No. 25-1726

In the Supreme Court of the United States

October 2025 Term

Willow Schimmel,
Petitioner

v.

United States of America,
Respondent.

On Writ of Certiorari to the

United States Court of Appeals

For the Thirteenth Circuit

Team 183

Region: Philadelphia

Brief for Respondent

Statement of the Issues Presented for Review

I. Under the Federal Tort Claims Act, the government waives immunity for certain intentional torts committed by "investigative or law enforcement officers," defined as officers authorized by law to conduct searches, seize evidence, or make arrests for violations of Federal law. Transportation Security Administration screeners perform routine security checks at airport checkpoints but lack the authority to arrest, seize evidence, or carry firearms. Does this statutory definition include TSA screeners, thereby allowing a false imprisonment claim against the United States under 28 U.S.C. § 2680(h)?

II. Under the Federal Tort Claims Act, the Discretionary Function Exemption bars suits against the government that arise when a federal employee engages in acts that "involve an element of judgement" and that arise from public, social, or economic policy considerations. Employees of the Transportation Security Administration perform discretionary acts in the course of their jobs when they screen travelers in airports prior to boarding planes. Do the acts by the TSA employees involve an element of judgement that is rooted in policy considerations, thereby insulating the United States from liability under 28 U.S.C. § 2680(a)?

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JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appels for the Thirteenth Circuit was entered on March 25, 2025. Petitioner timely filed a petition for a writ of certiorari, which this Court granted the petition on October 6, 2025. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

On March 18, 2024, Petitioner Willow Schimmel arrived at Eastland International Airport with less than an hour before her flight's boarding closed. (R. at 2.) She entered the Transportation Security Administration (TSA) security checkpoint, where TSA personnel were conducting thorough screenings to ensure passenger safety. (R. at 2.) The petitioner became frustrated with the fact that the line moved slower than she expected it to, given that she was already running behind. (R. at 2.) The line itself was moving slowly due to TSA screeners observing heightened security measures, which resulted in stopping and frisking more people. (R. at 2.) Because she was upset with what she considered to be an unnecessary delay, the petitioner began recording what occurred as people passed through the TSA checkpoint. (R. at 2.) She began by recording her commentary on the events in the TSA screening line with her phone's front facing camera and then used her phone's rear camera to directly record the line and its progress towards the checkpoint. (R. at 2-3.)

During this time, Ms. Schimmel began recording what she described as "TSA clowns stopping and frisking damn near everybody as they go through the body scanner." (R. at 3.) As the petitioner progressed through the line, she kept recording and holding the phone in such a way as to alternatively record her face and what she was seeing as the line progressed. (R. at 3.) She presented her identification when she entered the final screening line and continued to record

TSA screening procedures. (R. at 2.) At this point, TSA employee John Lurie approached Ms. Schimmel and asked her to stop recording the line and the TSA screening procedures. (R. at 3.) When he addressed the petitioner, he identified himself as a "Transportation Security Officer" (TSO) although he did not state what his abilities under that title were. (R. at 3.) Mr. Lurie told the petitioner she should "put her phone away" and stop recording the TSA screening procedures. (R. at 3.) Ms. Schimmel stated that she absolutely should be filming what the TSA screeners were doing because in her opinion they were frisking people unnecessarily and "making everyone late and miserable." (R. at 3.) She refused to put away her phone until she got to the screening checkpoint and insisted on continuing her activities, despite Mr. Lurie making it clear that she "was bothering everybody" and preventing them from doing their jobs. (R. at 3.) He stated that she had to stop recording before she could continue. (R. at 3.)

After Ms. Schimmel's continued refusal to stop recording TSA employees, Mr. Lurie drew a retractable belt from a barrier stanchion across the petitioner's path, which prevented her from continuing forward. (R. at 3.) She was able to go back, or leave the line, but if she kept recording, she was not allowed to continue onwards in the line. (R. at 3.) He then moved another stanchion so that people could continue around the petitioner to the screening checkpoint unimpeded. (R. at 3.) TSA employee Lurie told Ms. Schimmel he radioed his supervisor to deal with the situation, but the supervisor did not arrive before the standoff between the petitioner and Mr. Lurie concluded. (R. at 3.) After four minutes, the petitioner put her phone in her bag and Mr. Lurie allowed her to continue through the screening checkpoint and onwards to her flight. (R. at 3.) Ms. Schimmel allegedly was forced to sprint to catch her flight after successfully passing the screening checkpoint and in doing so, she tripped and twisted her ankle. (R. at 3.) At no point during the standoff did Mr. Lurie attempt to or ask to take the petitioner's phone, nor did he tell the petitioner to delete the information she had already recorded. (R. at 4.)

STATEMENT OF CASE

This case was brought in the United States District Court for the District of Eastland under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) and §§ 2671-2680. Respondent moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The district court granted Respondent's motion and dismissed the complaint without prejudice. (R. at 11.) The court concluded that although the law enforcement proviso to 28 U.S.C. § 2680(h) applied, the discretionary function exception barred the suit, even assuming the screener's conduct violated the First Amendment (R. 6-10.)

Petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit, which affirmed the district court's judgment. (R. at 12.) The court held that TSA screeners are not "investigative or law enforcement officers" under § 2680(h), so the intentional tort exception barred the claim. (R. at 13-16.) The court further concluded that, even if the proviso applied, the discretionary function exception would still bar the suit because the screener's conduct involved judgment susceptible to policy analysis, and constitutional allegations do not create exception to § 2680(a). (R. at 17-20.) Petitioner filed a petition for writ of certiorari, which the Court granted. (R. at 26.)

STANDARD OF REVIEW

This case arises from a dismissal for lack of subject matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1). (R. 2.) Questions of subject matter jurisdiction and statutory interpretation are reviewed *de novo*, with no deference to the district court's initial determination. *Franklin Am. Mortg. Co. v. Univ. Nat'l Bank of Lawrence*, 910 F.3d 270, 275 (6th Cir. 2018).

SUMMARY OF ARGUMENT

The Federal Torts Claims Act (FTCA) provides a limited waiver of sovereign immunity, but that waiver does not extend to the petitioner's claims because two statutory exceptions apply. First, TSA screeners do not qualify as "investigative or law enforcement officers" under 28 U.S.C. § 2680(h). Congress deliberately restricted the law enforcement proviso to officers instead of employees. Further, this provision permits certain claims only when the underlying acts are carried out by an "investigative or law enforcement officer," a term Congress defined narrowly. TSA screeners fall outside that category. They do not carry firearms, seize evidence, or make arrests, which are the benchmarks of law enforcement functions. Courts interpreting the statute have repeatedly held that TSA screeners are employees charged with administrative screening tasks, not "officers" empowered to enforce criminal law. Because TSA screener Lurie's responsibilities never strayed beyond routine checkpoint management, the law-enforcement proviso does not apply.

The structure of § 2680(h) also makes clear that the phrase "execute searches" refers to criminal investigatory searches, not administrative screenings. When read alongside, "seize evidence" and "make arrests," these powers collectively describe traditional criminal law enforcement functions. Under the established canon of noscitur a sociis, statutory terms take their meaning from neighboring words, preventing courts from expanding a waiver of sovereign immunity beyond what Congress clearly stated. TSA checkpoint procedures, by contrast, are regulatory inspections designed solely for security, not criminal enforcement. Because TSA screeners operate in a purely administrative capacity, their screenings do not fall within the type of law enforcement search authority Congress intended in § 2680(h).

The second exception is the Discretionary Function Exception in 28 U.S.C. § 2680(a) which applies when a government employee exercises discretion in performing the duties of their job and that discretion is grounded in a policy judgement. TSA screener Lurie acted within the discretion afforded to him by the TSA policy, and that discretion was grounded in the TSA's policy of security and efficiency. Courts hold that discretion exists whenever there is no regulation prescribing a specific course of action for the government employee to take. In this case, there was no specific regulation in place.

TSA screener Lurie did act with discretion when he prevented Ms. Schimmel, the petitioner, from recording the activities in the screening line. The TSA policy that he operates under gives him the ability to prevent people from violating the security of the airport and from disrupting normal operations. It does not prescribe specific circumstances, nor does it prescribe specific courses of action for TSA employees like Mr. Lurie to take in dealing with passengers. As a result, it gives TSA screeners discretion to do what is appropriate given their judgement in specific situations.

Petitioner contends that the United States Constitution acts as a regulation and cites to court holdings that articulate the idea that no government agent or agency should be permitted to violate the constitution. But this argument has not been recognized by the United States Supreme Court and merely has been held as precedent in several circuit courts. Regardless, of whether the Court chooses to adopt the view of the lower circuit courts, the actions of TSA screener Lurie do not violate the Constitution.

Lastly, the entire discretionary function exception is satisfied in this case, since Mr. Lurie was acting pursuant to policy considerations when he prevented the petitioner from videotaping the activities of the TSA screeners. The policy of the TSA is that no passenger is permitted to violate the security of the airport and air travel, nor are they allowed to interfere with the duties of the screeners. TSA Lurie's actions were pursuant to this policy. If the actions of the employee are susceptible to policy analysis, then courts have held that they are policy based. Therefore, the actions of TSA screener Lurie were policy based, and given that he acted with discretion, the discretionary function exception is satisfied, and this case should be barred.

Taken together, these points leave no footing for petitioner's claim. TSA screeners are not law enforcement officers, and their actions are covered by the discretionary function exception. For these reasons, the FTCA bars this suit, and the judgement of the lower court should be affirmed.

ARGUMENT

Sovereign immunity insulates the federal government, its agencies, and its officers from civil suits. *Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The FTCA in 28 U.S.C. § 1346(b) gives a limited waiver of sovereign immunity to those that want to sue the government for tort claims. *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 843 (11th Cir. 2013). This statue exclusively gives the federal district courts jurisdiction to hear claims against the United States that are "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." 28 U.S.C. § 1346(b)(1). But under limited circumstances, even that waiver does not apply, and the government is still immunized from certain tort claims.

I. TSA screeners do not qualify as "investigative or law enforcement officers" under 28 U.S.C. § 2680(h) because they lack traditional law enforcement powers and perform only administrative screenings.

The law enforcement proviso of the intentional torts exception does not apply because Officer Lurie, a TSA screener, is not an "investigative or law enforcement officer[]" under § 2680(h). The FTCA preserves sovereign immunity for claims arising out of specified intentional torts, including false imprisonment, unless committed by such officer. *See* 28 U.S.C. §§ 2671-2680. In 1974, Congress added the "law enforcement proviso" to section 2680(h) to waive sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers of the United States Government" for claims arising out of "assault, battery false imprisonment, false arrest, abuse of process, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C § 2680(h). This exception to sovereign immunity is commonly known as the "intentional tort exception." *Millbrook v. United States*, 569 U.S. 50, 52 (2013). The provision specifically defines "investigative or law enforcement officer" as used in section 2680(h) as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law." *Id.* Determining whether this exception applies requires analyzing (1) whether TSA screeners qualify as "investigative or law enforcement officers" under § 2680(h) and (2) whether they possess statutory authority to conduct criminal law enforcement activities, such as executing searches or making arrests.

A. <u>TSA screeners are employees, not officers, because they lack authority to make arrests, seize evidence, or conduct criminal investigatory searches as required by § 2680(h).</u>

The FTCA's "law enforcement proviso" creates an exception to the intentional tort bar for claims arising from "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed" by an "investigative or law enforcement officer. § 2680 (h). This term is defined as any United States officer "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* The "proviso" was created to "submit the Government to liability" when its officers "injure the public through search and seizures that are conducted without warrants or with warrants issues without probable cause." S. Rep. No. 93-588, at 4 (1973); *see also Martin v. United States*, 605 U.S. 395, 417-18 (2025) (Sotomayor, J., concurring) (analyzing the history and intended function of the proviso). Congress enacted the proviso in response to widespread criticism of federal narcotics agents who conducted "abusive, illegal and unconstitutional 'no-knock' raids." *See id.* at 2. Congress deliberately limited this proviso to "officers," not "employees," and waivers of sovereign immunity must be "unequivocally expressed" and construed narrowly. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941); *see also FAA v. Cooper*, 566 U.S. 284, 290–91 (2012).

In *Vanderklok v. United States*, 868 F.3d 189, 203 (3d Cir. 2017), the third circuit held that Transportation Security Officers (TSOs) are not "investigative law enforcement officers" under § 2680(h) where they are not "entrusted with greater responsibilities" than screening. *Vanderklok* involved a dispute between a civilian traveler and a TSA employee after what looked to be a bomb was detected by the screening. *See id.* at 193. The district court held that TSA screeners are not an "investigative or law enforcement agent" because they are not "'officer[s]' of the United States" under the definition given in § 2680(h) and on appeal, the third circuit agreed[1]. *Id.* at 203. The court began by noting that Congress's wording in the FTCA was

[1] The District Court determined that TSO did not qualify as an "investigative or law enforcement officer" under § 2680(h) because, as a TSA screener, he was not considered an "officer" of the United States. *Vanderklok v. United States*, 142 F. Supp. 3d 356, 361-62 (E.D. Pa. 2015). Although this issue was not subject to review on appeal, the Third Circuit discussed the proviso and agreed with the District Court's analysis, noting that "the existence of that proviso is nevertheless important because it assures that, in cases where TSOs has been

intentional. *See id.* While other provisions use the broader term "federal employee," the law enforcement proviso refers specifically to an "officer of the United States," which the court interpreted as a deliberate narrowing of scope. *Id*. To determine when a TSA agent qualifies as an officer, the court turned to the Aviation and Transportation Security Act. *See id.* The statute identifies "law enforcement personnel" only as those agents who are authorized to carry firearms, vested with police powers, and clearly marked by indicia of authority. *See id.* The court reasoned that because the TSO lacked these characteristics and performed only screening duties, he was a federal employee rather than a law enforcement officer. *See id.* The court emphasized that "in cases where TSOs has been entrusted with the greater responsibilities of an investigative or law enforcement officer, a tort action will lie." *Id.*

In *Corbett v. Transp. Sec. Admin.,* 568 F. App'x 690,701-02 (11th Cir. 2014) (per curiam), the eleventh circuit held that TSA screeners do not qualify as "investigative or law enforcement officers" under the FTCA's law enforcement proviso because they are not "officers of the United States," but rather federal employees. *Corbett* involved a traveler who refused to consent to either full-body scanner or manual pat-down search which led to screeners detaining him at the checkpoint. *See id.* at 692-93. The district court and court of appeals found that the proviso was not applicable because TSA is not a law enforcement agency[2]. *See id.* at 701. The court explained that the law enforcement proviso did not apply because TSA screeners are not "officers of the United States Government" under § 2680(h). *Id.* Unlike other FTCA provisions that refer broadly to "employees of the Government," the proviso uses the term "officer," which the court

entrusted with the greater responsibilities of an investigative or law enforcement officer, a tort action will lie." *Vanderklok*, 868 F.3d at 203.

[2] The Supreme Court had the opportunity to review the Eleventh Circuit's decision but denied certiorari. *See Corbett v. Transp. Sec. Admin.,* cert. denied, 575 U.S. 914 (2015).

viewed as a deliberate and meaningful distinction. *See id.* In determining what qualifies as an officer, the court examined the Aviation and Transportation Security Act. *See id.* That statute allows the TSA Administrator to designate certain employees as law enforcement officers, but only if they are authorized to carry firearms, make arrests, and execute warrants. *See id.* The court reasoned that simply performing screening duties does not confer the status of officer. *See id.*

Here, the law enforcement proviso does not apply because Mr. Lurie was not an "investigative or law enforcement officer" under § 2680(h). Mr. Lurie's role was limited only to screening passengers at the checkpoint. (R. at 3–4.) As in *Vanderklok*, where the Third Circuit concluded that TSOs are not covered by the proviso when their responsibilities do not extend beyond screening, Mr. Lurie's duties were purely administrative. 868 F.3d at 203. Mr. Lurie in his official capacity was only responsible for managing passenger and baggage screening, operating the screening systems, and directing the orderly flow of travelers through security checkpoints and terminal access points. (R. at 3.) Likewise, *Corbett* held that screeners are employees rather than officers because they lack the core law enforcement powers Congress contemplated. 568 F. App'x at 701–02. These cases strongly suggest that the proviso does not reach TSA screeners performing routine screening functions. Furthermore, both courts interpreted the proviso narrowly, limiting it to officers vested with powers like carrying firearms, making arrests, and executing warrants. *See Vanderklok*, 868 F.3d at 203; *Corbett*, 568 F. App'x at 701–02. Mr. Lurie's responsibilities never extended to any of those law enforcement functions. (R. at 3.)

The law enforcement proviso applies only to officers vested with powers like arrests, searches, and seizures. TSA screeners, including Mr. Lurie, perform routine screening and lack those powers. This Court should find the proviso inapplicable.

B. Administrative TSA screenings do not constitute the "execute searches . . . for violations of Federal law" power under § 2680(h), which refers to criminal investigatory searches associated with traditional law enforcement functions.

The Supreme Court has made clear that sovereign immunity can only be waived through an explicit statement in the statutory text. *See FAA v. Cooper*, 566 U.S. 284, 290 (2012). To avoid expanding the government's consent to suit beyond what Congress intended, courts must interpret any ambiguity in favor of immunity. *Id.* An ambiguity exists when the statute can reasonably be read to exclude monetary liability against the United States. *Id.* at 290–91. Nevertheless, the Court has also cautioned that exceptions to the FTCA's waiver should not be construed so narrowly that they undermine the statute's overall purpose. *Dolan v. USPS,* 546 U.S. 481, 491–92 (2006).

The rule of noscitur a sociis is intended to prevent ascribing to one word a meaning so expansive that it conflicts with other terms of the provision in a manner that gives "'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co*., 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G. D. Searle & Co*., 367 U.S. 303, 307 (1961)).

Here, we are strictly in the realm of administrative searches. The TSA screeners are specifically empowered to perform administrative searches on passengers and baggage going through the screening process but not searches associated with criminal law enforcement. This is what differentiates them from true TSA Officers like Federal Air Marshals and TSA criminal investigators. These officers are authorized to carry firearms, to "make an arrest without a warrant for any offense against the United States" based on probable cause, and to "seek and execute warrants for arrest or seizure of evidence" based on probable cause. Id. § 114(p)(2)(A)–(C). TSA screener Lurie is not permitted to carry a firearm, nor is he capable of making an arrest pursuant to probable cause. In the record, Mr. Lurie even states that he would get "law enforcement involved if Ms. Schimmel continued to record". (R. at 3.) This demonstrates that other TSA employees in the airport were true officers of the law, unlike Mr. Lurie who is merely a screener.

Furthermore, applying the cannon of noscitur a sociis, terms grouped in a statutory list are construed in relation to one another; thus, "execute searches" should be read alongside "seize evidence" and "make arrests" as powers associated with criminal law enforcement, not regulatory or administrative screening. *See generally Dolan v. USPS*, 546 U.S. at 485–86 (applying the cannon to 28 U.S.C. § 2680(b)). Mr. Lurie is empowered by the TSA solely to perform administrative searches of bags and officers, which would exclude his powers from the list enumerated in § 2680(b). As a result, his powers are not those of traditional law enforcement officers and the statute does not apply to him in this context.

Therefore, TSA screeners are authorized only to conduct administrative searches related to passenger and baggage screening, not criminal investigations. They lack powers such as making arrests or executing warrants, which Congress reserved for true law enforcement officers. Mr. Lurie was acting solely as a screener, not as an officer, and this Court should find that the law enforcement proviso does not apply.

II. The petitioner is barred from bringing this suit against the government under the FTCA, because the Discretionary Function Exception, 28 U.S.C. 2680(a), is applicable in this case.

28 U.S.C. 2680(a) states that the discretionary function exception covers "any claim" that is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." This Court interprets this exception as a two-part test that requires: (1) the employee must be acting with "discretion", and (2) they must make the choice based upon social, economic, or political policy considerations. *United States v. Gaubert*, 499 U.S. 315, 322-323 (1991). A discretionary act performed by a government employee is one that "involves any element of judgement or choice." *Id.* at 322. That discretion is absent "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkowitz v. United States*, 486 US 531, 536 (1988). Then the court must determine if the decision is grounded in public policy considerations, which *Gaubert* characterizes as "whether that judgement is of the kind that the discretionary function exception was designed to shield." 499 U.S. at 323. The type of activity is usually that which is grounded in public policy. "Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*, 467 US 797, 814 (1984). If both parts of the test are met, then the discretionary function exception immunizes the government from liability, and the case must be barred.

A. **<u>The first prong of the discretionary function exception is met, because TSA screener Lurie made a discretionary decision, not guided by a regulation.</u>**

The DFE requires that the employee have the latitude to exercise their own judgement in carrying out the duties of their job. *Gaubert,* 499 US at 322. Here, TSA screener Lurie was acting pursuant to the discretion afforded to him by the TSA policy put in place to both streamline the screening process in airports and ensure the security of fellow passengers. (R. at 3.) In two specific cases, this Court said that the DFE was created under Federal Law to prevent day-to-day operating practices of federal agencies from undergoing extensive litigation whenever a private citizen was displeased with the result of said practices. *See United States v. Varig Airlines*, 467 US 797, 814 (1984); *Berkowitz v. United States*, 486 US 531, 537 (1988). Through analysis of both cases, it is demonstrable that Mr. Lurie was afforded discretion, as it is defined by this Court, and was acting pursuant to that discretion by stopping Ms. Schimmel.

In *Berkowitz,* the Court held that 2680(a) specifically covers discretionary functions of government employees as opposed to all regulatory functions of government agencies. 486 US at 538. *Berkowitz* involved a suit brought by the parents of a child that was administered an oral polio vaccine, causing him to contract a severe form of polio. *See id*. at 533. The parents then sued the National Institute of Health for wrongfully licensing the Lederle Laboratories vaccine, permitting them to produce a vaccine that was faulty. *See id*. At the trial court, the government brought a motion for summary judgement in which they argued that licensing of vaccines was a discretionary function of a regulatory agency. *See id*. An argument that they also made at the appellate court, which accepted the argument saying, "federal law imposed no duties on regulatory agencies." *Id*. at 534. The Supreme Court reversed the decision of the appellate court based on the fact that there are government regulations specifically requiring the agency to receive specific test data from a manufactured prior to issuing a license. *See id.* at 542. The agency did not receive this test data, which meant that they were violating a specific federal regulation intended to govern the licensing of vaccines. *See id*. at 543. The Court held that the discretionary function exception immunizes the government from liability only where the government employee is acting within the discretion that their position affords to them, and not where a government regulation prescribes a specific course of action. *See id*. at 536. Here, the government was afforded no latitude to make a discretionary decision but instead was required by federal law to adhere to a specific set of standards prior to issuing approval of the vaccine. *See id*. at 542. This sets it apart as a case where the government had no discretion in performing their duty and therefore 2680(a) acted as no bar to the suit. *See id*. at 544. In contrast to the *Berkowitz* case, there are no federal regulations prescribing a specific course of action for TSA screener Lurie to take in performing the duties of his job.

In *Varig*, the Court held that FAA inspectors are covered by 2680(a) because they are empowered by the agency and federal law to make policy judgements in their program of spot-checking aircraft. 467 US at 820. The case revolved around two cases brought under the FTCA, in the Southern District of California against the FAA in the aftermath of two plane crashes. *See id*. at 800-803. The petitioners alleged that the FAA was negligent in certifying both aircraft as worthy of air travel under the FAA's multi-step certification process. *See id*. at 801. The District Court entered summary judgement on behalf of the FAA, stating that the case was barred by the discretionary function exception, but this decision was overturned by the Court of Appeals. *See id*. at 801-802. The appeals court reasoned that the FAA inspection program did not entail the "sort of policymaking discretion contemplated by the discretionary function exception." *Id*. at 802. This Court granted certiorari and reversed the decision of the California appeals court. *See* *id*. at 804. The framework put in place to certify these aircraft is the multistep process created by Congress, under which the FAA has put forth regulations delineating the minimum standards required for an aircraft to be deemed safe. *See id*. at 804-805. To accomplish the inspection process, the FAA has the power to appoint well qualified private inspectors to ensure the manufacturers are complying with the certification process. *See id*. at 807. These individuals are guided by the same procedures and practices as regular FAA inspectors, but they are not guided by specific regulations. *See id*. In its analysis of the case the Court highlighted that the discretionary function exception only applies to "challenged acts of the nature and quality that Congress intended to shield from liability." *Id*. at 813. Additionally, the Court highlighted that government employees are immunized from liability when acting as regulators of the acts of private individuals. *See id*. at 813-814. In this respect the Court held that the discretionary function exception did apply to the case since the FAA was not the one responsible for making the aircraft safe but merely are tasked with encouraging the manufacturer to comply with the Congressional regulations. *Id*. at 815. Therefore, the FAA is acting as a regulator of private activity and the secretary of the FAA, and the inspectors are using their best judgement to police the manufacturers. *Id*. It is made clear that judgement calls are made dependent on specific circumstances, which is why the FAA permits their inspectors to have discretion, and not follow specific regulations. *See id.* at 816-817. Additionally, the Court made it clear that Congress wished to prevent the judicial second guessing from impeding the efficient operation of government actors when they are making decisions grounded in social, economic, or public policy. *See id*. at 814. "The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Id*. at 820. Therefore, the Court determined that the discretionary function exception did bar the case due to the inspectors having both discretion and that their decisions were based in public policy. *See id*. Similarly to the FAA inspectors in this case, the TSA employees are empowered to use discretion in screening passengers and preventing them from recording in certain situations.

Similarly to the FAA inspectors in *Varig*, the TSA employees are given latitude to carry out the duties of their jobs. See 467 US at 820. Under the TSA policy, Mr. Lurie has the latitude to make a judgement call as to whether the person is engaging in an impermissible act, and he exercised that judgement. When the policy states "interference with screening includes but is *not limited to*," it gives the TSA employee the ability to decide what actions are interfering with the screening process and what constitutes being disruptive. (R. at 4.) Even if the decision to prevent Ms. Schimmel from continuing forward in line for four minutes was an abuse of that discretion, TSA screener Lurie is permitted under the DFE to make that decision. 18 USC 2680(a); (R. at 3.)

The TSA policy for screeners does give them discretion to prevent people from filming, and there is no federal regulation that prescribes a specific course of action for TSA screener Lurie to take in dealing with these instances. Therefore, the discretion prong of the DFE analysis is met in this case, and the Court should find as such.

B. **The United States Constitution was not violated by TSA screener Lurie's actions, because he was acting with the discretion given to him by a policy that does not violate the constitution.**

The petitioner cites to *Martin v. United States*, where this Court cited an appellate court opinion in the Third circuit, which stated that "governments never have discretion to violate the constitution." 145 S. Ct. 1703 (2025); quoting *Xiaoxing Xi v. Haugen*, 68 F.4th 824, 839-840 (3rd. Cir. 2023). And that when they do, the DFE does not apply because no discretion is present in their decision. *See id*. This is a decision that is binding in the Third circuit, but that only acts as persuasive authority for this Court. Yet, it if this Court were to adopt that decision in their analysis of this case, the Court would find that no constitutional violation occurred. Therefore, the DFE would still apply because the petitioner's constitutional rights were not violated because of TSA screener Lurie's exercise of discretion.

Ms. Schimmel's constitutional claim is based upon her alleged first amendment right to film any public official at any time she chooses, yet appellate courts and the federal law itself say that this right is subject to reasonable time, place, and manner restrictions. *Gericke v. Begin*, 753 F.3d 1, 8 (1st. Cir. 2014) (holding that private individuals have the right to film police officers in the course of their duties if there is no reasonable restriction in place to prevent it); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st. Cir. 2011) (holding that the right to film police officers is well established and permissible if it does not interfere with their duties, and is done so peacefully). Mainly, it is limited in two specific instances: (1) when there would be a security risk posed by filming the activities of the employee/official, and (2) when it interferes with the employee/official's operations or duties. *See Gericke,* 783 F.3d at 8. As the lower court stated, usually those issues are challenged in a different context and via a different medium than the FTCA. (R. at 18.) If Ms. Schimmel were to directly protest the restrictions made by TSA on her ability to film the actions of TSA employees in the airport, by bringing a constitutional claim against the TSA, then the policy would have to undergo a strict scrutiny analysis. The standard put forth in *Ward v. Rock Against Racism*, states that it must be: (1) a content neutral restriction, (2) narrowly tailored, and (3) serve a compelling government interest. 491 U.S. 781, 793 (1989) (holding that the sound amplification guideline is constitutional under the first amendment, since it is a reasonable time, place, and manner restriction). Briefly, it is demonstratable that the TSA policy could pass a strict scrutiny analysis.

Here, the policy is content neutral, narrowly tailored, and serves a compelling government interest. It is content neutral because it does not state that videotaping of specific activities is prohibited, but merely where those videotaping activities can be done and that they must not interfere with the TSA screening operations. (R. at 4.) Therefore, it can meet the first prong of the analysis since it is not content specific, which would require that the government limit the speech or expression based upon a dislike of the message it conveys. *Ward,* 491 U.S. at 791. Secondly, the restriction is narrowly tailored since it only prevents filming in an airport in specific locations, namely near the screening checkpoints, and restricts what can be filmed. (R. at 4.) Passengers are permitted to film in other parts of the airport, which is very broad, thereby only putting a very limited restriction on when and where they cannot film. (R. at 4.) Thirdly, this policy serves the compelling government interest of national security, as well as operational safety and efficiency. The policy states that the passengers cannot film screens or other items that are shielded from view. (R. at 4.) Throughout its history, this Court has held that "there is no government interest more compelling that the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (holding that the Secretary of State has the right to revoke the passport of any individual without violating their constitutional rights if they are deemed a national security risk). Security is a paramount concern in all airports in a post-9/11 world, and the policy of the TSA advances those security interests. Therefore, the policy advances a compelling government interest. The Court therefore can see the policy itself does not violate the first amendment given that it is a reasonable time, place, and manner restriction.

The policy is not unconstitutional since it can pass strict scrutiny and only places reasonable time, place, and manner restrictions on Ms. Schimmel's freedom of speech. TSA screener Lurie acted pursuant to his discretion afforded him by the TSA policy. (R. at 4.) Since Mr. Lurie's actions were pursuant to a constitutional policy, and the DFE is crafted to allow a government employee to act within the discretion afforded to them by the policy, it should apply in this case. At most the acts taken my Mr. Lurie are a mild abuse of his discretion afforded to him by the constitutional TSA policy, but they would still be covered under the DFE. 28 USC 2680(a).

Consequently, if the Court were to consider the Third Circuit's rationale that the government lacks discretion to violate the constitution, the case is still barred by the DFE since Ms. Schimmel's constitutional rights were not violated, and the Court should find as such.

C. **The second prong of the discretionary function exception is met, because TSA screener Lurie was acting as a government employee pursuant to a public policy.**

"The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Additionally, the Court stated, "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id*. at 324.

In the case of *Gaubert*, this Court stated that if the judgement of the employee in question was susceptible to policy analysis, then the judgement is policy related. 499 U.S. at 324. In this case, TSA screener Lurie was exercising his judgement in limiting Ms. Schimmel from violating a policy of security. The analysis in this case is whether a policy exists that TSA screener Larie followed by requesting that Ms. Schimmel cease her videotaping activities. The policy in question is that of security. The TSA directives articulate a clear policy that (a) the person recording cannot take videos of equipment shielded from public view and (b) cannot hold up the process of going through the TSA checkpoints. TSA screener Lurie knows this policy and his actions reflect that he understands the security measures put in place by TSA. Therefore, his actions are susceptible to policy analysis, making his actions policy related.

From his perspective, Ms. Schimmel was videotaping his colleagues performing the function of their job, which is to keep flights secure, and in the process, she was disrupting the screening process. (R. at 3.) There are few jobs more important in the 21st century than ensuring air travel is safe and secure for the passengers, pilots, and support staff. The entire point of the DFE is to shield a government employee from civil liability when they make a judgement call based on the policy espoused by the government agency they work for. *See Varig*, 467 US at 811. TSA screener Lurie made a judgement call that Ms. Schimmel was being disruptive and possibly violating security policies in the process. (R. at 3.) He then exercised his policy related judgement by preventing Ms. Schimmel from videotaping at a certain point in the screening process. (R. at 3.) Were the Court to rule that that the DFE does not bar the suit brought by the petitioner, then they would rule that TSA employees do not have the discretion to implement the policies embodied in the TSA regulations. The policies constructed to ensure the safety and security of air travel, and the efficient operation of the pre-flight screening process. The Court would be stripping the agents of their ability to make decisions based upon their best judgement in specific scenarios. The decision to allow this suit and disregard the protection afforded by 2680(a) is not supported by the logic in *Varig,* where the FAA inspectors were permitted to use their best judgement to promote the safety of air travel. *See* 467 US at 811. Similarly, in this case

Mr. Lurie is using the judgement afforded him by the TSA policy, to enforce the policy that is directly related to safe air travel and the efficient process of screening passengers. Given that this Court in *Varig*, upheld the right of the FAA inspectors to continue exercising their policy judgement, the decision in the instant case should be the same. *Id.*

The respondent is not asking the Court to expand the latitude afforded to TSA employees in their daily operations, but instead to recognize that they are given a level of discretion in performing their job. Already the discretion to enforce security related policies is present in federal law and in the TSA regulations. 49 USC 114(f)(7) (stating that TSA employees are permitted to enforce security related regulations and requirements). Not permitting individuals to videotape in certain instances is directly related to the security of the operations related to preflight screening. It is evident that Mr. Lurie's judgement is susceptible to policy analysis and that he was following the TSA policy in preventing Ms. Schimmel from having her phone out during the screening process.

Given that Mr. Lurie's judgement was based in the public policy of security and efficiency embodied in the TSA policies, the policy judgement prong of the DFE analysis is met. Therefore, since both the discretion prong and the policy judgement prong are met, the petitioner's case should be barred by this Court.

CONCLUSION

For the foregoing reasons, we ask this Court to affirm the ruling of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

Counsel for Respondent.