior law after holding that the FTCA does not waive the government’s sovereign immunity for a tort committed by an employee if an employer would not be vicariously liable under the applicable state law), *vacated and remanded*, 585 F.3d 187 (4th Cir. 2009); *Montez ex rel. Montez v. Dep’t of Navy*, 265 F. Supp. 2d 750, 754 (N.D. Tex. 2003) (“This [scope of employment] determination is made under applicable state rules of respondeat superior.” (citing *Garza v. United States*, 809 F.2d 1170, 1171 (5th Cir. 1987))), *rev’d sub nom. Montez v. Dep’t of Navy*, 392 F.3d 147 (5th Cir. 2004). As these cases indicate, there is no standard federal definition of “scope of employment” as used in the FTCA.

B. *Factual Background of Montez v. Department of Navy*

In December 2000, twenty-one-year-old Emilio Partida was on active duty in the U.S. Navy and was temporarily assigned to the Naval Recruiting Station in San Angelo, Texas.⁴⁸ From time to time, Partida was given permission to drive a Navy vehicle home to visit his family in Mertzon, Texas.⁴⁹ On December 30, 2000, Petty Officer Gene D. Martin allowed Partida to take such a trip over the New Year's holiday.⁵⁰ The loan of the vehicle served no Navy or government purpose, except perhaps the morale boost associated with a family visit.⁵¹ He was instructed to park and leave the car at his house until January 2, 2001, when he was to return to work, and "not to use the car as a personal vehicle."⁵² This type of use, however, was against Navy regulations, which state that government vehicles are not to be used for anything but official purposes.⁵³ Based on these regulations, according to Martin's commanding officer, Captain P.M. Ricketts, Partida should not have been allowed to use a Navy vehicle for this trip.⁵⁴

On December 30th, contrary to Martin's instructions, Partida drove the car to a ranch outside of San Angelo, Texas.⁵⁵ He and sixteen-year-old Abel Valencia, whom he picked up on his way, drank alcohol at the ranch and then returned to Mertzon.⁵⁶ On December 31st, Partida, Abel, and eighteen-year-old Carlos Natividad drove the car to a mall in San Angelo, where seventeen-year-old Nicholas Montez met them.⁵⁷

That evening, New Year's Eve, Partida and his five friends decided to attend a wedding party and dance in Big Lake, Texas.⁵⁸ Partida volunteered to drive them, although he knew that he was not authorized to do so.⁵⁹ He drove himself, Abel, Carlos, and Nicholas, in addition to Kimberly Whitt and Ray Montez, Jr., who were both seventeen years of age.⁶⁰ Partida stopped to buy beer, and then began the forty-three mile drive from Mertzon to Big Lake.⁶¹ Around 9 p.m., while taking a sharp curve at a high

⁴⁸ *Montez*, 265 F. Supp. 2d at 752.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 752 n.1. The Naval regulation indicates that misuse violates the Uniform Code of Military Justice and federal law, although it does not specify to which federal law it is referring. *See id.*

⁵⁴ *Montez*, 265 F. Supp. 2d at 752 n.1.

⁵⁵ *Id.* at 752.

⁵⁶ *Id.*

⁵⁷ *Id.* at 752-53.

⁵⁸ *Id.* at 753.

⁵⁹ *Id.* at 753.

⁶⁰ *Montez*, 265 F. Supp. 2d at 753.

⁶¹ *Id.*

speed, Partida lost control of the car.⁶² The car flipped, and Kimberly, Nicholas, and Ray were ejected, resulting in the death of Kimberly and Nicholas.⁶³ Ray, Abel, and Carlos sustained serious injuries.⁶⁴ As a result of the incident, Partida was discharged from the Navy, convicted of vehicular manslaughter, and sentenced to ten years' probation.⁶⁵

Representatives of Kimberly and Nicolas, along with the surviving passengers, sued the federal government pursuant to the FTCA in the United States District Court for the Northern District of Texas.⁶⁶ The government filed a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, arguing that Partida was not acting within the scope of his employment when the accident occurred.⁶⁷ The plaintiffs argued to the contrary, claiming that he was actively recruiting his friends to join the Navy at the time and pointing to the fact that he was driving a Navy vehicle.⁶⁸

The district court granted the motion to dismiss based on a finding that "Partida was not 'acting within the scope of his office or employment'" with the Navy at the time, rendering the FTCA inapplicable.⁶⁹ He was not a Navy recruiter, nor could the plaintiffs establish a theory of apparent authority to act as one.⁷⁰ Even if he had authority to act as a recruiter, the court found that he was not doing so in furtherance of the Navy's business at the time of the accident, since it was a Sunday, he was off duty, he was not in uniform, and there were numerous social activities throughout that day.⁷¹ Additionally, borrowing the car violated Navy policy and although Martin gave explicit instructions not to use it as a personal vehicle, Partida bought beer and kept it in the trunk, and Partida himself said it was a personal trip.⁷²

In its ruling, the district court treated the scope of employment question as jurisdictional. It called it a "jurisdictional prerequisite," explaining that "[u]nless Partida was acting within the scope of his office or employment at the time of the accident, there is no jurisdiction under the FTCA."⁷³ The plaintiffs appealed to the Fifth Circuit Court of Appeals.⁷⁴ The Fifth

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* The district court's opinion gives no indication as to whether Partida was injured, or to what extent.

⁶⁵ *Id.* at 753 n.2.

⁶⁶ *Montez*, 265 F. Supp. 2d at 753.

⁶⁷ *Id.*

⁶⁸ *Id.* at 754-55.

⁶⁹ *Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004) (quoting *Montez*, 265 F. Supp. 2d at 757).

⁷⁰ *Montez*, 265 F. Supp. 2d at 755-56.

⁷¹ *Id.* at 756.

⁷² *Id.*

⁷³ *Id.* at 754, 757.

⁷⁴ *Montez*, 392 F.3d at 148.

Circuit reversed the district court's dismissal of the case for lack of subject matter jurisdiction.⁷⁵

II. THE IMPROPRIETY AND IMPLICATIONS OF THE *MONTEZ* COURT'S DECISION

A. *A Brief Civil Procedure Interlude: Rule 12(b)(1) vs. Rules 12(b)(6) and 56*

In order to understand and appreciate the procedural and substantive consequences of the various approaches to this issue, a brief description of the civil procedure context involved is valuable. Federal Rule of Civil Procedure 12(b)(1) allows dismissal of a case for lack of subject matter jurisdiction.⁷⁶ A ruling against the plaintiff pursuant to a 12(b)(1) motion is not a judgment on the merits and simply means that the plaintiff has failed to plead and/or prove that federal jurisdiction exists.⁷⁷ Rule 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted."⁷⁸ Rule 56 allows summary judgment in favor of the movant if no genuine issues of material fact are in dispute and the movant is entitled to judgment as a matter of law.⁷⁹ If the court rules against the plaintiff on either a Rule 12(b)(6) or 56 motion, it is rendering judgment on the merits of her claim.⁸⁰

A defendant making a Rule 12(b)(1) or 12(b)(6) motion can challenge the court's jurisdiction either facially or factually.⁸¹ In a facial attack, the

⁷⁵ *Id.* at 151. Part II.B, *infra*, discusses this decision.

⁷⁶ See FED. R. CIV. P. 12(b)(1).

⁷⁷ Colella & Bain, *supra* note 7, at 2868 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936)) (internal quotation marks omitted) (alteration in original))).

⁷⁸ FED. R. CIV. P. 12(b)(6).

⁷⁹ FED. R. CIV. P. 56.

⁸⁰ See *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) (explaining that a Rule 12(b)(6) motion assesses the merits of the case as opposed to the court's jurisdiction, as a Rule 12(b)(1) motion does); Colella & Bain, *supra* note 7, at 2868 ("Unlike a 12(b)(6) motion, a summary judgment motion does not simply test the sufficiency of the complaint; it involves an examination of the material outside the complaint, and determines whether on the undisputed facts presented in that material, the movant is entitled to judgment as a matter of law." (citing *Kunkes v. United States*, 78 F.3d 1549, 1550 n.2 (Fed. Cir. 1996))); *Jama v. INS*, 22 F. Supp. 2d 353, 361 (D.N.J. 1998) (noting that if the court finds "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief" when ruling on a 12(b)(6) motion, the complaint must be dismissed (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957))).

⁸¹ *CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008) (citing *United States ex rel. Atkinson v. Penn. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007)); *Kerns v. United States*, 534 F. Supp. 2d 633, 636 (D. Md. 2008) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)), *vacated and*

defendant claims the complaint is deficient on its face because it fails to allege a basis for subject matter jurisdiction; in this context, the court treats both Rule 12(b)(1) and 12(b)(6) motions in the same way, taking the plaintiff's allegations as true and deciding, based solely on the complaint, whether the plaintiff has properly alleged jurisdiction or stated a claim for relief.⁸²

The cases implicated here, however, involve factual attacks in which the defendant claims that the factual prerequisites for jurisdiction are lacking.⁸³ If the factual attack is made pursuant to a 12(b)(1) motion, the court considers matters outside of the complaint to determine if it has jurisdiction, the plaintiff bears the burden of proving jurisdiction exists, the court does not make inferences in the plaintiff's favor, and no presumption of truth accompanies the plaintiff's allegations.⁸⁴ "[T]he trial court is free to weigh the evidence [beyond the pleadings] and satisfy itself as to the existence of its power to hear the case."⁸⁵ In other words, the existence of a disputed fact will not prevent the court from evaluating for itself whether it has jurisdiction.⁸⁶

In contrast, if a factual attack is made using a 12(b)(6) motion, in order to consider matters outside the complaint the court converts the motion to one for summary judgment under Rule 56 and then determines whether material facts are disputed and whether the moving party is entitled to judgment as a matter of law.⁸⁷ In doing so, the court makes all reasonable inferences in favor of the nonmoving party (here, the plaintiff) and the moving party (the defendant) bears the burden of proving that no material facts are at issue.⁸⁸

remanded, 585 F.3d 187 (4th Cir. 2009); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)); *Colella & Bain*, *supra* note 7, at 2868; *Stefania A. Di Trolino*, Comment, *Undermining and Untwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 SETON HALL L. REV. 1247, 1257 (2003) (citing 2 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[1], at 12-39 (3d ed. 1997)).

⁸² *CNA*, 535 F.3d at 139 (citing *Atkinson*, 473 F.3d at 514); *Kerns*, 534 F. Supp. 2d at 636 (citing *Adams*, 697 F.2d at 1219); *Lawrence*, 919 F.2d at 1529 (citing *Menchaca*, 613 F.2d at 511); *Colella & Bain*, *supra* note 7, at 2868 (citing *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981)); *Di Trolino*, *supra* note 81, at 1257 (citing 2 MOORE, *supra* note 81, § 12.30[1], at 12-39).

⁸³ *CNA*, 535 F.3d at 139 (citing *Atkinson*, 473 F.3d at 514); *Kerns*, 534 F. Supp. 2d at 636 (citing *Adams*, 697 F.2d at 1219); *Lawrence*, 919 F.2d at 1529 (citing *Menchaca*, 613 F.2d at 511); *Colella & Bain*, *supra* note 7, at 2869.

⁸⁴ *CNA*, 535 F.3d at 139; *Colella & Bain*, *supra* note 7, at 2869 (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

⁸⁵ *Lawrence*, 919 F.2d at 1529 (quoting *Williamson*, 645 F.2d at 412-13).

⁸⁶ *Id.*

⁸⁷ *Colella & Bain*, *supra* note 7, at 2869.

⁸⁸ *Id.* (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 484 (10th Cir. 1995)).

B. *The Fifth Circuit's Reasoning and the Related Circuit Split*

In reversing the *Montez* district court's dismissal of the case, the Fifth Circuit recognized that the trial court can usually weigh the evidence and resolve disputed facts to determine whether or not it has jurisdiction and that no presumption of truth attaches to the plaintiff's complaint.⁸⁹ However, the court declared that, "where issues of fact are central both to subject matter jurisdiction and the claim on the merits . . . the trial court must assume jurisdiction and proceed to the merits."⁹⁰ Thus, the Fifth Circuit requires trial courts to treat the scope of employment question as a merits issue by converting a Rule 12(b)(1) motion to either a Rule 12(b)(6) or a Rule 56 motion.⁹¹

The Fifth Circuit provided several justifications for its approach to the scope of employment question. First, since scope of employment is also an element of the underlying cause of action, arguing the merits indirectly in the context of a jurisdictional dispute serves no purpose.⁹² Second, the court asserted that directly reaching the question of whether a federal right exists and dismissing a claim on the merits if no such right is found is the best way to promote judicial economy.⁹³ Lastly, the conversion provides more

⁸⁹ *Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

⁹⁰ *Id.* at 150.

⁹¹ *Id.* (citing *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1347 (5th Cir. 1985); *Williamson*, 645 F.2d at 415).

⁹² *Id.* The court did not elaborate, but it may be reasoning that if the parties are going to argue the merits, they should say so and do so pursuant to the "proper" civil procedure device (Rule 12(b)(1) is reserved for jurisdictional questions, while Rule 56 is reserved for merits disputes). See *infra* note 93 for more conjecture as to what the court may be referring to.

⁹³ *Montez*, 392 F.3d at 150 (quoting *Williamson*, 645 F.2d at 415). The court does not elaborate on what it means by this assertion. It is possible that the court means that since this issue is going to have to be hashed out in even greater detail during the merits/trial stage, it is better to get into this full discussion right away instead of discussing it more briefly at the jurisdiction stage and saving the more in-depth discussion for trial. In other words, since the jurisdictional and merits issues overlap, it is more efficient to try them both at the time of trial when the judge renders a decision on the merits rather than to try them separately, first at the jurisdiction stage and then again at trial. It is also possible that the court is referring to the preclusive effect of dismissal on the merits—a claim dismissed on the merits cannot be re-filed, but a claim dismissed for lack of jurisdiction can usually be amended to properly allege jurisdiction (or taken to the court where jurisdiction does lie) and filed again. If the plaintiff is going to eventually lose on the merits, the court may feel it would be better to dismiss on the merits the first time around so that she cannot file again, instead of dismissing for lack of jurisdiction, leaving open the possibility for re-file and "waste" of judicial resources on a claim that will eventually lose on the merits anyway. For a discussion of why this reasoning likely does not hold water in the FTCA context, see *Colella & Bain*, *supra* note 7, at 2873-74 ("Once an FTCA action is dismissed for lack of subject matter jurisdiction, the plaintiff's right to tort recovery against the United States is foreclosed. The plaintiff cannot proceed in state court because state courts do not have jurisdiction over the United States. Nor can the plaintiff proceed in federal court because the FTCA is the only statute that subjects the United States to tort liability." (footnote omitted)). Also, see *infra* Part III.B.1 for a discussion on judicial efficiency.

protection to the plaintiff who is facing a challenge to the merits of her claim because the defendant must go forward under either Rule 12(b)(6) or Rule 56, both of which restrict the trial court's discretion to a greater extent than Rule 12(b)(1).⁹⁴ The FTCA's jurisdictional scope of employment question, according to the *Montez* court, is too intertwined with the merits of the underlying claim to be decided on a 12(b)(1) motion.⁹⁵ Based on this reasoning, the Fifth Circuit concluded in *Montez* that, "the district court should not have resolved disputed facts dispositive of both subject matter jurisdiction and the merits of an FTCA claim on a 12(b)(1) motion."⁹⁶ Therefore, it reversed the district court's dismissal of the claim for lack of subject matter jurisdiction.⁹⁷

The Fifth Circuit is not alone in the manner in which it addresses the FTCA scope of employment question. It joined the Ninth⁹⁸ and Eleventh⁹⁹ Circuits, and cited their decisions in its opinion.¹⁰⁰ Most recently, the Fourth Circuit also agreed with the Fifth Circuit's treatment.¹⁰¹ There is a circuit split on this issue, however. On one side, the Fourth, Fifth, Ninth, and Eleventh Circuits' position is that the FTCA's jurisdictional scope of employment question is too intertwined with the merits to be decided on a Rule 12(b)(1) motion; thus, such motions are to be converted into Rule 12(b)(6) or Rule 56 motions.¹⁰² On the other side of the split, the Second and Third Circuits hold that the scope of employment issue is properly handled at the jurisdictional stage and accordingly will review it under a Rule 12(b)(1) motion.

The Third Circuit recently explained its position in *CNA v. United States*.¹⁰³ The court reasoned that the FTCA defines the federal courts' jurisdiction to hear claims of this type—the requirements to waive sovereign immunity under the FTCA are described in the same provision of the statute that grants jurisdiction.¹⁰⁴ Furthermore, the court held that the jurisdictional issues in this context are not excessively intertwined with the merits, thus the Rule 12(b)(1) standard is proper for deciding the scope of employment issue.¹⁰⁵ This is how the district court initially ruled in *Montez*.¹⁰⁶

⁹⁴ *Montez*, 392 F.3d at 150 (quoting *Williamson*, 645 F.2d at 415).

⁹⁵ *Id.*

⁹⁶ *Id.* at 151.

⁹⁷ *Id.*

⁹⁸ *Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983).

⁹⁹ *Green v. Hill*, 954 F.2d 694 (11th Cir. 1992), *withdrawn*, 968 F.2d 1098 (11th Cir. 1992); *Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990).

¹⁰⁰ *Montez v. Dep't of Navy*, 392 F.3d 147, 151 (5th Cir. 2004) (citing *Green*, 954 F.2d at 698; *Lawrence*, 919 F.2d at 1529; *Augustine*, 704 F.2d at 1079).

¹⁰¹ *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009).

¹⁰² *Green*, 954 F.2d at 698; *Lawrence*, 919 F.2d at 1529; *Augustine*, 704 F.2d at 1079.

¹⁰³ 535 F.3d 132, 140 (3d Cir. 2008).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

The Second Circuit similarly handles the scope of employment question at the jurisdictional stage under a Rule 12(b)(1) motion, as demonstrated in *Hamm v. United States*.¹⁰⁷ In that case, the Second Circuit reasoned that sovereign immunity is jurisdictional in nature, and that since the FTCA sets forth the sovereign's consent to be sued, it also defines the court's jurisdiction.¹⁰⁸ Thus, if the waiver does not apply in a particular case, it should be dismissed under a Rule 12(b)(1) motion.¹⁰⁹ The court went on to conclude that, under New York respondeat superior law, the employee involved was not acting within the scope of his employment at the time of the tort.¹¹⁰ It accordingly affirmed dismissal of the claim for lack of subject matter jurisdiction.¹¹¹

The Fourth Circuit is the most recent circuit to decide this question. On October 29, 2009, the court handed down its opinion in *Kerns v. United States*, focusing on this precise issue.¹¹² The district court in *Kerns* followed the approach of the Second and Third Circuits.¹¹³ It dismissed the case for lack of subject matter jurisdiction on a Rule 12(b)(1) motion, finding that the employee involved was not acting within the scope of her employment with the government at the time of the tort under Maryland respondeat superior law.¹¹⁴ The district court noted that, in cases where the jurisdictional facts are too intertwined with the facts central to the merits of the case, "the proper course of action is to find that jurisdiction exists and resolve the entire factual dispute by a proceeding on the merits."¹¹⁵ However, it held that this was not a situation where the two were sufficiently entangled to necessitate proceeding to the merits.¹¹⁶ To the contrary, "FTCA jurisdictional issues arising under respondeat superior theories . . . are normally quite distinct from the underlying merits of the case and thus would 'not usually present a serious problem' for a court deciding a 12(b)(1) motion."¹¹⁷ The court went on to say that courts "regularly" grant 12(b)(1) mo-

¹⁰⁶ *Montez ex rel. Montez v. Dep't of Navy*, 265 F. Supp. 2d 750, 754-57 (N.D. Tex. 2003), *rev'd sub nom. Montez v. Dep't of Navy*, 392 F.3d 147 (5th Cir. 2004); *see supra* Part I.B.

¹⁰⁷ 483 F.3d 135 (2d Cir. 2007).

¹⁰⁸ *Id.* at 137 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996)).

¹⁰⁹ *Id.* (citing *Wake*, 89 F.3d at 57).

¹¹⁰ *Id.* at 138-40.

¹¹¹ *Id.* at 140.

¹¹² *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009).

¹¹³ *Kerns v. United States*, 534 F. Supp. 2d 633 (D. Md. 2008).

¹¹⁴ *Id.* at 640.

¹¹⁵ *Id.* (quoting *Schalk v. Associated Anesthesiology Practice*, 316 F. Supp. 2d 244, 248-49 (D. Md. 2004)) (internal quotation marks omitted).

¹¹⁶ *Id.*

¹¹⁷ *Id.* (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). The court does not explain its basis for this assertion.

tions dismissing FTCA claims for lack of subject matter jurisdiction.¹¹⁸ On appeal, the Fourth Circuit Court of Appeals vacated and remanded.¹¹⁹ After surveying both sides of the circuit split, the Fourth Circuit stated, “we are constrained to agree with the more-stringent approach [of the Fifth, Ninth, and Eleventh Circuits]: Because the scope-of-employment issue is determinative of both jurisdiction and the underlying merits of an FTCA claim, dismissal under Rule 12(b)(1) is inappropriate,” and the court should instead convert the motion and apply either a 12(b)(6) or Rule 56 standard.¹²⁰

C. *The Ramifications of the Fifth Circuit’s Approach*

When a plaintiff files a complaint in court, she must allege that jurisdiction exists for the court to hear the suit.¹²¹ “[T]he party invoking federal jurisdiction bears the burden of establishing its existence.”¹²² Thus, when the court engages in resolving the subject matter jurisdiction question, the burden of proof rests with the plaintiff to demonstrate that jurisdiction exists by a preponderance of the evidence.¹²³ A Rule 12(b)(1) motion for dismissal based on lack of subject matter jurisdiction is the mechanism by which the party defending the suit may challenge whether or not the plaintiff has in fact established subject matter jurisdiction.¹²⁴

Lack of subject matter jurisdiction is a protected defense, which means that even if a defendant fails to raise it immediately, he does not waive the

¹¹⁸ *Id.* (citing *Williams v. United States*, 50 F.3d 299, 305 (4th Cir. 1995); *Hodge v. United States*, 443 F. Supp. 2d 795, 800 (E.D. Va. 2006), *aff’d*, 224 F. App’x. 235 (4th Cir. 2007); *Lumpkins v. United States*, 187 F. Supp. 2d 535, 538-39 (D. Md. 2002); *Buckingham v. United States*, 124 F. Supp. 2d 943, 944 (D. Md. 2000), *aff’d*, 217 F.3d 837 (4th Cir. 2000)).

¹¹⁹ *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009).

¹²⁰ *Id.* at 195.

¹²¹ *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

¹²² *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104 (1998) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)); *see also Montez ex rel. Montez v. Dep’t of Navy*, 265 F. Supp. 2d 750, 753 (N.D. Tex. 2003) (“A party seeking to invoke the jurisdiction of a federal court must prove that jurisdiction is proper.” (citing *Stockman v. Fed. Election Comm’n*, 138 F.3d 144, 151 (5th Cir. 1998); *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 566 (N.D. Tex. 1997))), *rev’d sub nom. Montez v. Dep’t of Navy*, 392 F.3d 147 (5th Cir. 2004); *Colella & Bain, supra* note 7, at 2862-63 (“It is axiomatic that federal courts are courts of limited jurisdiction and that a party seeking to invoke the power of an Article III court bears the burden of demonstrating that either the Constitution or some act of Congress opens the federal courthouse doors to a claim.” (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 22-23 (5th ed. 1994))).

¹²³ *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007) (citing *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002)); *see also McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006) (citing *McNutt*, 298 U.S. at 189; *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004)) (stating that the party asserting jurisdiction bears the burden of proof).

¹²⁴ *See* FED. R. CIV. P. 12(b)(1).

ability to raise it later on.¹²⁵ In fact, a court may raise the issue *sua sponte*.¹²⁶ Rule 12(h)(3) states that, “[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court *must* dismiss the action.”¹²⁷ The fact that the lack of subject matter jurisdiction defense continues to be available throughout the entire case demonstrates its importance, as does the fact that the court is required to dismiss the case if it discerns subject matter jurisdiction is lacking, regardless of when in the course of the case this determination is made.¹²⁸

As discussed in detail above,¹²⁹ when a defendant presents a Rule 12(b)(1) motion, the plaintiff bears the burden of proving subject matter jurisdiction to survive the motion. Thus, the burden of proving that the court in fact has jurisdiction to hear the claim still rests where it originally lies, with the plaintiff. However, converting a Rule 12(b)(1) motion into Rule 12(b)(6) motion for failure to state a claim causes the burden to shift to the defendant.¹³⁰ The same is true for conversion into a Rule 56 motion for summary judgment, which forces the defendant (the moving party) to bear the burden of proving that there are no genuine issues of material fact in dispute and that he is entitled to judgment as a matter of law.¹³¹

This burden allocation and shifting has important implications in the FTCA context. Because the plaintiff bears the burden of proving jurisdiction, the plaintiff must show that all of the jurisdictional requirements set forth in the FTCA are met. If the United States brings a 12(b)(1) motion, the burden still rests with the plaintiff to establish that the court in fact has jurisdiction. However, if a court converts the 12(b)(1) motion to a 12(b)(6), the defendant is now in the position of having to prove the court does not have jurisdiction, instead of the plaintiff having to prove that it does. The same is true for conversion into a Rule 56 motion for summary judgment, in which the burden also shifts to the defendant.¹³² Again, when the contested issue is one regarding jurisdiction, as in the FTCA context, the defendant is now required to carry the burden of proving the negative, that the court does not have jurisdiction.

Aside from this burden shifting, the conversion also affects the judge’s role. At the outset of litigation, the judge must determine, first and foremost, whether or not the court has jurisdiction to hear the case at all. In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court must resolve for itself whether there is a basis for jurisdiction and, if

¹²⁵ See FED. R. CIV. P. 12(h)(3).

¹²⁶ *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006).

¹²⁷ FED. R. CIV. P. 12(h)(3) (emphasis added).

¹²⁸ See FED. R. CIV. P. 12(h)(3).

¹²⁹ See *supra* Part II.A.

¹³⁰ See *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (3d Cir. 2003) (citing *Thompson v. County of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994)).

¹³¹ See FED. R. CIV. P. 56.

¹³² See *id.*

not, it must dismiss the claim.¹³³ Under the method used by the Fourth, Fifth, Ninth, and Eleventh Circuits, when addressing the scope of employment question in FTCA claims, the judge is to presume jurisdiction and move on to the merits. Thus, the judge does not decide the question of whether or not the court has jurisdiction and instead uses a Rule 12(b)(6) or 56 standard to come to a decision on the merits of the claim. This strips the judge of an important and traditional role—that of ensuring the court has jurisdiction before it hears a case on the merits.

Finally, conversion has another related ramification. The Fourth, Fifth, Ninth, and Eleventh Circuits were, in effect (and sometimes even expressly), requiring the court to assume that it has jurisdiction.¹³⁴ The Supreme Court has consistently and explicitly rejected the use of such a tactic. In *Steel Co. v. Citizens for a Better Environment*,¹³⁵ the Court discussed several circuits' approach of proceeding directly to a merits question and disregarding challenges to jurisdiction in cases where, for example, merits questions are easier to resolve or the same party would prevail on the merits as would prevail if jurisdiction were denied.¹³⁶ The Court adopted the Ninth Circuit's language for this practice, referring to it as "the doctrine of hypothetical jurisdiction."¹³⁷ The Court explicitly declined to approve such an approach, as it conflicts with fundamental separation of powers principles by "carr[ying] the courts beyond the bounds of authorized judicial action."¹³⁸ If jurisdiction is lacking, the court may not, in any case, proceed.¹³⁹ Quoting *Ex parte McCardle*,¹⁴⁰ the Court declared that "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."¹⁴¹ Jurisdiction must be established as the first step.¹⁴² The *Steel*

¹³³ *Montez ex rel. Montez v. Dep't of Navy*, 265 F. Supp. 2d 750, 753 (N.D. Tex. 2003), *rev'd sub nom.* *Montez v. Dep't of Navy*, 392 F.3d 147 (5th Cir. 2004).

¹³⁴ See, e.g., *Kerns v. United States*, 585 F.3d 187, 195 (4th Cir. 2009) ("A district court should assume jurisdiction and assess the merits of the claim when the relevant facts—for jurisdictional and merits purposes—are inextricably intertwined." (citing *United States ex. rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009); *Adams v. Bain*, 697 F.2d 1213, 1220 (4th Cir. 1982))).

¹³⁵ 523 U.S. 83 (1998).

¹³⁶ *Id.* at 93.

¹³⁷ *Id.* at 94 (citing *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996)) (internal quotation marks omitted).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 74 U.S. (7 Wall.) 506 (1868).

¹⁴¹ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *McCardle*, 74 U.S. 506).

¹⁴² *Id.* (citing *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884)); see also Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 693 (2005) (arguing that jurisdiction should be resolved first, "according to the jurisdiction-granting statutory language, before even peeking at the factual specifics of the plaintiff's federal cause of action" (citing *Steel Co.*, 523 U.S. at 94-95; *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 365 (2d Cir. 2000))).

Company Court went on to say that “[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. . . . The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation . . . of powers”¹⁴³

III. THE PROPER APPROACH TO THE SCOPE OF EMPLOYMENT QUESTION

A. *Treat the Scope of Employment Question as Jurisdictional Pursuant to a 12(b)(1) Motion, but Require Only a Prima Facie Showing*

One concern of the Fourth, Fifth, Ninth, and Eleventh Circuits that leads them to convert 12(b)(1) motions centered on the scope of employment issue to Rule 12(b)(6) and Rule 56 motions stems from the procedural ramifications discussed in Part II.A, *supra*. The fear is that the plaintiff is facing an indirect attack on the merits of his claim because of the overlap between jurisdiction and the merits on the scope of employment issue, and thus will not have enough procedural protection under a Rule 12(b)(1) motion. However, conversion is not the proper method of addressing this concern as it disregards the jurisdictional nature of the scope of employment question, improperly shifts the burden allocation, distorts the role of the judge, and proceeds on the impermissible basis of hypothetical jurisdiction.

Instead, a superior approach would be to treat the scope of employment issue as a jurisdictional question, but to require less of a factual showing at the jurisdictional stage than that which is appropriate and required at trial.¹⁴⁴ This is the approach that the Third Circuit advocates, although it does not explain what this “less of a factual showing” entails. As a preponderance of the evidence would be necessary to succeed at trial, at the jurisdictional stage the court should require a prima facie showing that the tortfeasor was acting in the scope of his employment in order for the plaintiff to survive the 12(b)(1) motion to dismiss.¹⁴⁵ This approach would promote efficient resolution of the jurisdictional question while not prematurely rendering a decision on the merits.¹⁴⁶

¹⁴³ *Steel Co.*, 523 U.S. at 101 (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); *United States v. Richardson*, 418 U.S. 166, 179 (1974); *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792)) (citations omitted).

¹⁴⁴ *CNA v. United States*, 535 F.3d 132, 144-45 (3d Cir. 2008); *Gould Elecs. Inc., v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) (citing *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977); *Gotha v. United States*, 115 F.3d 176, 178-79 (3d Cir. 1997)).

¹⁴⁵ For a discussion advocating for the application of a “prima facie” standard to all situations where a factual or legal element related to the forum’s authority overlaps with the merits of the claim, see Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973 (2006).

¹⁴⁶ *See id.* at 1020 (concluding that using a lower standard for any situation in which jurisdictional facts also implicate merits issues promotes efficiency at the jurisdictional stage without foreclosing a

A preponderance of the evidence standard requires the finder of fact “to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden” on that issue.¹⁴⁷ In other words, the fact must be more likely than not, or supported by the greater weight of the evidence.¹⁴⁸ A prima facie standard requires something less stringent than a preponderance of the evidence.¹⁴⁹ Unfortunately, despite the term’s frequent use, “prima facie” is rarely explicitly defined.¹⁵⁰ “This traditionally vague phrase requires the plaintiff to establish a ‘non-trivial possibility’ that the jurisdictional facts exist and that therefore the alleged scenario took place.”¹⁵¹ The plaintiff may meet the standard “by showing that the totality of the relevant facts gives rise to an inference” that the element is met.¹⁵² For purposes of an FTCA claim, that would mean making enough of a factual showing to raise an inference that the tortfeasor was acting in the scope of his employment at the time, based on that state’s legal definition of “scope of employment.” Although the definition of prima facie is less precise than that of preponderance, the key is that the plaintiff must make a showing greater than a “mere allegation,” but less than “more likely than not.” However, if the plaintiff meets this prima facie standard on the scope of employment issue for purposes of determining jurisdiction, she will still be required at trial to meet the higher preponderance standard on all elements of her cause of action, including the scope of employment element, to be successful on the merits of her claim. Thus the standard is not lowered throughout, but merely for purposes of the initial jurisdiction determination.

The following Section discusses several benefits of the jurisdictional prima facie approach. By not requiring the plaintiff to produce the level of

merits decision). Because the element will have to be proven by a preponderance at trial, an affirmative ruling at the beginning for jurisdictional purposes using a prima facie standard does not necessitate an affirmative ruling on the issue at trial.

¹⁴⁷ *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (alteration in original) (internal quotations marks omitted)).

¹⁴⁸ *See, e.g., Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (“A preponderance of the evidence is . . . [e]vidence which is . . . more convincing than the evidence . . . offered in opposition to it . . .” (quoting *Greenwich Collieries v. Dir., Office of Workers’ Comp. Programs*, 990 F.2d 730, 736 (3d Cir. 1993), *aff’d*, 512 U.S. 267 (1994)) (alterations in original) (internal quotation marks omitted)); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 535 (1990) (explaining that the preponderance standard requires proof by the greater weight of the evidence) (Blackmun, J., dissenting).

¹⁴⁹ *See Clermont*, *supra* note 145, at 978-79 (citing *Johnson v. California*, 545 U.S. 162, 173 (2005) (holding that a prima facie showing of a *Batson v. Kentucky*, 476 U.S. 79 (1986), violation requires less than “more likely than not”)).

¹⁵⁰ *Id.* at 978.

¹⁵¹ *Id.* (citing *United Barge Co. v. Logan Charter Serv., Inc.*, 237 F. Supp. 624, 631 (D. Minn. 1964)).

¹⁵² *Johnson*, 545 U.S. at 168 (quoting *Batson*, 476 U.S. at 93-94) (internal quotation marks omitted).

proof that will be necessary at trial, this approach acknowledges that the jurisdictional scope of employment inquiry may involve factual issues that are also relevant to the merits of the plaintiff's underlying tort claim. However, it properly keeps the scope of employment a jurisdictional question by addressing it under a Rule 12(b)(1) standard, thereby maintaining the proper burden allocation, keeping the judge's role intact, and not hypothetically assuming jurisdiction. Furthermore, it addresses the concern of the Fourth, Fifth, Ninth, and Eleventh Circuits that the plaintiff needs more protection than is afforded under the traditional 12(b)(1) motion (given the overlap between factual issues of jurisdiction and the merits in this context), by not requiring the plaintiff to prove an element of the merits of her claim by preponderance of the evidence so early in litigation.

B. *Why the Jurisdictional Prima Facie Approach Is Superior to Conversion*

1. Scope of Employment: A Jurisdictional Question

In claims brought pursuant to the FTCA, the federal court does not find its jurisdiction to hear the case in the general grant of federal question jurisdiction conferred in 28 U.S.C. § 1331.¹⁵³ The source of federal courts' jurisdiction to hear tort cases against the United States is the FTCA itself.¹⁵⁴ The FTCA states: "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States."¹⁵⁵ Furthermore, sovereign immunity is a jurisdictional concept,¹⁵⁶ and "[t]he terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit."¹⁵⁷ The statutes that constitute the government's consent to be sued delineate the scope of jurisdiction by referencing the claims for which the government has waived immunity.¹⁵⁸ In the FTCA context, this means that the scope of jurisdiction includes only those cases that meet all of the listed requirements.

Since the source of jurisdiction is the FTCA statute itself, a closer look at the statute provides additional insight. All of the subsections of 28 U.S.C. § 1346, including § 1346(b)(1), contain references to jurisdiction and speak in jurisdictional terms, and "courts must presume that a legislature says in a

¹⁵³ *CNA v. United States*, 535 F.3d 132, 140 (3d Cir. 2008).

¹⁵⁴ *Id.*

¹⁵⁵ 28 U.S.C. § 1346(b)(1) (2000).

¹⁵⁶ *See Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007) (citing *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996) (stating that sovereign immunity is of a jurisdictional nature)).

¹⁵⁷ *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (internal quotation marks omitted)); *CNA*, 535 F.3d at 140 (quoting *Sherwood*, 312 U.S. at 586).

¹⁵⁸ *FDIC v. Meyer*, 510 U.S. 471, 479 (1994).

statute what it means and means in a statute what it says there.”¹⁵⁹ In § 1346(b)(1), the statutory provision that confers jurisdiction on the federal courts is the same provision containing the requirements a case must meet in order for the FTCA to waive the government’s sovereign immunity.¹⁶⁰ By setting forth these requirements in the jurisdictional provision of the statute, Congress clearly made the requirements jurisdictional.¹⁶¹ One of these requirements is that the employee must have been acting within the scope of employment. Thus, the scope of employment inquiry is a jurisdictional issue and should be treated as such by the federal courts.

The fact that scope of employment is also an element of the underlying substantive tort action, based in applicable state law, does not mean that it should not be addressed at the jurisdictional stage. Reading it the other way, that the scope of employment question is only meant to be decided on the merits,

conflates two “analytically distinct” inquiries. The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver . . . the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief.¹⁶²

The fact that the scope of employment requirement is in the same provision as the grant of jurisdiction in the FTCA suggests that each portion of the provision expresses a limitation on the government’s waiver of sovereign immunity and, accordingly, circumscribes the subject matter jurisdiction of the federal courts.¹⁶³

The Supreme Court has consistently held that in every case the issue of jurisdiction must be decided first and foremost.¹⁶⁴ A federal court is not to “hypothesize subject-matter jurisdiction.”¹⁶⁵ A disposition regarding jurisdiction must be reached before a disposition on the merits.¹⁶⁶ This threshold requirement is “inflexible and without exception,” because “[j]urisdiction is power to declare the law, and [w]ithout jurisdiction the court cannot proceed at all in any cause.”¹⁶⁷ Therefore, since the waiver of

¹⁵⁹ *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

¹⁶⁰ 28 U.S.C. § 1346(b)(1) (2000); *CNA*, 535 F.3d at 140.

¹⁶¹ *See CNA*, 535 F.3d at 142 (citing *Beazer E., Inc. v. Mead Corp.*, 525 F.3d 255, 261 (3d Cir. 2008); *see also id.* (“To evaluate whether Congress ‘clearly stated’ that a requirement should ‘count as jurisdictional,’ we ask whether the requirement appears in or receives mention in the jurisdictional provision of a given statute.” (citations omitted))).

¹⁶² *FDIC*, 510 U.S. at 484 (citing *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)) (citation omitted).

¹⁶³ *CNA*, 535 F.3d at 142.

¹⁶⁴ *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

¹⁶⁵ *Id.* (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93 (1998)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (quoting *Steel Co.*, 523 U.S. at 94-95) (internal quotation marks omitted).

sovereign immunity is a jurisdictional matter, and since jurisdiction is absolutely to be decided first, the courts must decide whether a waiver of sovereign immunity applies before moving onto the merits of a particular case.

In the FTCA context, this necessitates deciding the scope of employment question at the outset, since it is a requirement to confer jurisdiction. The court should employ the appropriate mechanism for a jurisdictional inquiry: a Rule 12(b)(1) motion. Since “[s]overeign immunity is ‘jurisdictional in nature,’ . . . where a waiver of sovereign immunity does not apply, a suit should be dismissed under Fed. R. Civ. P. 12(b)(1) and not Fed. R. Civ. P. 12(b)(6) for failure to state a claim.”¹⁶⁸ As mentioned above, the fact that the scope of employment question will be addressed again during the disposition of the merits, if the claim survives an attack on jurisdictional grounds, does not change the fact that whether or not jurisdiction exists must be decided first. The extent of the government’s liability is “of concern only after the fact of consent to be sued, and therefore jurisdiction, is established.”¹⁶⁹

Handling this issue as a jurisdictional inquiry pursuant to a 12(b)(1) motion, as the Second and Third Circuits do, also comports with the theory of limited jurisdiction or limited waiver of sovereign immunity. Waivers of the sovereign immunity of the United States must be “unequivocally expressed” to be effective.¹⁷⁰ “[T]he general rule [is] that waivers of sovereign immunity are to be read narrowly in favor of the sovereign.”¹⁷¹ Waivers are not to be enlarged to an extent greater than what the language of the statute delineating the waiver requires.¹⁷² In fact, even legislative history has no bearing in determining whether a statute has clearly waived sovereign immunity— “[i]f clarity does not exist [in the statutory text], it cannot be supplied by a committee report.”¹⁷³

The United States should not be forced to defend a suit on the merits that does not fall into a category of claims for which it has unequivocally

¹⁶⁸ Hamm v. United States, 483 F.3d 135, 137 (2d Cir. 2007) (citing Wake v. United States, 89 F.3d 53, 57 (2d Cir. 1996)).

¹⁶⁹ Lawrence v. Dunbar, 919 F.2d 1525, 1528 n.4 (11th Cir. 1990).

¹⁷⁰ United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992) (quoting Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 95 (1990)) (internal quotation marks omitted).

¹⁷¹ FDIC v. Meyer, 510 U.S. 471, 480 (1994) (citing *Nordic Vill.*, 503 U.S. at 34); see also Lane v. Pena, 518 U.S. 187, 192 (1996) (“[A] waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.” (citing *United States v. Williams*, 514 U.S. 527, 531 (1995); *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981))); *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (“Waivers of immunity must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires.” (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951); *E. Transp. Co. v. United States*, 272 U.S. 675, 686 (1927); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983)) (internal quotation marks and citations omitted)).

¹⁷² *Nordic Vill.*, 503 U.S. at 34 (citing *Ruckelshaus*, 463 U.S. at 685).

¹⁷³ *Id.* at 37.

waived its sovereign immunity. This is the entire point of the sovereign immunity doctrine. “[The FTCA] does not . . . waive the government’s sovereign immunity for injuries resulting from the tortious conduct of an employee when an employer would not be vicariously liable under state law.”¹⁷⁴ Thus, to sue the government in the first place, it must be established that the employee was acting within the scope of his or her employment under the applicable state law. If this is not established, the suit must not go forward on the merits, as the government in that case has not consented to be sued. Without this consent, a suit against the government may not be entertained in court and must be dismissed immediately.

Based on the foregoing, the FTCA scope of employment question is jurisdictional and should be handled accordingly. The jurisdictional *prima facie* approach maintains this classification by addressing the issue at the jurisdictional stage, applying a 12(b)(1) standard. This promotes timely resolution of the jurisdictional question at an early stage in litigation, as any jurisdictional question should be handled, and is, moreover, judicially efficient. The court is allowed to hold a full evidentiary hearing on a jurisdictional issue and may allow the parties to conduct limited discovery as to that issue.¹⁷⁵ If the court determines that it has jurisdiction—in other words, that there is *prima facie* evidence that the tortfeasor was acting within the scope of his employment—the parties can go on to litigate the merits of the case and will have a starting point for the full battle over the scope of employment issue, which at the trial stage must be proven by a preponderance of the evidence. This threshold determination, therefore, either (1) advances settlement if the parties have a better perspective as to their respective positions based on the newly available information and current progression of the case, or (2) streamlines the eventual trial because some of the discovery and discussion over an element of the tort action has already taken place.¹⁷⁶ If the court determines that it does not have jurisdiction, this saves judicial and party resources that would have been spent fully litigating the merits, only to discover at a later stage that the court did not have jurisdiction in the first place. Conversion to a Rule 12(b)(6) or 56 motion, on the other hand, means that if any factual issue (not just limited to scope of employment) is in dispute, the court will send the case to trial. All of the issues of the merits of the case would then be in play, wasting judicial and party resources litigating the merits of a cause of action when it may eventually fail on the scope of employment issue anyway.

¹⁷⁴ *Kerns v. United States*, 534 F. Supp. 2d 633, 637 (D. Md. 2008), *vacated and remanded*, 585 F.3d 187 (4th Cir. 2009).

¹⁷⁵ *Di Trollo*, *supra* note 81, at 1258-59 (citing *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 365 (1st Cir. 2001)); *Colella & Bain*, *supra* note 7, at 2874 (citing *Williams*, 50 F.3d at 304; *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)).

¹⁷⁶ *See Colella & Bain*, *supra* note 7, at 2874 (discussing a similar result if the judge were to actually decide some merits issues in the process of determining that it has jurisdiction).

2. Burden Allocation and the Judge's Proper Role

Treating the scope of employment question at the jurisdictional stage under a 12(b)(1) motion also maintains the proper burden allocation between the plaintiff and defendant. The plaintiff traditionally bears the burden of proving, by a preponderance of the evidence, that the court has jurisdiction to entertain the suit. When the defendant challenges jurisdiction pursuant to a Rule 12(b)(1) motion, the burden of proving jurisdiction appropriately stays with the plaintiff. A defendant should not be in a position of having to prove the negative (i.e., that jurisdiction does not exist). This is precisely what happens if the court converts the motion to a Rule 12(b)(6) or 56 motion—the court places the burden of showing that jurisdiction is lacking on the defendant.

Besides the desire to maintain this traditional burden allocation between a plaintiff and defendant, a particularly relevant excerpt from the Supreme Court's decision in *McNutt v. General Motors Acceptance Corp.*¹⁷⁷ also supports the proposition that the burden of proving an element of jurisdiction rests with the plaintiff and should remain there:

[The prerequisites for jurisdiction defined by the statute] are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. . . . [T]he one who claims that the power of the court should be exerted in his behalf . . . must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty.¹⁷⁸

Furthermore, given the importance of the doctrine of sovereign immunity, keeping the burden with the plaintiff is especially important in the context of immunity waivers. “When FTCA subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff bears the burden of persuasion and must establish an unequivocal waiver of immunity with respect to her claim.”¹⁷⁹ In order to protect the government's sovereign immunity, plaintiffs should have to establish that statutory consent to be sued applies in a particular case. The United States, as a defendant, should never be forced to bear the burden of persuading a federal court that the court lacks subject matter jurisdiction over an FTCA suit.

¹⁷⁷ 298 U.S. 178 (1936).

¹⁷⁸ *Id.* at 189.

¹⁷⁹ *Kerns*, 534 F. Supp. 2d at 636 (citing *Williams*, 50 F.3d at 304).

Additionally, treating the scope of employment question at the jurisdictional stage under a 12(b)(1) motion also maintains the proper role of the judge. It is not only the province of the judge to decide jurisdiction at the outset of litigation, it is the judge's duty to so.¹⁸⁰ The "court should conclusively establish the existence of Article III jurisdiction [based in the Constitution or in a statute] at the first phase before considering whether the plaintiff has a claim or who should win at [trial]."¹⁸¹ If the court does not have jurisdiction, or is not sure whether it does or not, it may not move on to the merits of the claim. Converting the motion to a 12(b)(6) or 56 motion strips the judge of this duty—it forces the court to assume jurisdiction and move on to the merits. The Supreme Court has held that this is an inappropriate exercise.¹⁸² The judge is the gatekeeper at the doors of the federal courthouse: the judge must decide, when the plaintiff reaches the stoop, whether to allow her in for a full discussion of the merits of her claim or to deny entry.¹⁸³ This gatekeeper role is important because it ensures that only plaintiffs who have established valid constitutional or statutory grounds for being in court are allowed to proceed.¹⁸⁴ Otherwise, judicial resources are tied up in litigating claims that fail on jurisdictional grounds, which relates back to the discussion of judicial efficiency above.

Lastly, an oft-cited rationale for conversion from a 12(b)(1) motion to 12(b)(6) or 56 motion is that courts do not want to deny a plaintiff the right to have a jury render a decision on the merits of her claim, "reasoning that a Rule 12(b)(1) jurisdictional determination that involved the resolution of merits issues improperly invades the province of the jury."¹⁸⁵ This would seemingly weigh in favor of conversion because, as noted, the scope of employment question is both a jurisdictional and a merits issue. However, this rationale dissolves in the FTCA context, because there is no right to a jury trial in an FTCA action—the judge renders a decision both on jurisdic-

¹⁸⁰ Wasserman, *supra* note 142, at 673 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 243 (1999)).

¹⁸¹ *Id.*

¹⁸² *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) ("[T]his court [has] adhered to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits. . . . The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception . . ." (quoting *Steel Co.*, 523 U.S. at 94-95) (citations and internal quotation marks omitted)).

¹⁸³ See Idleman, *supra* note 180, at 241 ("For both constitutional and institutional reasons, the subject-matter jurisdiction of the federal courts is jealously guarded by its Article III keepers.").

¹⁸⁴ See Wasserman, *supra* note 142, at 673 (emphasizing the need for the judge to decide as an initial matter whether jurisdiction exists, based on the Constitution or a statute) (citing *Steel Co.*, 523 U.S. at 92; Idleman, *supra* note 180, at 243).

¹⁸⁵ *Colella & Bain*, *supra* note 7, at 2872-74 (citing *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 735 (9th Cir. 1979); *Marks Food Corp. v. Barbara Ann Baking Co.*, 274 F.2d 934, 936 (9th Cir. 1960); *Rhoades v. United States*, 950 F. Supp. 623, 629 (D. Del. 1996)).

tion and the merits.¹⁸⁶ Thus, any justification for conversion appealing to the fundamental right to a jury trial, or to reverence for decisions that belong to the jury and are not be usurped by the judge, are simply inapposite when referring to the FTCA.¹⁸⁷

3. Adequate Protection of Plaintiffs

The evidentiary requirement of the jurisdictional *prima facie* approach also addresses a major concern of the Fourth, Fifth, Ninth, and Eleventh Circuits. Those circuits have concluded that the jurisdictional scope of employment question is too intertwined with the merits of the case, and thus the court must assume jurisdiction and treat the challenge as a direct attack on the merits of the plaintiff's case. The main reason for this is a desire to afford the plaintiff procedural safeguards that are not in place under a normal challenge to subject matter jurisdiction.

Normally, "where subject matter jurisdiction is being challenged, the trial court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case."¹⁸⁸ The court may decide a motion to dismiss for lack of subject matter jurisdiction based solely on the complaint, the complaint plus undisputed facts, or the complaint plus undisputed facts and court-resolved disputed facts.¹⁸⁹ Thus, the plaintiff's allegations are not presumed to be true and the court may resolve disputes over material facts in order to decide whether or not it has jurisdiction.¹⁹⁰ The concern of the Fourth, Fifth, Ninth, and Eleventh Circuits is that the plaintiff in a scope of employment challenge is, in actuality, facing an attack on the merits of her claim, not just an attack on jurisdiction, but does not get the presumption of truth attached to her pleadings as she would in a typical attack on the merits under a Rule 12(b)(6) motion for failure to state a claim or a Rule 56 motion for summary judgment. Thus, courts have con-

¹⁸⁶ See 28 U.S.C. § 2402 (1994) ("[A]ny action against the United States under section 1346 shall be tried by the court without a jury . . ."); see also Colella & Bain, *supra* note 7, at 2873 (explaining that "the judge in an FTCA action determines both jurisdiction and the merits of the underlying tort claim; there is no right to a jury trial" (citing *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981))).

¹⁸⁷ For a discussion of the interplay between Rule 12(b)(1) and the right to a jury trial in the context of other federal statutes, especially Title VII, see Di Trolio, *supra* note 81.

¹⁸⁸ *Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004) (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)).

¹⁸⁹ *Id.* (citing *Robinson v. TCI/U.S. W. Commc'ns Inc.*, 117 F.3d 900, 904 (5th Cir. 1997)); see also *Montez ex rel. Montez v. Dep't of Navy*, 265 F. Supp. 2d 750, 753 (N.D. Tex. 2003) ("Dismissal is warranted if those allegations [in the complaint], together with any undisputed facts and the court's resolution of disputed material facts, establish that there is no basis for federal subject matter jurisdiction."), *rev'd sub nom. Montez v. Dep't of Navy*, 392 F.3d 147 (5th Cir. 2004).

¹⁹⁰ *Montez*, 392 F.3d at 149.

cluded that conversion to one of the latter motions is necessary to protect the plaintiff.

The jurisdictional *prima facie* approach addresses this concern by instructing district courts to “take care not to reach the merits of a case when deciding a Rule 12(b)(1) motion.”¹⁹¹ In doing so, district courts are to require less jurisdictional proof than is demanded at trial.¹⁹² Specifically, the court should require only a *prima facie* showing that the tortfeasor was acting within the scope of his employment at the time of the tort to survive a 12(b)(1) motion. This is less than the preponderance showing required at trial on the merits; thus, the plaintiff is afforded some protection from having to fully prove an element of her substantive claim at the jurisdictional determination stage.

[This procedural protection] ensure[s] that defendants are not allowed to use Rule 12(b)(1) to resolve the merits too early in litigation. By requiring less of a factual showing than would be required to succeed at trial, district courts ensure that they do not prematurely grant Rule 12(b)(1) motions to dismiss claims in which jurisdiction is intertwined with the merits and could be established, along with the merits, given the benefit of discovery.¹⁹³

This approach does not go so far, however, as to treat scope of employment as a merits question that should be decided under a Rule 12(b)(6) or Rule 56 motion, as the Fourth, Fifth, Ninth, and Eleventh Circuits inappropriately do.¹⁹⁴

C. *An Example of How the Jurisdictional Prima Facie Approach Would Operate in Practice*

The factual setting of *CNA* provides a straightforward example of how the jurisdictional *prima facie* approach would be applied in practice. In late 2002, Marty Armstrong was nearing high school graduation in Pittsburg, Pennsylvania, and was a recruit in the Army’s Delayed Entry Program.¹⁹⁵ In December 2002, Pittsburg Army recruiter Staff Sergeant Corey Lewis, who had recruited Armstrong, found out that Armstrong was on the streets after his mother kicked him out.¹⁹⁶ Lewis allowed Armstrong to live in his apartment, against his supervisor’s direction, after attempts to find other accommodations for Armstrong failed.¹⁹⁷ This was not only a violation of

¹⁹¹ *CNA v. United States*, 535 F.3d 132, 144 (3d Cir. 2008) (citing *Gould Elecs. Inc., v. United States* 220 F.3d 169, 178-79 (3d Cir. 2000)).

¹⁹² *Id.* (citing *Gould Elecs.*, 220 F.3d at 178).

¹⁹³ *Id.* at 145.

¹⁹⁴ *Id.* at 144-45.

¹⁹⁵ *Id.* at 137.

¹⁹⁶ *Id.* at 138.

¹⁹⁷ *CNA*, 535 F.3d at 138.

his superior's order, but also of Army regulations.¹⁹⁸ At some point, Armstrong discovered a handgun in Lewis's apartment and took it.¹⁹⁹ In January 2003, Armstrong, with the help of an accomplice, robbed Michael Lahoff at gunpoint in a parking garage, using the gun he took from Lewis's apartment.²⁰⁰ In the course of the robbery, Armstrong shot Lahoff, leaving him paralyzed from the neck down.²⁰¹

Lahoff's employer's workers' compensation carriers who paid out benefits as a result of this incident brought an FTCA claim against the government, asserting that the government was vicariously liable for Lewis's negligence.²⁰² The government moved for dismissal under 12(b)(1) for lack of subject matter jurisdiction, contending that Lewis was not acting within the scope of his employment at the time.²⁰³

In determining whether Lewis was acting within the scope of employment, the court looked to Pennsylvania respondeat superior law.²⁰⁴ Under Pennsylvania law, conduct is within the scope of employment if (1) it is the kind of conduct the employee is employed to perform, (2) it occurs "substantially within the authorized time and space limits," and (3) it is motivated in some part by a purpose to serve the employer.²⁰⁵ Lewis's statements revealed that he was motivated to let Armstrong stay with him out of concern for Armstrong's welfare, but also to some extent out of a concern that Armstrong would be unable to continue pursuing a career with the Army if he could not stay near the city in order to finish high school.²⁰⁶ Although Lewis's statement supported the third factor of the scope of employment test, the record was completely devoid of any evidence tending to support the first two factors.²⁰⁷ Allowing a recruit to stay with him violated Army regulation, so this action was not considered the kind of conduct Army employees are employed to perform.²⁰⁸ Further, Lewis's actions were wholly outside authorized time and space limits; Lewis's supervisor explicitly forbade Lewis from allowing Armstrong to stay in his home, so his actions were unauthorized.²⁰⁹

In order to survive the government's 12(b)(1) motion under the jurisdictional prima facie approach, a plaintiff like the one in *CNA* would have to make a prima facie showing that each of the three factors required for

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 137-38.

²⁰¹ *Id.* at 137.

²⁰² *Id.* at 138.

²⁰³ *CNA*, 535 F.3d at 138.

²⁰⁴ *Id.* at 146.

²⁰⁵ *Id.* (citing *Brumfield v. Sanders*, 232 F.3d 376, 380 (3d Cir. 2000)).

²⁰⁶ *Id.* at 147.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *CNA*, 535 F.3d at 147.

conduct to fall within the scope of employment under Pennsylvania law were present. Thus, if the court finds that the plaintiff has come forward with sufficient evidence to raise at least an inference that the state law requirements for scope of employment are met, the court may deny the 12(b)(1) motion and proceed.²¹⁰ In *CNA*, the plaintiff made a prima facie showing that the third prong was satisfied—Lewis’s statements raised an inference that he was in part motivated by a purpose to serve the Army.²¹¹ In a hypothetical case with some additional facts, to make a prima facie showing of the first two prongs the plaintiff could have, for example, offered evidence (1) that Lewis’s supervisor said, “only let him stay with you if there are no other options,” raising an inference that this was condoned by the Army, or (2) that Armstrong took the gun from Lewis’s bag during a training exercise, raising an inference that the conduct occurred at an authorized time and place. This hypothetical plaintiff would survive a 12(b)(1) motion under the jurisdictional prima facie approach. Obviously, the plaintiff would have to prove all three prongs by a preponderance of the evidence at trial, but a prima facie showing would be sufficient to find that jurisdiction exists and to allow the case to move forward.

D. *How the Supreme Court Would Rule if It Granted Certiorari on This Issue: A Comparison with Treatment of the “Minimum Employee” Threshold in Title VII Civil Rights Act Cases*

The Fifth Circuit remanded *Montez* to the district court and the decision has not been appealed to the Supreme Court. In fact, none of the leading cases on this issue in any of the circuits have, as of yet, been appealed to the Supreme Court.²¹² Thus, there is no indication as to whether the Court would grant certiorari in a case involving this issue.

However, prior to 2007, the Fifth Circuit’s approach to this issue, exemplified in *Montez*, was the view of all of the circuits which had ruled on it up until that time—the Fifth, Ninth and Eleventh. Then, in 2007 and 2008, the Second and Third Circuits took the opposite stance, and in 2009 the Fourth Circuit agreed with the Fifth, Ninth, and Eleventh Circuits. Thus, because the existence of a circuit split on the issue is a relatively recent development, the Supreme Court may be asked to settle the matter in the near future, provided a writ of certiorari is filed from a circuit court of appeals case.

If the Court does grant certiorari, it will likely agree with the Second and Third Circuits, along with the position taken by this Note, that the

²¹⁰ See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981).

²¹¹ *CNA*, 535 F.3d at 147.

²¹² See *id.*; *Hamm v. United States*, 483 F.3d 135 (2d Cir. 2007); *Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990); *Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983).

scope of employment issue in the FTCA context is properly treated as a jurisdictional question. First, this prediction is supported by the Court's precedent. As discussed previously,²¹³ the Supreme Court has consistently rejected the practice of hypothesizing jurisdiction for the purpose of rendering a decision on the merits, and requires that the issue of jurisdiction be decided first.²¹⁴ Since waivers of sovereign immunity are jurisdictional in nature, federal courts must decide whether sovereign immunity has in fact been waived prior to any discussion of the merits.

Second, and more specifically, an examination of the Court's recent ruling on a comparable issue involving the "minimum employee" threshold requirement in Title VII of the Civil Rights Act of 1964²¹⁵ employment discrimination claims also supports this prediction. In *Arbaugh v. Y & H Corp.*,²¹⁶ the plaintiff brought a Title VII sexual harassment suit in federal court against her former employer.²¹⁷ The jurisdictional provision of the Civil Rights Act grants federal courts authority to hear civil actions "brought under" Title VII.²¹⁸ Covering a broader range of cases, 28 U.S.C. § 1331 grants the federal courts subject matter jurisdiction over all cases which arise under the laws of the United States, including Title VII cases.²¹⁹ The definitions provision of Title VII, 42 U.S.C. § 2000e, defines "employer" to include only those employers with fifteen or more employees.²²⁰

After a jury verdict for the plaintiff, the employer brought a motion to dismiss for lack of subject matter jurisdiction, asserting that it had fewer than fifteen employees and thus was exempt from a Title VII suit.²²¹ The trial court felt that it had little choice but to grant the motion, believing that the fifteen employee requirement was jurisdictional (a ruling that the Fifth Circuit Court of Appeals affirmed on appeal).²²² The issue the Supreme Court faced was "whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief."²²³ The Court held that the requirement does not confine the subject matter jurisdiction of the federal courts, but, instead, is a substantive element of the plaintiff's underlying Title VII claim.²²⁴ Thus, the defendant

²¹³ See *supra* Part III.B.1.

²¹⁴ *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).

²¹⁵ 42 U.S.C. § 2000e (2000).

²¹⁶ 546 U.S. 500 (2006).

²¹⁷ *Id.* at 503-04.

²¹⁸ *Id.* at 503 (quoting 42 U.S.C. § 2000e-5(f)(3)).

²¹⁹ *Id.*

²²⁰ *Id.* (citing 42 U.S.C. § 2000e(b)).

²²¹ *Id.* at 504.

²²² *Arbaugh*, 546 U.S. at 504.

²²³ *Id.* at 503.

²²⁴ *Id.* at 504.

had to raise the objection during the trial on the merits and could not raise it at this late stage of the suit; the Supreme Court accordingly reversed in favor of the plaintiff.²²⁵

The Supreme Court began its discussion by noting that federal court subject matter jurisdiction over a claim and the “essential ingredients of a federal claim for relief” are two concepts that are often conflated.²²⁶ Title VII contains its own provision granting jurisdiction to the federal courts, because, at the time of its passage, the federal question jurisdiction-conferring statute, § 1331, required that the amount in controversy be greater than \$10,000, and Congress did not want to impede a Title VII plaintiff’s access to federal courts with such a requirement.²²⁷ Section 1331 was amended in 1980, removing the amount in controversy requirement and since then, the jurisdictional provision of Title VII merely serves to emphasize the legislative intent that Title VII claims be adjudicated in a federal forum.²²⁸ The Court granted certiorari to resolve a circuit split on the issue of whether the minimum employee threshold in Title VII was jurisdictional or an element of the plaintiff’s claim.²²⁹

The Court noted that the plaintiff in a Title VII case invokes the jurisdiction of the federal courts under the federal question jurisdiction statute, but the instant plaintiff’s case “arises under” Title VII, which states that in order for the law to apply, a specific fact (greater than fifteen employees) must be present.²³⁰ In addition, nothing in the statute’s text convinced the Court that Congress intended for courts, *sua sponte*, to ensure this requirement was met, as courts are obligated to do with regard to elements of subject matter jurisdiction.²³¹ Also, the minimum employee threshold appears in a provision separate from Title VII’s jurisdictional provision, and the section in which it appears “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.”²³² Lastly, courts should only treat “a threshold limitation on a statute’s scope” as jurisdictional if Congress “clearly states that . . . [it] shall count as jurisdictional.”²³³

The issue in *Arbaugh* dealing with Title VII is analogous to the FTCA scope of employment question. *Arbaugh* suggests that the Supreme Court would hold that the conditions, including scope of employment, set forth in the FTCA statute are properly treated as jurisdictional, unlike the minimum employee threshold for employment discrimination cases. The differences

²²⁵ *Id.*

²²⁶ *Id.* at 503.

²²⁷ *Id.* at 505.

²²⁸ *Arbaugh*, 546 U.S. at 506.

²²⁹ *Id.* at 509.

²³⁰ *Id.* at 513.

²³¹ *Id.* at 514.

²³² *Id.* at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

²³³ *Id.* at 515-16 (citing *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000)).

between Title VII and the FTCA appear in areas the Supreme Court deemed important in *Arbaugh*.

In FTCA cases, the FTCA itself is the source of a federal court's jurisdiction to hear the claim, not the general federal question statute. Thus, the FTCA provides the threshold for federal courts' jurisdiction to hear tort suits against the United States and the requirements therein should be treated accordingly.²³⁴ Also, the scope of employment requirement to bring suit under the FTCA is located in the same provision that confers jurisdiction to the federal courts, unlike in the Title VII statute, which has one provision granting jurisdiction and an entirely separate definitional provision where the minimum employee threshold is located. By placing the scope of employment requirement in the jurisdictional provision of the FTCA, Congress explicitly made this statutory threshold requirement jurisdictional and federal courts should treat it as such.

Lastly, the Supreme Court in *Arbaugh* explained that "Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors."²³⁵ One of the several examples it gives is 28 U.S.C. § 1346(a)(2), in which Congress limits the federal courts' subject matter jurisdiction for actions in which the amount in controversy drops below a certain threshold amount.²³⁶ Although not part of the FTCA, § 1346(a)(2) is adjacent to the FTCA provision at issue here, § 1346(b)(1),²³⁷ and uses extremely similar language.

For these reasons, if the Supreme Court grants certiorari on the FTCA scope of employment issue, it will likely reach the opposite result from the one it reached regarding the minimum employee threshold of Title VII.

CONCLUSION

In *Montez*, the Fifth Circuit improperly held that the FTCA scope of employment requirement is a merits question and thus should not be decided at the jurisdictional stage under a Rule 12(b)(1) motion, but instead should be converted to a Rule 12(b)(6) motion for failure to state a claim or a Rule 56 motion for summary judgment. The Fourth, Fifth, Ninth, and Eleventh Circuits take the same approach. This conversion inappropriately removes the question from its proper jurisdictional category, shifts the burden of proving a jurisdictional requirement to the defendant, strips the judge of an important duty to ensure the court has jurisdiction to entertain a suit at the earliest possible stage in litigation and at all times prior to reaching the

²³⁴ *CNA v. United States*, 535 F.3d 132, 142 (3d Cir. 2008).

²³⁵ *Arbaugh*, 546 U.S. at 516 n.11.

²³⁶ *Id.*

²³⁷ The text of the statute is quoted in Part I.A, *supra*.

merits of a case, and impermissibly assumes hypothetical jurisdiction to move onto an adjudication on the merits.

Contrary to the *Montez* court's handling of the issue, the proper approach is to treat the scope of employment question as jurisdictional, utilizing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, but requiring less in the way of proof than would be required for the plaintiff to succeed on the merits of her underlying tort claim. Specifically, the plaintiff should be required to make a prima facie showing at the jurisdictional stage. This jurisdictional prima facie approach, followed in spirit by the Second and Third Circuits, ensures that the scope of employment question is answered at the jurisdictional phase, which is appropriate because the FTCA statute makes scope of employment a jurisdictional requirement. Further, it keeps the burden on the plaintiff to prove jurisdiction, holds intact the judge's duty to ensure that the court has jurisdiction at an early stage in litigation, and ensures that a jurisdictional determination occurs before a disposition on the merits. Lastly, Supreme Court precedent indicates express disfavor for the use of hypothetical jurisdiction and emphasizes the importance of deciding jurisdiction as an initial matter before reaching the merits of a claim. An analysis of the Supreme Court's recent decision regarding the minimum employee threshold of Title VII indicates that, if the Court granted certiorari on the scope of employment issue, it would likely adopt the approach that this Note advocates.