No. 25-1726

IN THE

SUPREME COURT OF THE UNITED STATES

WILLOW SCHIMMEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari from the

United States Court of Appeals

For The Thirteenth Circuit

BRIEF FOR RESPONDENT

Team 199
Brooklyn Regionals
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether Transportation Security Administration screeners are "investigative or law enforcement officers" within 28 U.S.C. § 2680(h)'s law enforcement proviso, such that the United States' sovereign immunity is waived for the intentional tort of false imprisonment.

II. Whether the discretionary function exception, 28 U.S.C. § 2680(a), bars a tort action notwithstanding a plausible allegation that a government employee's conduct violated the Constitution.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit rendered judgment affirming the United States District Court for the District of Eastland's dismissal of the petitioner's complaint for lack of subject matter jurisdiction. R. at 20. This Court then granted certiorari during its October 2025 term. R. at 26. Accordingly, this appeal is properly before this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Factual Summary

The relevant facts for this appeal come from the petitioner's complaint. In March 2024, the petitioner was in line at an airport Transportation Security Administration ("TSA") security checkpoint. R. at 2. Growing impatient with the line's slow movement, the petitioner began recording the scene with her smartphone. *Id.* At first, the petitioner recorded herself discussing her frustration with the pace of the line. R. at 2–3. Then, she switched to recording, per her own profane narration, the "TSA Clowns." *Id.* She continued recording and narrating as she moved through the line, swapping between recording herself with the front-facing camera and the line with the rear-facing camera. *Id.* While recording, the petitioner held her phone at chest level. *Id.* The petitioner briefly paused her recording to present identification before resuming and expressing even more annoyance that the line was now moving even slower. *Id.*

At this point, the petitioner was approached by John Lurie, a TSA employee. *Id.* Lurie identified himself as a Transportation Security Officer ("TSO"). *Id.* As a TSO, Lurie oversees and conducts passenger security screenings at terminal entry and exit points. *Id.* Lurie informed the petitioner that the TSA employees had been aware of the filming and instructed the petitioner to stop recording immediately. *Id.* The petitioner refused to do, arguing that the TSA employees were not properly doing their jobs. *Id.* Lurie insisted that the petitioner stop recording, telling her "you can't go on unless you stop." *Id.* Lurie then adjusted the barrier stanchions in the area to block the petitioner from moving forward, allowing passengers behind her to proceed through the checkpoint. *Id.* Lurie told the petitioner that he would "get law enforcement involved" because "we can't let you disrupt things or record sensitive areas." *Id.* Lurie also stated that a supervisor had been called and was on their way. *Id.* After several minutes, the petitioner finally complied with Lurie's instructions to stop recording, and Lurie permitted the petitioner to proceed through the checkpoint. *Id.*

II. Procedural History

A. Petitioner's Complaint and the United States' Motion to Dismiss

The petitioner filed suit against the United States in the United States District Court for the District of Eastland. R. at 4. The complaint alleged that Lurie lacked legal authority to restrain the petitioner until she stopped recording because the First Amendment and TSA policy protected her right to record. *Id.* As evidence of this policy, the complaint cites a statement from TSA's website, which states that "TSA does not prohibit . . . videotaping . . . as long as the screening process is not interfered with or sensitive information is not revealed." *Id.* The statement defines "interference" as "includ[ing] but . . . not limited to holding a recording device up to the face of a TSA officer so that the officer is unable to see or move . . ." *Id.* The statement neither includes nor excludes recording at chest level while narrating in its definition of "interference." *Id.* The statement concludes by saying "[those being screened] may not film or take pictures of equipment monitors that are shielded from public view." *Id.*

The complaint sought to invoke the district court's exclusive jurisdiction under 28 U.S.C. § 1346(b)(1), the Federal Tort Claims Act ("FTCA"). R. at 4–5. In response, the United States moved to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). R. at 1. The motion argued that two exceptions to the FTCA's waiver of the United States' sovereign immunity for the torts of its employees applied to the complaint: the intentional tort exception under 28 U.S.C. § 2680(h) and the discretionary function exception under 28 U.S.C. § 2680(a). *Id.*

B. District Court's Decision

The district court granted the United States' motion to dismiss for lack of subject matter jurisdiction. R. at 2. While the district court determined that the law enforcement proviso did not bar the suit, it nonetheless held that the court lacked jurisdiction because Lurie's conduct fell within the discretionary function exception. R. at 5.

First, the district court determined that the "law enforcement proviso" within the intentional tort exception did not bar the suit. R. at 6. The district court did so because it found Lurie to be an "investigative or law enforcement officer." R. at 7. In its analysis, the district court noted a split in authority on whether TSOs like Lurie are law enforcement officers. *Id.* Ultimately, the district court held that TSOs are law enforcement officers because their title and duties make them officers of the United States and they are empowered to "execute searches" as the phrase is commonly understood. *Id*. Therefore, according to the district court, the law enforcement proviso applied, overruling the intentional tort exception. *Id.*

However, the district court still dismissed the suit because it held the discretionary function exception applied. R. at 11. The district court followed this Court's two-part test adopted in *United States v. Gaubert*, 499 U.S. 315, 322–334 (1991), which asks first if the federal employee's conduct was discretionary and then if the exercise of discretion is in furtherance of a policy goal. R. at 8–9. The district court found that the petitioner failed to demonstrate that any federal statute, federal regulation, or TSA policy prescribed a course of action for Lurie to take under the circumstances. R. at 9. Indeed, the district court held that the complaint's allegations supported that Lurie was acting according to his discretion. *Id.* The district court further held that such discretion was susceptible to a policy analysis since judgments about preventing a traveler from proceeding through a security checkpoint implicate considerations of public safety and efficient operations, satisfying the second prong of *Gaubert*. *Id.* Therefore, the district court found the *Gaubert* test satisfied and held that the discretionary function exception barred the suit.

The district court further held that the alleged violation of petitioner's First Amendment rights did not override the discretionary function exception. R. at 11. The district court reasoned that the fact that a federal employee cannot commit constitutional violations is an entirely separate consideration from the FTCA's abrogation of sovereign immunity. R. at 10. The district court found that nothing within the exception's language limited its application based on the degree of the abuse of discretion, even if that abuse was unconstitutional. R. at 10–11. The district court rejected the petitioner's argument because the holding petitioner sought would run counter to the Supreme Court's command that constitutional claims are not cognizable under the FTCA. R. at 11. The district court went on to hold that the petitioner's reading of the discretionary function exception would subvert the exception's role as a gatekeeping jurisdictional doctrine by creating complex factual and doctrinal inquiries. *Id.* For these reasons, the district court held that the discretionary function exception did apply, and therefore dismissed the suit. *Id.*

C. Circuit Court Decision

The Thirteenth Circuit affirmed the district court's decision, holding that the suit was barred by *both* the intentional tort exception and discretionary function exception. R. at 17. First, the circuit court reversed a position of the district court, holding that TSOs like Lurie were not "investigative or law enforcement officers." R. at 13–14. Second, the court held that Lurie's conduct was in service of a discretionary function and that the discretionary function exception applied even if Lurie's conduct violated the Constitution. R. at 14.

The circuit court held that the district court erred in deciding that Lurie was a law enforcement officer. R. at 15. The circuit court found that the district court wrongfully chose the broadest possible definition of the statute's terms and analyzed them out of context. *Id.* In the circuit court's eyes, this incorrect definition led the district court to the "superficial" logic that the law enforcement proviso applies to TSOs merely because their badges say "officer" and they conduct "searches" of baggage and passengers. *Id.* The circuit court stated that a better reading of the proviso in context suggested that it was meant to apply to officers empowered by law to execute searches for violations of federal law. *Id*. The circuit court went on to hold that TSOs were neither officers nor empowered to execute searches or seize evidence as Congress uses those terms. R. at 16. The circuit court reasoned that airport screenings are administrative searches rather than criminal searches, and thus are divorced from the government's normal law enforcement interests. R. at 16–17. Therefore, TSOs like Lurie are neither investigative nor law enforcement officers and are therefore not subject to the law enforcement proviso. R. at 17.

In deciding the applicability of the discretionary function exception, the circuit court echoed the district court. The circuit court also invoked *Gaubert* and likewise concluded that the petitioner failed to point to any federal statute, regulation, or policy that specifically prescribed Lurie's conduct under the circumstances. R. at 19. Additionally, the circuit court agreed that the discretion involved required policy-related judgments of safety and efficiency. *Id.*

Further, the circuit court held that whether Lurie abused his discretion by acting unconstitutionally could not be the basis for a tort claim against the United States. R. at 20. Indeed, the circuit court stated that courts who have held otherwise have done so with little justification or actual interpretation of the FTCA. R. at 18. Like the district court, the circuit court found that the tautology that federal employees lack the ability to violate the constitution is completely irrelevant to the FTCA. *Id.* The circuit court stated that holding otherwise would be "incongruous" with the congressional intent underlying the FTCA and would transform the FTCA into a "free-ranging constitutional claims act." R. at 19. Because the petitioner's claimed constitutional violation did not remove her suit from the bounds of the discretionary function exception, the circuit court held the suit to be barred. *Id.* As such, and because the suit was barred by the intentional tort exception, the circuit court affirmed the district court's dismissal of the suit. R. at 20.

SUMMARY OF THE ARGUMENT

TSA screeners are not "officers" subject to the law enforcement proviso (the "Proviso"). As such, this claim is barred under the Federal Tort Claims Act and this case should be dismissed. The plain language of the Proviso distinguishes between federal employees and officers, indicating that the terms are read as distinct. As TSA screeners comprise employees under the TSA's governing legislation, and as the Proviso only waives liability for intentional torts by federal officers, this claim does not fall under the scope of the Proviso and is barred. This finding is supported by this Court's classification of administrative, as compared to investigatory, governmental powers. Finally, the Proviso's legislative history and the lack of a clear congressional statement abrogating sovereign immunity as to the screeners show that screeners are not subject to the Proviso. The inherent weightiness of sovereign immunity counsels strongly against its abrogation in the absence of a clear statement. The lower court's decisions should thus be affirmed, and this case dismissed.

Additionally, the discretionary function exception, 28 U.S.C. § 2680(a), bars a tort action notwithstanding a plausible allegation that a government employee's conduct violated the constitution. The plain language of the statute establishes that the United States is immune from liability under the discretionary function exception even when an employee's abuse amounts to a constitutional violation. The constitutional principle of separation of powers requires that Congress, not this Court, amend the exception and/or abrogate the United States' sovereign immunity. Further, constitutional claims are not recognizable under the FTCA because a private person cannot violate the Federal Constitution, and a claimant must allege that the United States would be liable to the claimant as a private person. Finally, allowing constitutional violations to circumvent the discretionary function exception would transform the exception from a jurisdictional doctrine to a complex factual inquiry. Thus, this Court should affirm, and this case should be dismissed.

STANDARD OF REVIEW

Lower court rulings on Rule 12(b)(1) motions to dismiss do not receive any deference on appeal. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) ("decisions on questions of law are reviewable de novo" (internal quotation marks omitted)). In evaluating a 12(b)(1) motion to dismiss in the FTCA context, a court accepts all the factual allegations of the complaint as true and asks whether those allegations state a sufficient claim to survive the motion. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). A plaintiff meets their burden of establishing subject matter jurisdiction if the complaint does not clearly fall within any of the exceptions of 28 U.S.C. § 2680, which includes both the intentional tort exception and discretionary function exception. *Am. Reliable Ins. Co. v. United States*, 106 F.4th 498, 504 (6th Cir. 2024). If the plaintiff meets this burden, the burden shifts to the United States to prove the applicability of a specific exception. *Id.*

ARGUMENT

I. TRANSPORTATION SECURITY ADMINISTRATION SCREENERS ARE NOT INVESTIGATIVE OR LAW ENFORCEMENT OFFICERS WITHIN THE LAW ENFORCEMENT PROVISO.

TSA screeners do not constitute "investigative or law enforcement officers" pursuant to the meaning of 28 U.S.C. § 2680(h)'s law enforcement proviso. The Proviso's plain language, its legislative history, and the inherent gravity involved in an abrogation of sovereign immunity all counsel against a waiver of sovereign immunity pursuant to the Proviso. Therefore, the United States' sovereign immunity is not waived, and this suit is barred under the FTCA.

The FTCA congressionally abrogates the sovereign immunity of the United States, "allow[ing] those injured by federal employees to sue the United States for damages." *Martin v. United States*, 605 U.S. 395, 400 (2025). However, immunity is preserved if the tort claim "aris[es] out of. . .false imprisonment" or several other enumerated intentional torts committed by a federal employee. 28 U.S.C. § 2680(h). Yet this "exception is itself subject to a 'law enforcement proviso'" exception. *Martin*, 605 U.S. at 401 (citing *Millbrook v. United States*, 569 U.S. 50 (2013)). The Proviso allows claims to proceed when the "claim. . .arises out of one of the proviso's six intentional torts, *and* is related to the 'acts or omissions' of an investigative or law enforcement officer.'" *Millbrook*, 569 U.S. at 54–55. An "investigative or law enforcement officer" is defined by the FTCA 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. 28 U.S.C. § 2680(h).

A. The plain language of the statute dictates that the exercise of investigatory powers by federal officers is required for suits against the United States to proceed. As TSA screeners constitute federal employees, this case is barred.

The plain language of the Proviso waives sovereign immunity for investigative and law enforcement actions taken by federal officers. The plain language of the Proviso does not waive such immunity for administrative actions taken by federal employees. TSA screeners constitute federal employees and take administrative actions, thus sovereign immunity is not waived here.

1. The distinction between "officer" and "employee" in the FTCA and ATSA makes clear that the terms are to be read independently.

Congress' election to make the Proviso applicable solely to federal *officers*, rather than all federal *employees* is significant. The law enforcement Proviso states sovereign immunity is waived for claims arising with "regard to acts or omissions of investigative or law enforcement *officers* of the United States Government." 28 U.S.C. § 2680(h). (emphasis added). 'Investigative or law enforcement officer' is defined 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.* In making the Proviso applicable only to federal *officers*, Congress chose to materially limit the United States' waiver of sovereign immunity.

This Court, in *Southwest Airlines Co. v. Saxon*, recently affirmed the usage of the meaningful-variation canon when interpreting statutory language. 596 U.S. 450, 457–58 (2022) (citing A. SCALIA & B GARNER, READING LAW 170 (2012)) ("[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). That is, the "well-settled cano[n] of statutory interpretation" dictates that where Congress chooses to use different terms, distinct meanings are to be inherently inferred. *Southwest Airlines*, 596 U.S. at 457.

Further, this Court has counseled against "reading[s] of [statutes] that would render superfluous an entire provision passed in proximity as part of the same Act." *Yates v. United States*, 574 U.S. 528, 543 (2015) (describing the canon against surplusage). Indeed, "statute[s] must be construed, if possible, as a harmonious whole, and in such a way as to give effect to all its parts." *United States v. New York & Cuba Mail S.S. Co.*, 269 U.S. 304 (1925). The "canon against surplusage is "strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021). A provision is rendered superfluous when its words are no longer "give[n] effect" and the provision no longer serves an "independent function." *Marx*, 568 U.S. at 385; *Yates*, 574 U.S. at 543. Taken together, this Court has held that distinct words are to be given distinct meanings, especially when a reading otherwise would render provisions inharmonious and without effect.

The FTCA regularly distinguishes between officers and employees.; subsequently, the two words should be read with different meanings. The FTCA permits suits against the United States for "negligent or wrongful act[s] or omission[s]" committed by United States employees, but precludes suits for employees' intentional torts. 28 U.S.C. § 1346(b)(1). However, suits for intentional torts committed by federal *officers* are permitted pursuant to the Proviso. 28 U.S.C. § 2680(h). Those legislating the FTCA utilized these words selectively and distinctly. As the FTCA "has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Southwest Airlines*, 596 U.S. at 457. It would be contrary to this Court's own guidance, therefore, if the terms 'officers' and 'employees' of the United States were granted the same interpretation.

Moreover, if the two terms are granted the same meaning, the law enforcement proviso would be rendered superfluous and provide an absurd reading of the FTCA. The FTCA allows suits against the United States for torts "caused by the negligent or wrongful act or omission of any employee[.]" 28 U.S.C. § 1346(b)(1). Suits against the United States are precluded for intentional torts committed by federal employees. 28 U.S.C. § 2680(h). Suits against the United States are *allowed* for intentional torts committed by federal officers. *Id.* If "officer" and "employee" have the same meaning, then the FTCA concurrently precludes and allows suits against the United States for intentional torts; such an absurd result cannot have been the intent of Congress. The Proviso is intended to carve out a sphere of conduct for which the United States is liable; reading the terms "officer" and "employee" as the same strips this provision of its independent meaning and effect, rendering the Proviso superfluous while creating absurd and contrary results. The conflation of the terms "employee" and "officer" would be contrary to this Court's guidance and would preclude the legislature's intent from being given proper effect. Thus, the two terms must be evaluated as separate and distinct, with materially different meanings.

2. The regulations governing the TSA clarify that TSA screeners are employees, not officers, of the federal government.

The legislation governing the TSA—the Aviation and Transportation Security Act ("ATSA")—distinguishes between officers and employees in both title and duties. For instance, for all flights originating in the United States, "screening [of passengers and luggage]. . .shall be carried out by a Federal Government *employee*." 49 U.S.C. § 44901(a) (emphasis added). TSA screeners are entrusted with the "screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles." 49 U.S.C. § 114(p)(2).

Separately, the Transportation Security Administrator is obligated to "order the deployment of at least 1 law enforcement *officer*. . .at each airport security screening location to ensure passenger safety and national security." 49 U.S.C. §§ 44901(h)(1), (2) (emphasis added). Those designated as *officers* by the Administrator are empowered to "carry a firearm; make an arrest without a warrant for any offense against the United States committed in the presence of the officer. . .[and to] seek and execute warrants for arrest or seizure of evidence. . .upon probable cause that a violation has been committed." 49 U.S.C. § 114(p)(2). The terms "officer" and "employee" must be given distinct, separate meanings. To read the terms as having the same meaning would be to overlook the intentional distinction between the terms chosen by Congress, with each designation possessing not only materially different titles, but also materially different legal responsibilities and capabilities.

Employees are thus entrusted with the screening of passengers and property, while officers are entrusted with ensuring passenger safety and national security. This distinction in both name and function is bolstered by the fact that the Administrator is permitted to change TSA personnel's designation *from* an employee *to* an officer. 49 U.S.C. §§ 114(p)(1), (2) (2025) ("The Administrator may designate an *employee* of the Transportation Security Administration or other Federal agency to serve as a law enforcement *officer*") (emphasis added). As TSA screeners are responsible for the "screening of all passengers and property[,]" a function reserved solely for federal employees, TSA screeners constitute federal employees, entirely distinct from federal officers. 49 U.S.C. § 114(p)(2). Subsequently, this suit is barred under the FTCA and the decision of the lower courts should be affirmed.

3. The Proviso encompasses investigatory—not administrative—activity; sovereign immunity is thus not waived, as TSA screeners perform administrative functions.

The Proviso's second clause mandates that officers are only those "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). Such language implicates traditional police powers, and, as TSA screeners engage in administrative activities rather than investigatory ones, they are not "officers" subject to the Proviso's waiver of sovereign immunity. *Vanderklok v. United States*, 868 F.3d 189, 208 (3d Cir. 2017) (describing how "TSA employees are typically not law enforcement officers and do not act as such.").

While TSA screeners do engage in "searches" under the layman's interpretation of the word, this Court has long distinguished between administrative and investigatory searches. *City of*

Indianapolis v. Edmond, 531 U.S. 32 (2000). "Searches" within the legal context are traditionally investigatory, analyzed in the Fourth Amendment criminal context. *Id.* Such searches are "ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Id.* at 37. Indeed, "the only other statutes found in the United States code that employ analogous terminology [to 'investigative or law enforcement officers']. . .discuss the authority of certain officers to conduct investigations relevant to *criminal law enforcement*." *Iverson v. United States*, 973 F.3d 843 (8th Cir. 2020) (Gruender, R. dissenting) (emphasis added).

Administrative searches, conversely, have no such requirement. *Id.* Administrative searches are not conducted for the purposes of determining "violations of Federal law," but rather are suspicionless searches, upheld where they are "designed to serve special needs, beyond the normal need for law enforcement. . .provided that those searches are appropriately limited." *Id.* (internal citation omitted) (emphasis added); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (noting administrative searches are "divorced from the State's general interest in law enforcement."). Thus, administrative searches are distinguished from traditional law enforcement in purpose, scope, and constitutional constraints.

The searches conducted by TSA screeners are administrative searches. Searches conducted by screeners at airports are "suspicionless screenings. . . not implemented to gather evidence of a crime with an eye toward criminal prosecution, but rather to effect 'an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard and aircraft.'" *Pellegrino v. United States Transp. Sec. Admin.* 937 F.3d 164, 184 (3d Cir. 2019) (citing *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (en banc)). TSA screeners are statutorily limited solely to "screening" passengers and their immediate belongings. 49 U.S.C. § 44901(a). Further, airport searches are not subject to probable cause requirements, nor are they related to purposes of resolving crimes. Therefore, TSA screeners solely conduct administrative searches, are not empowered to engage in investigatory searches, and do not perform any actions related to investigatory searches.

As TSA screeners are not empowered to engage in investigatory searches, nor to "seize evidence [or] make arrests for violations of Federal law[,]" it is clear that TSA screeners do not constitute officers of the United States; thus, TSA screeners are not subject to the Proviso. 28 U.S.C. §2680(h). Sovereign immunity for the United States is therefore not waived, and the decisions of the lower courts should be affirmed.

B. The legislative history of the Proviso demonstrate that it was not intended to, and does not presently, encompass TSA screeners.

The legislative history surrounding the Proviso's abrogation of sovereign immunity demonstrates that the conduct at issue here is not encompassed by the scope of the Proviso. To subject the United States to liability for such actions is thus contrary to Congress' intent.

The Proviso was enacted "following a series of 'abusive, illegal and unconstitutional 'no-knock' raids' conducted by federal narcotics agents" in violation of the Fourth Amendment of the Constitution. S. Rep. No. 93-588, at 2 (1973). These raids comprised shocking actions by federal officers. *Martin*, 605 U.S. at 419 (describing actions taken by federal officials in no-knock raids: federal officers "breached [a] front door and detonated a flash-bang grenade. . .found the couple's hiding spot, dragged [the plaintiff] from [there], 'threw him down on the floor,' handcuffed him, and began 'bombarding him with questions.' [While simultaneously] another officer trained his weapon on [the plaintiff's wife] who was lying on the floor half-naked, having fallen. . . Only then did another officer. . .realize the team had the wrong house." *See also*, *id.* at 420 (stating "15 state and federal officers. . . smash[ed] down [the plaintiffs'] door and burs[t] into their home. . .tied them up at gunpoint, and threatened to shoot [the plaintiffs] if [they] moved" only to discover "they 'had the wrong people.'") (Sotomayor, S., concurring).

The Proviso was intended to curtail such egregious behavior by exposing the government to liability; this was to "ensure 'innocent individuals who are subjected to raids of [this] type. . .have a cause of action against the individual Federal agents. . .*and* the Federal Government.'" *Id.* (emphasis in original). Congress intended the waiver of sovereign immunity to curtail actions which so shocked the conscience of the nation as to warrant statutory intervention to eliminate them.

The waiver of sovereign immunity was not intended to apply to the actions at issue in this case. Here, the federal employee merely "insisted [the petitioner] immediately stop recording" and stated that his supervisor had been called in to assist with the situation. R. at 3. Congressional purpose—to protect "innocent individuals who are subjected to [no-knock] raids" in violation of their Fourth Amendment rights—is not furthered by subjecting the United States to liability for the conduct of this employee. Such conduct was never intended to be covered by the Proviso, and is not presently covered by the Proviso. Therefore, the decisions of the lower courts should be affirmed, and this case should be dismissed.

C. The weightiness of abrogating sovereign immunity favors its preservation in the presence of ambiguity.

The scope of the law enforcement Proviso must be considered within context. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, *considering the purpose and context of the statute*, and consulting any precedents or authorities that inform the analysis.") (emphasis added).

Consideration of context is particularly important here: it "has long been established that the United States, as sovereign, 'is immune from suit save as it consents to be sued.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity is of such great weight that this Court itself has, "on many occasions[,]" stated "a waiver of sovereign immunity must be unequivocally expressed in statutory text." *FAA v. Cooper*, 566 U.S. 284, 290 (2012).

Without a clear, unequivocal statement of intent to abrogate immunity, this Court noted that "[*a*]*ny* ambiguities in the statutory language are to be construed in *favor of immunity*, so that the Government's consent to be sued is *never* enlarged beyond. . .what the text requires." *Id.* (emphasis added). Such "[a]mbiguity exists if there is a plausible interpretation of the statute that would *not* authorize money damages against the Government." *Id.* at 290–91(emphasis added).

The Proviso on its face does not permit waiver of sovereign immunity due to the actions of TSA screeners, as they do not constitute federal officers. However, if this Court finds that they *possibly* may constitute federal officers, this case then turns solely on the resolution of ambiguity within a statute. Therefore, the Court need not reach the merits of the question as to whether TSA screeners are federal "investigative or law enforcement officers" at all. The ambiguity within the statutory language *must* be construed in favor of sovereign immunity. *Cooper*, 566 U.S. at 290.

While there is clear congressional intent to abrogate *some* sovereign immunity, there is no clear statement within the Proviso that TSA screeners qualify as investigative or law enforcement officers, and therefore no clear statement that the sovereign immunity is abrogated as to them. As there is a plausible interpretation that screeners are *not* investigative or law enforcement officers, there is a plausible interpretation that money damages are not authorized against the United States, and therefore statutory ambiguity exists. *Id.* (stating "[a]mbiguity exists if there is a plausible interpretation of the statute that would *not* authorize money damages against the Government.") (emphasis added). This is evidenced not only by the present case, but also by the current split in the lower court's resolution of this issue. *See Vanderklok v. United States,* 868 F.3d 189, 208 (3d Cir. 2017); *Corbett v. Transp. Sec. Admin*., 568 F. App'x 690, 701–02 (11th Cir. 2014); *Iverson v. United States*, 973 F.3d 843 (8th Cir. 2020) (all holding that TSA screeners are not federal officers); *cf. Pellegrino v. U.S. Transp. Sec. Admin.,* 937 F.3d 164, 170 (3d Cir. 2019) (en banc); *Osmon v. United States*, 66 F.4th 144, 148 (4th Cir. 2023); *Mengert v. United States*, 120 F.4th 696, 718 (10th Cir. 2024) (all holding that TSA screeners are federal officers). Yet courts finding waiver of sovereign immunity in this context have erred, as, absent a clear statement of congressional abrogation, ambiguities within the statute must be construed in favor of preserving sovereign immunity. *Cooper*, 566 U.S. at 291 ("[a]ny ambiguities in the statutory language are to be construed in favor of immunity [and] in favor of the sovereign.").

Here, as the suit turns on the resolution of ambiguity, this Court has already dictated the resolution of this case: the deciding court must find in favor of preserving sovereign immunity. Therefore, the decisions of the lower courts should be affirmed, and this case dismissed.

II. THE DISCRETIONARY FUNCTION EXCEPTION BARS A TORT ACTION NOTWITHSTANDING A PLAUSIBLE ALLEGATION THAT A GOVERNMENT EMPLOYEE'S CONDUCT VIOLATED THE CONSTITUTION.

Through the discretionary function exception, the United States retains its sovereign immunity from any FTCA claim "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The purpose of this exception "is 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. Gaubert*, 499 U.S. 315, 323 (1991).

The discretionary function exception bars a tort action notwithstanding a plausible allegation that a government employee's conduct violated the constitution for several reasons. *First*, the language of 28 U.S.C. § 2680(a) establishes that constitutional violations do not override the United States' sovereign immunity. *Second*, a holding consistent with the United States' position aligns with this Court's longstanding emphasis on the constitutional principle of separation of powers. *Third*, constitutional claims are not cognizable under the FTCA because a private person cannot violate the Federal Constitution. *Fourth*, a holding adverse to the United States would transform the discretionary function exception from a jurisdictional doctrine to a complex factual inquiry.

A. The language of 28 U.S.C. § 2680(a) establishes that constitutional violations do not override the United States' sovereign immunity.

The plain language of discretionary function exception establishes that the United States is immune from liability for constitutional violation claims brought under the FTCA. The exception is also missing a clear abrogation of the United States' sovereign immunity. As such, the United States maintains its sovereign immunity and this suit should be dismissed.

1. The plain language of 28 U.S.C. § 2680(a) immunizes the United States from liability for constitutional violation claims brought under the FTCA.

In all statutory construction cases, this Court begins with the language of the statute. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (quoting *Robinson v. Shell oil Co.*, 519 U.S. 337, 340 (1997)) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). The inquiry ceases "if the statutory language is unambiguous and the 'the statutory scheme is coherent and consistent.'" *Robinson*, 519 U.S. at 340. "[W]hen statutory language is plain, we must enforce it according to its terms."

Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) (citing *Dodd v. United States*, 545 U.S. 353, 359 (2005); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000); *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

The discretionary function exception, 28 U.S.C. § 2680(a), is clear and unambiguous and, therefore, should be enforced according to its terms. 28 U.S.C. § 2680(a) states:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused*.

Emphasis added.

The phrase "whether or not the discretion involved be abused" is clear and unambiguous: if a government agent or employee is acting performing a discretionary function, then the United States is protected from liability regardless of if that agent or employee abused their discretion, including constitutional violations. There is no ceiling in this statute. The statute does not say "whether or not the discretion involved, *excluding constitutional violations*." Rather, it contains the language that Congress intended it to and, as such, the United States retains its sovereign immunity despite a constitutional violation.

This Court has found a lack of language creating a "constitutional violation exception" as instructive when determining Congressional intent. In *Hui v. Castaneda*, the Court sought to determine if 42 U.S.C. § 233 precluded an action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), against U.S. Public Health Service personnel for constitutional violations arising out of their official duties. 559 U.S. 799 (2010). Analyzing the plain language of the statute, which contained no constitutional violation exceptions, this Court determined that § 233 did preclude a *Bivens* action because Congress intended to make the FTCA the exclusive remedy for § 233 violations. *Id.* The Court used the Westfall Act as support for its conclusion. *Id.*; 28 U.S.C. § 2679. The Westfall Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims against United States employees arising out of their official conduct. In providing this immunity, Congress used essentially the same language as in § 233: stating that the remedy against the United States is exclusive of any other civil action or proceeding. Notably, § 2679(b)(2)(A) provided an exception for constitutional violations. Subsection (2)(A) states that the immunity granted by § 2679(b)(1) "does not extend or apply to a civil action against an employee of the Government . . . brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).

The logic of *Hui* is dispositive in the present issue: if Congress intended for constitutional violations to be outside the protections of the discretionary function exception, that language would have been included in § 2680(a). As written, there is no exclusionary language that pushes constitutional violations outside the scope of the discretionary function's protections. Comparing the FTCA to the Westfall Act, it is telling that Congress did not include an exception for constitutional violations. Congress is aware of constitutional violations and has established exceptions for when the United States can be sued for them. The FTCA does not include one. Congress had the opportunity to carve out a constitutional violation exception to 28 U.S.C. § 2680(a) but chose not to. As such, the plain and unambiguous words of § 2680(a) must be given weight as written.

Even if this Court were to find that the language was ambiguous, the United States still retains sovereign immunity. As discussed in Section I(C) above, ambiguity favors the sovereign retaining its immunity. There is no clear explicit language that constitutional violations are included in 28 U.S.C. § 2680(a), so at most the statute is ambiguous. Even so, the United States retains its sovereign immunity against a constitutional violation brought under the FTCA.

Several circuit courts agree with the proposition that the United States does not lose its sovereign immunity when a constitutional violation claim is brought under the FTCA. In *Linder v. United States*, the Seventh Circuit highlighted that "[s]ection 2680(a) tells us that there is no liability even if a regulation or directive is invalid, and even if the discretion conferred under it has been abused." 937 F.3d 1087, 1090 (7th Cir. 2019). The Seventh Circuit emphasized that "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations. It applies to torts, as defined by state law[.]" *Id.*

Similarly, in *Shivers v. United States*, the Eleventh Circuit rejected a "constitutional-claims exclusion" from the discretionary function exception. 1 F.4th 924, 930 (11th Cir. 2021). The Eleventh Circuit reasoned that "Congress left no room for the extra-textual 'constitutional-claims exclusion' for which [the petitioner] advocates" and that "the incompatibility of [claimant's] proposed exclusion with the FTCA's remedial scheme is reinforced by the fact that Congress did not create the FTCA to address constitutional violations at all but, rather, to address violations of state tort law committed by federal employees." *Id.*

The plain language of the § 2680(a) is dispositive. As the Seventh and Eleventh Circuits emphasized, constitutional violations are irrelevant to the discretionary function exception. The language is clear and unambiguous: "whether or not the discretion involved be abused." If the United States can show that an employee was acting with discretion and that the conduct is susceptible to a policy analysis, the United States retains its sovereign immunity even if the employee abuses that discretion by violating the Constitution.

2. Within the plain language of 28 U.S.C. § 2680(a), there is no clear congressional intent to abrogate the United States' sovereign immunity.

Congress' intent to abrogate the United States' sovereign immunity "must be obvious from 'a clear legislative statement.'" *Seminole Tribe v. Fla*, 517 U.S. 44, 56 (1996) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991)); *see also Tennessee v. Lane*, 541 U.S. 509, 517 (2004) (stating that the first step to determining if Congress has abrogated a state's immunity is to determine "whether Congress unequivocally expressed its intent to abrogate that immunity.") "This rule arises from a recognition of the important role played by the Eleventh Amendment and the broader principles that it reflects." *Id.*; *see also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238–39 (1985); *Quern v. Jordan*, 440 U.S. 332, 345 (1979). "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate [sovereign immunity]." *Atascadero*, 473 U.S. at 246.

The FTCA is an example of Congress utilizing a valid constitutional power to abrogate the United States' sovereign immunity. It is an unequivocal and clear intent to remove immunity from the United States in certain tort actions. Within this abrogation, Congress also created the discretionary function exception. In doing so, it created a subset of cases where, when an officer or employee is acting within their discretion, the United States retains its sovereign immunity, revoking the previous abrogation. That is all Congress did. Congress did not present a clear legislative statement or intent to abrogate the United States' sovereign immunity from constitutional claims under the FTCA. Put another way, Congress did not abrogate the United States' sovereign immunity within the exception to the initial abrogation of sovereign immunity. Since 28 U.S.C. § 2680(a) does not create a cause of action—and rather eliminates them—the United States retains its sovereign immunity.

B. A holding consistent with the United States' position aligns with this Court's longstanding emphasis on the constitutional principle of separation of powers.

This Court has consistently emphasized the importance of separation of powers as a fundamental principle of the Constitution. *See, e.g. Metropolitan Wash. Airports Auth v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991) ("the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.") (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("[s]eparation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority."); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[t]his Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *Collins v. Yellen*, 594 U.S. 202, 245 (2021) ("the separation of powers is designed to preserve the liberty of all the people."). This principle is essential to preserving liberty and maintaining the balance of power among the legislative, executive, and judicial branches.

This Court has also highlighted the principle of judicial restraint, underscoring the judiciary's role as an interpreter of the law rather than a legislator. *See, e.g. Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is."); *Day-Brite Lighting, Inc. v. Missouri*, 342, U.S. 421, 423 (1952) ("we do not sit as a superlegislature to weigh the wisdom of legislation.").

A holding that constitutional violations are outside the purviews of the discretionary function exception would contravene foundational separation of powers principles. This Court has repeatedly rejected statutory interpretations that blur the constitutionally mandated separation of powers. The language of the FTCA is clear: the discretionary function exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). A reading of the statute that arbitrarily adds "excluding constitutional violations" pushes this Court out of its role as an interpretive body and into the role of legislators. Reading 28 U.S.C. § 2680(a) with the missing language would essentially amend the exception without Congressional input.

The language of 28 U.S.C. § 2680(a) is clear. There is no need for this Court to add language into the statue without any evidence that Congress intended for that language to be there. This Court should interpret the language as written and allow Congress to respond. If Congress meant to exclude constitutional violations from 28 U.S.C. § 2680(a), it is free to pass an amendment to override an opinion of this Court. If Congress passed 28 U.S.C. § 2680(a) as intended, it can do nothing. The decision, either way, is one for the legislature—not this Court.

C. Constitutional claims are not recognizable under the FTCA because a private person cannot violate the Federal Constitution.

To be actionable under the FTCA, a claim "must allege that the United States 'would be liable to the claimant' as 'a private person'" under state law. *FDIC V. Meyer*, 510 U.S. 471, 477 (1994) (quoting 28 U.S.C. § 1346(b)); *see also United States v. Olson*, 546 U.S. 43, 44 (2005) ("[t]he Federal Tort Claims Act . . . authorizes private tort actions against the United States '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.'") (quoting 28 U.S.C. § 1346(b)(1)). This Court interprets these words to mean that "the United States waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort." *Id.* A claim based on the Federal Constitution, which a private person cannot violate, fails to meet that requirement. *FDIC*, U.S. 510 at 477–78. "The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access*

Corp. v. Halleck, 587 U.S. 802, 804 (2019); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("it is fundamental that the First Amendment prohibits governmental infringement on the right of free speech.").

The FTCA is clear: the United States may be subject to suit under circumstances where, if it were a *private person*, it would be liable to the claimant. Therefore, no action under the FTCA can contain a constitutional claim as you cannot have both a private person *and* a constitutional violation. This Court's precedent has consistently adhered to this private person standard. *Olson*, U.S. 546 at 46. Without a private person analogue, which cannot exist in a constitutional violation context, there is no FTCA action. There may be other avenues for a claimant to pursue for an alleged constitutional violation, but a FTCA action is not the appropriate. As a matter of law, FTCA liability cannot rest on a constitutional violation because there is no private person analogue.

D. A holding adverse to the United States would transform the discretionary function exception from a jurisdictional doctrine to a complex factual inquiry.

The discretionary function exception is a jurisdictional doctrine meant to be applied at the outset of litigation to determine if the United States is sovereignly immune from the suit. A holding that allows constitutional violations to circumvent the exception would force a court to conduct a complex factual inquiry into the United States actor's conduct. What is meant to be a jurisdictional evaluation will be transformed into an assessment of the merits of claimant's state tort law claim.

The discretionary function exception is a jurisdictional doctrine. No complex factual inquiry should be conducted at the outset of a case where a court is attempting to determine if it has the authority to hear the case. Permitting constitutional violations to circumvent the discretionary function exception will erode the purpose of the exception to the point that the United States will be unable to rely on this Congressional created protection. Claimants will simply plead a state tort law claim *and* a constitutional violation claim as a workaround of the United States' immunity. This would severely erode the United States' ability to defend itself in litigation as it would remove almost entirely an avenue of protection afforded to it by Congress.

E. Petitioner's attempts to establish that the United States' sovereign immunity has been waived are unavailing.

The petitioner attempts to show that the United States' sovereign immunity for constitutional violation claims under the FTCA has been waived, but to no avail. The petitioner can only ask two things of this Court: interpret 28 U.S.C. § 2680(a) to include a 'constitutional-claims exclusion' without the language to support such a reading *or* to create a new law that fashions a runaround of the United States' sovereign immunity in cases involving the discretionary function exception. Both call for this Court to violate the separation of powers and must be rejected. Congress would need to amend 28 U.S.C. § 2680(a) to include a 'constitutional-claims exclusion' or create the new law. Petitioner is plainly asking this Court to revoke the United States' sovereign immunity that was properly and constitutionally provided by Congress. The Court must reject this attempted heist.

Petitioner, like all individuals, has the right to pursue any perceived grievances against the United States or any party she believes caused her harm. However, she must do so in the appropriate forum. A constitutional claim under the FTCA is not appropriate as the plain language of the discretionary function exception clearly indicates the United States retains sovereign immunity even if the employee abuses their discretion when the conduct occurred. As a matter of law, the petitioner's claims must fail, and this case must be dismissed.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the lower courts and grant the United States' motion to dismiss. The complaint fails to adequately plead that any waiver of sovereign immunity applies to this case.

The law enforcement proviso does not cover the relevant employee's conduct. TSA screeners are not "investigative or law enforcement officers" under the Proviso's meaning. The legislative history of the Proviso makes clear that the Proviso was meant to protect innocent individuals harmed by no-knock warrants. The Proviso was not meant to prevent TSA screeners from asking travelers not to record and preventing them from proceeding through security checkpoints. The Proviso's text also requires a government officer to exercise investigatory or traditional powers to trigger a waiver of sovereign immunity. TSA screeners are employees, which are treated distinctly from officers under both the FTCA and the regulations governing the TSA. Additionally, TSA screeners conduct administrative searches, not the investigatory activities covered by the Proviso. As such, TSA screeners are therefore not encompassed by the law enforcement Proviso. Even if ambiguity exists as to their coverage under the Proviso, this Court's precedents require such ambiguity to be resolved in favor of preserving sovereign immunity. As such, the law enforcement proviso does not apply to this case, and there is no waiver of the United States' sovereign immunity.

The discretionary function exception immunizes the United States from a tort action notwithstanding a plausible allegation that a government employee's conduct violated the Constitution. The plain language of 28 U.S.C. § 2680(a) is clear and unambiguous: the exception applies "whether or not the discretion be abused." The exception's text also lacks the necessary abrogation language and intent of Congress to remove the United States' sovereign immunity. To preserve the separation of powers, the exception's clear and unambiguous language must be interpreted as written. Even if there is an ambiguity, this Court's precedent requires that it be resolved in favor of the United States. Further, constitutional claims under the FTCA are barred because there is no private person analogue. Under the FTCA, the United States must be capable of being sued as if it were an individual person. Individuals cannot violate the constitution and be held liable. Therefore, the United States cannot be liable under the FTCA for constitutional violations. Finally, a holding adverse to the United States would transform the discretionary function exception from a jurisdictional doctrine to a complex factual inquiry, essentially eliminating a Congressionally created protection for the United States. As such, this Court should affirm the lower court's decisions to dismiss this case.

Respectfully submitted,

/s/ *Team 199*

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