No. 25-1726

In the Supreme Court of the United States

October 2025 Term

Willow Schimmel,

Petitioner,

v.

United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE ISSUES

I. Whether the statutory text, congressional intent, and 28 U.S.C. § 2680(h)'s local definition of "investigative or law enforcement officer" encompasses Transportation Security Administration screeners—public safety employees who perform administrative functions divorced from traditional law enforcement.

II. Whether Transportation Security Administration screeners are authorized to exercise discretion within the meaning of 28 U.S.C. § 2680(a)—irrespective of an alleged constitutional violation—when they operate without specific constitutional prescriptions under a flexible framework, such that sovereign immunity is preserved and the separation of powers is respected.

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STATEMENT OF THE CASE

I. Statement of the Facts.

Petitioner's disruption. In March 2024, Petitioner Willow Schimmel arrived at Eastland International Airport less than one hour before her flight's scheduled boarding closure. R. at 2. Because of her concern that screening operations were progressing too slowly, Petitioner began filming the checkpoint with her smartphone. R. at 2. As she advanced through the queue, Petitioner alternated between recording herself and security operations with critical narrated commentary. R. at 2–3. After clearing the initial identification checkpoint, Petitioner approached the secure area and continued filming Transportation Security Administration (TSA) employees' oversight and control of passenger screening. R. at 3.

Checkpoint management. Transportation Security Officer (TSO) John Lurie observed Petitioner recording in the immediate vicinity of screening operations. R. at 3. Officer Lurie approached Petitioner, introduced himself as a TSO, and instructed her to stop recording and secure her phone. R. at 3. When Petitioner objected and asserted a right to continue recording, Officer Lurie explained her conduct was interfering with checkpoint operations and could implicate security concerns. R. at 3. To prevent congestion, Officer Lurie temporarily adjusted a barrier stanchion to prevent Petitioner's conduct from delaying other passengers. R. at 3. Petitioner's noncompliance caused Officer Lurie to radio his supervisor and contemplate contacting law enforcement—after sufficiently warning her of those consequences. R. at 3. Once Petitioner chose to comply with Officer Lurie's instructions, she was immediately permitted to proceed through the screening process. R. at 3.

Alleged consequences. Petitioner was not arrested, penalized, or searched beyond routine screening. R. at 2–4. Nevertheless, she alleges the necessary security requirements caused her to rush to her gate, injure her ankle, miss her flight, and experience emotional distress. R. at 3–4.

II. Proceedings Below.

Alleging false imprisonment arising out of her detention at the TSA checkpoint, Petitioner brought suit against the United States in October 2024 under the Federal Torts Claims Act (FTCA). 28 U.S.C. §§ 1346(b)(1), 2671–2680; R. at 4–5. She sought monetary damages for alleged mental anguish and physical injury. R. at 4. Petitioner attempted to invoke federal jurisdiction under the FTCA's limited waiver of sovereign immunity. R. at 2, 4–5. Petitioner contended a routine TSA screening led to her unlawful detention. R. at 4. She asserted her conduct was protected by both the First Amendment and by a statement appearing on TSA's publicly available website. R. at 4.

Respondent timely moved to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing Petitioner's claim was barred by the FTCA's intentional tort and discretionary function exceptions. FED. R. CIV. P. 12(b)(1); R. at 2, 5. In March 2025, the district court granted Respondent's motion and dismissed the complaint without prejudice. R. at 11. The district court held the intentional tort exception did not bar suit because the law enforcement provision applied to TSOs. R. at 7. The discretionary function, however, did bar suit; it was not displaced by the law enforcement provision or the alleged constitutional violation. R. at 11.

Petitioner timely appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 12–13. While the appeal was pending, this Court decided *Martin v. United States*, clarifying the law enforcement provision has no effect outside the intentional tort exception. 605 U.S. 395 (2025); R. at 13. In light of *Martin*, the Thirteenth Circuit affirmed the district court's dismissal in part, holding: (1) TSA screeners are not "investigative or law enforcement officers" as defined by § 2680(h); and (2) the discretionary function exception independently barred suit, irrespective of any alleged constitutional violation. R. at 17–19. This appeal follows.

SUMMARY OF THE ARGUMENT

This is not a case about the government simply evading accountability; rather, this case is about respecting the boundaries of sovereign consent and the judiciary's obligation to apply statutes as they are written. Petitioner seeks to expand the FTCA's carefully crafted waiver of sovereign immunity by: (1) stretching the law enforcement provision to encompass administrative screeners; and (2) alleging a constitutional violation to bypass the discretionary function exception. Both efforts require disregard of statutory text, structure, history, and foundational separation-of-powers principles.

Consequently, this case presents two questions about statutory boundaries. The first asks who Congress meant to include as officers under § 2680(h). The second asks whether TSA screenings are discretionary under § 2680(a), notwithstanding an alleged constitutional violation. In each instance, Petitioner's theory would require this Court to read beyond what Congress authorized, ignoring constitutional restraints.

I. TSA screeners are not covered by the law enforcement provision.

The law enforcement provision does not include TSA screeners because Congress confined the re-waiver of sovereign immunity to a narrow class of federal officers exercising traditional criminal law enforcement powers. The provision's text, when read as a whole, defines officers by reference to a unified set of authorities: executing searches, seizing evidence, and making arrests for violations of federal law. The terms operate together to describe powers connected to criminal law as understood by Congress in 1974 when it added the law enforcement provision. The definition does not include administrative, public safety procedures, such as TSA screening.

The statutory language requires narrow construction. Applying ordinary tools of interpretation, "execute searches" cannot be read in isolation or expanded to include all conduct that might qualify as a "search" for modern Fourth Amendment purposes. Instead, it must be understood in light of its statutory neighbors—quintessential criminal law functions. Severing "execute searches" from its context ignores both the provision's grammatical structure and this Court's repeated instruction that interpretive canons yield to statutory coherence.

History reinforces a narrow reading. When Congress enacted the provision in 1974, "search" was a criminal law term of art referring to investigatory activity undertaken to gather evidence of criminal wrongdoing. Administrative airport screening, now justified under the special needs doctrine, was neither doctrinally developed nor understood as law enforcement in 1974. The special needs doctrine postdates the FTCA and cannot be used to retroactively redefine its scope. Treating administrative screening like criminal searches would sever the provision from its original meaning.

Statutory structure aligns. Section 2680(h) preserves sovereign immunity for intentional torts, then re-waives liability for only a narrow class of federal officers. Because the provision is an exception to an exception, it demands narrow construction. Reading it to include TSA screeners risks allowing the provision to swallow the intentional tort exception altogether—precisely what Congress sought to avoid. Congress' later enactment of the Aviation and Transportation Security Act (ATSA) provides further confirmation. When establishing TSA, Congress explicitly classified screeners as federal employees performing administrative functions while separately authorizing a class of officers to exercise traditional law enforcement powers. Congress did not amend the FTCA, expand § 2680(h), or reclassify TSA screeners as officers for sovereign immunity purposes.

Legislative history confirms the provision's narrow focus. Congress responded to remedy documented abuses by federal narcotics agents conducting criminal raids—not to regulate routine screening. Proposals to broaden the provision beyond traditional police misconduct were expressly considered and rejected. The Congressional Record underscores the democratic choice Congress made to provide a remedy for victims of criminal law enforcement abuse while preserving sovereign immunity for administrative government functions.

Judicial expansion of the provision would therefore undermine democratic accountability. Decisions about whether to expose the Treasury to liability belong to Congress, not the courts. Respecting the limits Congress imposed does not excuse misconduct; it preserves the constitutional allocation of authority by ensuring any expansion of liability comes through legislation rather than retroactive judicial revision.

II. TSA screeners exercise policy-laden discretion, irrespective of an alleged constitutional violation.

Even if the law enforcement provision applies, Petitioner's claim is still barred by the FTCA's discretionary function exception. The exception independently preserves sovereign immunity for conduct involving judgment or choice grounded in public policy, even where discretion is allegedly abused. TSA screening decisions fall squarely within the exception.

Under *Gaubert*, the threshold question is whether governing law mandates a specific course of action. TSA screening does not. Congress and the TSA deliberately designed the screening regime to prioritize flexibility, adaptability, and swift judgment in response to evolving security conditions. TSA policies articulate general objectives, not fixed commands, and leave frontline personnel to assess security risks, interferences, and passenger flow. The challenged conduct here—managing checkpoint order in response to passenger behavior—reflects precisely the kind of situational judgment *Gaubert* protects.

Allegations of a constitutional violation do not alter the analysis. The Constitution does not supply the kind of specific, mandatory directive that removes discretion for purposes of § 2680(a).

Allowing constitutional allegations to defeat the discretionary function exception would force courts to resolve merits questions as a prerequisite to determining jurisdiction. A result contrary to Congress' design and this Court's instruction that sovereign immunity inquiries remain antecedent to liability.

The FTCA also waives immunity only where the United States could be liable as a private person. Some constitutional violations, including Petitioner's claim, lack a common law tort analogue. Permitting Petitioner to repackage her constitutional claim as an FTCA tort claim would import a *Bivens*-style liability scheme into a statute Congress carefully limited. Petitioner's theory requires an expansion this Court declined to authorize.

The discretionary function exception is jurisdictional, and that posture matters. It operates at the outset of litigation, often on pleadings alone, to prevent courts from entangling themselves in policy-laden judgments better suited for the legislative branch. Using constitutional allegations to circumvent a jurisdictional bar erodes the separation of powers. Ultimately, Petitioner's theory attempts to transform the FTCA from a limited waiver of sovereign immunity into a general vehicle for constitutional claims. Congress did not enact such a regime. Respecting the statutory limits crafted by Congress preserves democratic accountability and the balance of power among the three branches of government.

STANDARD OF REVIEW

A district court's dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) is reviewed de novo. *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012); *Am. Reliable Ins. Co. v. United States*, 106 F.4th 498, 504 (6th Cir. 2024). Because sovereign immunity implicates subject matter jurisdiction, it presents a legal question subject to independent appellate review. *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016). Appellate courts therefore assess de novo whether the United States has waived sovereign immunity. *Garling v. U.S. Env't Prot. Agency*, 849 F.3d 1289, 1293–94 (10th Cir. 2017).

Whether a claim falls within the FTCA—and whether any statutory exception to that waiver applies—likewise presents a question of law reviewed de novo. *Clendening v. United States*, 19 F.4th 421, 426 (4th Cir. 2021); *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009). Because the applicability of FTCA exceptions bears directly on the existence of subject matter jurisdiction, appellate review proceeds without deference to the district court's legal conclusions. *Koletas v. United States*, 159 F.4th 813, 817 (11th Cir. 2025).

ARGUMENT

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). In other words, the United States is immune from all suits absent an express waiver of immunity, with any ambiguity "strictly construed . . . in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192 (1996); *see also United States v. Sherwood,* 312 U.S. 584, 586 (1941). Accordingly, the burden lies with the plaintiff to establish an unequivocal waiver of sovereign immunity exists and that no waiver exceptions apply. *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005). A claim must be dismissed if the plaintiff fails to meet the burden. *Medina v. United States,* 259 F.3d 220, 223 (4th Cir. 2001).

One partial waiver of sovereign immunity is the FTCA. Enacted in 1946 to allow for suits in tort, it renders the government liable "to the same extent as a private individual under like circumstances." *Levin v. United States,* 568 U.S. 503, 507 (2013); *see* 28 U.S.C. § 1346. Congress limited the waiver with thirteen exceptions that preserve the government's immunity. 28 U.S.C. § 2680(a)-(n). Where an exception applies, sovereign immunity remains intact, and courts lack subject matter jurisdiction. *Id.* Two of those exceptions are implicated in the present case: the intentional tort and discretionary function exceptions. 28 U.S.C. § 2680(a), (h).

I. TSA screeners fall outside the proviso because they do not perform traditional law enforcement functions.

First, the intentional tort exception bars claims for certain enumerated intentional torts, including false imprisonment, the sole tort asserted here. *See* 28 U.S.C. § 2680(h). Within the text of § 2680(h) lies the law enforcement provision—functioning as an exception to the exception—commonly referred to as the "proviso." *See Millbrook v. United States*, 569 U.S. 50, 55 (2013). The proviso countermands the intentional tort exception and re-waives sovereign immunity when a properly alleged tort is committed by certain federal officers. 28 U.S.C. § 2680(h). The proviso's applicability depends on the status of the federal actor—not the nature of the challenged conduct. *See Millbrook*, 569 U.S. at 55–57.

As a threshold matter, Petitioner asserts a claim for false imprisonment falls within the FTCA's intentional tort exception. R. at 4; *see* 28 U.S.C. § 2680(h). Accordingly, the exception preserves Respondent's immunity absent application of the proviso. *See* 28 U.S.C. § 2680(h). The proviso addresses "investigative or law enforcement officers of the United States," further defined within as those who are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Resorting to the ordinary or common law meaning of "officer," as Petitioner suggests, is improper because the FTCA supplies a local definition. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). According to this Court's precedent, when Congress defines a statutory term, its definition controls. *See generally id.*

Petitioner erroneously places Officer Lurie under this definition because he "execute[s] searches," so it is necessary to define this phrase within the proviso's context. 28 U.S.C. § 2680(h); R. at 13. Lower courts are divided on the proviso's applicability to TSA screeners.[1] The division stems from textual ambiguity in the phrase "execute searches," with some courts importing modern Fourth Amendment doctrine and others construing the term in light of the proviso's text, structure, and historical purpose. *Contrast Hernandez v. United States*, 34 F. Supp. 3d 1168 (D. Colo. 2014); *with Pellegrino*, 937 F.3d 164.

[1] While district courts have presented a theory akin to Respondent's, the Circuit Courts that have addressed this issue agree with Petitioner. *See generally*, *Koletas*, 159 F.4th 813; *Mengert v. United States*, 120 F.4th 696 (10th Cir. 2024); *Osmon v. United States*, 66 F.4th 144 (4th Cir. 2023); *Leuthauser v. United States*, 71 F.4th 1189 (9th Cir. 2023); *Pellegrino v. U.S. Transp. Sec. Admin.*, 937 F.3d 164 (3rd Cir. 2019); *Iverson v. United States*, 973 F.3d 843 (8th Cir. 2020).

The better-reasoned decisions adopt the latter approach, recognizing Congress' intent to authorize only a narrow waiver of sovereign immunity, confined to a well-defined class of federal officers who possess and exercise traditional law enforcement powers. *See, e.g., Hernandez*, 34 F. Supp. 3d 1168; *Weinraub v. United States*, 927 F. Supp. 2d 258, 262 (E.D.N.C. 2012). In contrast, other courts place dispositive emphasis on the modern functions of airport security, characterizing passenger and property screenings as "searches." *See, e.g., Pellegrino*, 937 F.3d 164. That functionalist approach is flawed; it collapses administrative screening into law enforcement authority, disregards the statutory definition, and impermissibly expands a carefully circumscribed waiver of sovereign immunity. Petitioner's functional framing rests on policy concerns about accountability rather than statutory authorization. But policy critiques, no matter how forceful, cannot waive sovereign immunity. Whether additional categories of federal employees should be included in the proviso requires Congress' legislative judgment.

The relevant question is not whether TSA screening involves a "search" for Fourth Amendment purposes, but whether Congress granted TSOs authority to exercise law enforcement powers for violations of federal law within the meaning of § 2680(h). It did not. "[F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy," so courts must apply the statute as written, not reshape it to accommodate an evolving society. *United States v. Rutherford*, 442 U.S. 544, 555 (1979); *see also Pellegrino*, 937 F.3d at 181 (Krause, J., Dissenting).

a. The proviso's text confirms a narrow construction consistent with Congress' understanding of law enforcement at the time.

The statute's text supplies the controlling analytical framework. *See Kosak v. United States*, 465 U.S. 848 (1984). Indeed, it is a basic assumption "the legislative purpose is expressed by the ordinary meaning of the words used." *Am. Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982).

When, however, Congress speaks with precision and provides a local definition in the relevant statute, any contrary ordinary meaning is displaced. *Stenberg*, 530 U.S. at 942. Here, the proviso expressly defines "investigative or law enforcement officers" 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," so that definition controls the inquiry. 28 U.S.C. § 2680(h).

i. The proviso's plain language and grammatical structure support a unified law enforcement reading.

The phrase "to execute searches, to seize evidence, or to make arrests for violations of Federal law" does not reflect three independent authorities divorced from criminal law enforcement. 28 U.S.C. § 2680(h). Read in context, the references to searches, evidence, arrests, and violations of federal law collectively define the status and legal authority of the officer Congress intended to reach, not the particular manner in which any one function might be exercised. *See Millbrook*, 569 U.S. at 56. A single canon of construction cannot resolve ambiguity; interpretive canons act as contextual tools that must be applied together to ascertain how Congress understood these terms within the FTCA's carefully crafted waiver of sovereign immunity. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

First, the canon of *noscitur a sociis* supports a narrow reading of "execute searches." This Court explains this principle is appropriately applied where, as here, a word is capable of multiple meanings but must be read narrowly to avoid conferring unintended breadth on an act of Congress. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). This Court likewise cautions statutory language should not be construed to expand a statute beyond what Congress intended. *See United States v. Stevens*, 559 U.S. 460 (2010). Statutory text cannot be read in isolation; the meaning of a word necessarily depends on "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

This Court's application of *noscitur a sociis* in *Stevens* is illustrative. 559 U.S. at 469–72. In *Stevens*, the government urged an expansive interpretation of a federal statute criminalizing the creation or distribution of depictions of animal cruelty, arguing the statute swept broadly enough to encompass a wide range of expressive material. *Id.* Rejecting that reading, this Court emphasized the surrounding statutory terms did not meaningfully accommodate the provision as the government suggested and warned such an interpretation would dramatically enlarge the statute's reach. *Id.* at 474–77. Importantly, *Stevens* did not repudiate *noscitur a sociis*; this Court simply declined to apply the canon because the relevant statute lacked a coherent set of neighboring terms capable of giving the disputed phrase meaning. *Id.* at 474. Far from undermining the canon, *Stevens* confirms its force turns on statutory context and expresses skepticism of expansive interpretations severing a term from its contextual surroundings. *Id.*

Nor does *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, counsel otherwise. 559 U.S. 280 (2010). In *Graham County*, this Court declined to give weight to *noscitur a sociis* where a short, disjunctive statutory list grouped together terms "quite distinct from the other no matter how construed." *Id.* at 288. Where statutory neighbors do not meaningfully relate, the canon sheds little light; a concern absent here. *Id.* Unlike the terms at issue in *Graham County*, the proviso's list of authorities form a tightly related cluster describing classic police powers. Thus, *Graham County* reinforces—rather than weakens—the conclusion that *noscitur a sociis* is most illuminating where, as here, Congress has deliberately grouped functionally related authorities. *Id.*

Within the proviso, "execute searches" appears alongside "seize evidence" and "make arrests," two terms inherently and historically associated with criminal law enforcement. Read together, these associates narrow the meaning of "execute searches" to traditional law enforcement searches grounded in criminal investigation—not administrative or regulatory functions. This contextual reading is reinforced by the proviso's express limitation to actions taken "for violations of federal law," a phrase tying the list to the investigation and prosecution of federal crimes. *See Dolan*, 546 U.S. at 486 ("[A] word is known by the company it keeps.").

Two of the three enumerated authorities, "seize evidence" and "make arrests," are quintessentially criminal in nature. Evidence is seized for the purpose of establishing guilt in criminal prosecution; arrests are made to restrain liberty based on criminal wrongdoing. *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 306–07 (1967); *United States v. Watson*, 423 U.S. 411, 417 (1976). Both powers presuppose some level of individualized suspicion and the exercise of force unique to criminal law enforcement. *See generally Terry v. Ohio*, 392 U.S. 1, 16–17 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534–37 (1967). Accordingly, the third authority, "execute searches," must be read in harmony with the other two as referring to criminal law enforcement conduct rather than generalized public safety procedures. *See Millbrook*, 569 U.S. at 55–57.

Reading the three cohesively rebuts a purely disjunctive interpretation that treats "execute searches" as an open-ended grant untethered from its statutory neighbors. This Court repeatedly rejects such acontextual analysis where Congress groups related terms to convey a single cohesive concept. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 575–76 (1995) (reading "communication" narrowly by reference to surrounding terms to reflect a unified statutory concept); *Yates v. United States*, 574 U.S. 528, 543 (2015) (construing a statutory list as an integrated whole rather than a collection of isolated terms). Read as a whole, the proviso reflects a deliberate congressional choice to confine its scope to traditional law enforcement activity. Applying *noscitur a sociis* here does not rewrite the statute; it respects Congress' intentional decision to define "investigative or law enforcement officers" by reference to a closely related set of criminal law enforcement powers, thereby excluding administrative or security screening functions from the FTCA's narrow waiver of sovereign immunity.

Second, Petitioner's reliance on the rule of the last antecedent does not carry the weight she suggests. The canon provides, as a general matter, a limiting phrase ordinarily modifies only the noun or phrase it immediately follows. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). But this Court makes clear this canon functions only as a starting point, not a dispositive presumption. *Id.* If applying the canon would distort statutory structure or undermine Congress' evident design, courts should not hesitate to look beyond it. *Id.* Indeed, modifiers placed at the end of a coordinated series may be read to apply to each item in the series when it best accords with the statute's structure and sense—a concept embodied by the series qualifier canon. *See Lockhart v. United States*, 577 U.S. 347, 352 (2016); *Paroline v. United States*, 572 U.S. 434, 446–47 (2014).

The series qualifier canon's limitation on the last antecedent canon is critical. This Court repeatedly cautions canons of construction are merely interpretive tools, not mechanical commands; none of which may be applied in isolation from statutory context. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). As Karl Llewellyn, Justice Antonin Scalia, and Bryan Garner have aptly explained, interpretive canons operate in "thrust and parry"; the thrust of one canon is often parried by either another canon, competing textual indicators, statutory structure, or congressional purpose. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012).

Accordingly, the decisive question is not simply whether the last antecedent canon can be applied, but whether its application would make sense of the statute. Here, the better reading uses "for violations of Federal law" to qualify the entire coordinated series of law enforcement powers clearly enumerated by Congress. This is consistent with the proviso's narrow and carefully drawn scope.

ii. The historical underpinnings of "execute searches" supports a narrow definition.

The proviso's reference to "execute searches" must be interpreted as Congress understood it at the time. *See Wisconsin Cent. Ltd v. United States*, 585 U.S. 274, 284 (2018). "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Id.* Courts are not free to update statutory meaning to reflect later-developed doctrines or evolving regulatory practices; original meaning must govern. *Id.*

When Congress amended the FTCA in 1974, "search" was a concept firmly embedded in criminal investigation and traditional law enforcement authority. *See generally Terry*, 392 U.S. 1. It did not encompass suspicionless screenings executed for the purpose of public safety. *See generally,* 28 U.S.C. § 2680(h). The modern special needs doctrine, which now encompasses airport security screenings, developed later and cannot be retrofitted to expand the statute's meaning. *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (recognizing, for the first time, searches done for a "special need" other than law enforcement purposes); *see also Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (discussing the special needs doctrine in connection with airport security screening). Reading contemporary airport security practices into the proviso would sever the statutory text from its historical meaning and impermissibly broaden the waiver of sovereign immunity beyond the limits Congress set.

First, it is necessary to consider Congress' understanding of "search" at the time the statute was written. As this Court explains, when Congress employs a legal term of art, it is presumed to adopt the settled meaning that term carried in the relevant body of law at the time of enactment. *FAA v. Cooper*, 566 U.S. 284, 291–92 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992)). A disjunctive reading of the proviso's coordinated set of authorities cannot be reconciled with Congress's understanding of "search" when drafting § 2680(h). *See Osmon*, 66 F.4th 144. At that time, "search" was a term of art rooted in criminal law, defined as an examination undertaken to uncover evidence of criminal wrongdoing—not a generalized regulatory or administrative inspection. *See Search*, Black's Law Dictionary 1518 (4th ed. 1968) (defining "search" as an examination conducted "with a view to the discovery of . . . evidence of guilt to be used in the prosecution of a criminal action"); *see also Pellegrino*, 937 F.3d at 182 (Krause, J., dissenting) (noting the majority's failure to recognize this definition of "search," giving decisive weight to the dictionary's definition of "officer").

The proviso's text reinforces its investigative connection. Congress listed "execute searches" alongside the authorities "seize evidence" and "make arrests." 28 U.S.C. § 2680(h). At the time of enactment, each listed power was quintessentially criminal and uniformly exercised upon probable cause. *See Terry*, 392 U.S. at 16–17; *Hayden*, 387 U.S. at 306–07; *Watson*, 423 U.S. at 417. Read together, the list reflects a cohesive bundle of criminal investigatory powers, not a disjunctive assortment of unrelated government functions. That reading is consistent with the proviso's purpose—addressing police misconduct.

At the time, Congress intended to expose the government to liability for traditional Fourth Amendment violations committed by law enforcement officers. As explained on the Senate floor, "the Committee amendment [consisting solely of the proviso] would submit the Government to liability whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued *without probable cause*." 120 Cong. Rec. 4080 (Mar. 5, 1974) (emphasis added). This contemporaneous explanation confirms Congress was focused on classic Fourth Amendment searches—not administrative screening.

Nor was this a specialized or idiosyncratic usage. Before 1974, courts invoked the phrase "execute searches" exclusively in criminal law contexts. *See, e.g., Chimel v. California*, 395 U.S. 752, 756 (1969) (discussing officers' authority to execute a search incident to arrest for evidence of crime); *Ng Pui Yu v. United States*, 352 F.2d 626, 628–29 (9th Cir. 1965) (addressing the execution of a search warrant issued in a criminal investigation). Congress, without exception, employed the same terminology in the United States Code only when conferring investigatory authority on law enforcement officers—never for administrative personnel.[2]

As Congress understood it in 1974, "execute searches" referred exclusively to traditional criminal law enforcement power. The legislative record confirms Congress understood the proviso in precisely these terms. During House debate on the proviso, House Members emphasized the amendment was limited to traditional law enforcement officers and excluded other federal employees:

> Mr. DONOHUE. And it only applies to law enforcement officers. It does not apply to any other Federal employees that might violate the rights of an individual. Is that not so?
> Mr. WIGGINS. The gentleman is correct, as I understand the bill.

[2] *See, e.g.*, 18 U.S.C. §§ 2231, 2234, 3109 (authorizing law enforcement officers to execute search warrants in criminal investigations); 22 U.S.C. § 2709(a)(2) (granting limited investigative authority tied to national security and law enforcement functions).

120 Cong. Rec. 4080 (Mar. 5, 1974). Nothing in that exchange suggests Congress intended the proviso to include administrative screeners whose duties do not involve criminal investigation.

Accordingly, courts examining the proviso's text in its historical context recognize the enumerated powers describe exclusively criminal law authorities. *Weinraub*, 927 F. Supp. 2d at 262; *Hernandez*, 34 F. Supp. 3d at 1179–80. For example, in *Hernandez*, the district court emphasized the proviso's listed authorities are classic law enforcement powers rooted in criminal investigation and prosecution. 34 F. Supp. 3d at 1179–80. Reading the list as an integrated whole, the court explained Congress used those authorities to identify officers who investigate crimes, gather evidence, and enforce criminal law—not TSA screeners. *Id.* Although *Hernandez* predates late appellate developments, its analysis is illustrative of the proviso's historical understanding. *Contra Mengert*, 120 F.4th 696.

Departing from the original understanding not only expands the proviso beyond its historical bounds but undermines the basic notice function of the statutory text. As this Court recently affirmed, "textualism serves as an essential guardian of the due process promise of fair notice," and if courts could unilaterally "discard an old meaning and assign a new one to a law's terms . . . how could people ever be sure of the rules that bind them?" *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 434 (2024) (Gorsuch, J., concurring).

Second, airport screenings are not investigatory in nature. Airport screening is properly understood as a special-needs search undertaken for programmatic, preventative purposes—not an investigatory effort to gather evidence for criminal prosecution. *See* Aviation and Transportation Security Act, Pub. L. 107–71, 115 Stat. 597 (2001) ("An Act To improve aviation security"). TSA's internal directives confirm its limited role; screening activities are confined to transportation security objectives and are not designed to detect evidence of unrelated crimes. When potential evidence of criminal wrongdoing is encountered, screeners must refer the matter to a law enforcement officer. TSA Mgmt. Directive No. 100.4. Only designated TSA law enforcement officers—not screeners—are authorized to perform seizures, arrests, or investigations of suspicious activity. TSA Mgmt. Directive No. 1100.88-1. TSA's division of authority frames the constitutional analysis which follows.

A search conducted for purposes "distinguishable from the general interest in crime control," is administrative in nature. *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015). Modern Fourth Amendment doctrine enforces the distinction by separating investigatory searches aimed at uncovering evidence of crime from administrative searches justified by regulatory or public safety objectives. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37–40 (2000) (invalidating suspicionless checkpoints executed for the primary purpose of ordinary law enforcement rather than a special need); *Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001) (striking down a hospital drug-testing program because it was designed to generate evidence for criminal prosecution).

Airport screening practices fall within the special needs framework because they are undertaken to protect public safety, not gather evidence of criminal wrongdoing. *See Von Raab*, 489 U.S. at 675 n.3 (discussing airport screenings as justified by special needs beyond law enforcement); *accord Chandler v. Miller*, 520 U.S. 305, 323 (1997). Some courts emphasized this same distinction in illustrative settings. For example, in *United States v. Aukai*, the Ninth Circuit upheld TSA's secondary screening conducted pursuant to agency policy after a passenger produced a boarding pass marked "No ID," explaining the search remained proper because its sole purpose was aviation security. 497 F.3d 955, 957–58, 960–62 (9th Cir. 2007) (en banc). Critically, once screening revealed concerns beyond the limited mission of aviation security, TSA did not detain the passenger or pursue criminal investigation; rather, a law enforcement officer was summoned to exercise those distinct powers. *Id.* at 958; *see generally* 49 USC § 44901(h)(2). The division of labor in *Aukai* illustrates precisely how to distinguish TSA screening from the execution of criminal searches as contemplated by the proviso. *See generally* 497 F.3d 955.

Properly understood, the special needs character of TSA screening confirms the narrow scope of the proviso. TSA screening is constitutional precisely because it is divorced from ordinary crime control and criminal investigation. *See Ferguson*, 532 U.S. at 83–84. Treating special needs searches as traditional law enforcement activity would collapse that distinction, transforming suspicionless, programmatic screening into criminal investigatory conduct that ordinarily requires probable cause, or at the very least individualized suspicion. *See Mengert*, 120 F.4th at 703, 719–22; *see generally Terry*, 392 U.S. at 27.

Petitioner erroneously attempts to bridge the gap between the special needs doctrine and the proviso, but these two frameworks are mutually exclusive. This exposes the flaw in decisions that read § 2680(h) to encompass TSA screening. Interpreting the proviso to treat TSA screeners as law enforcement officers executing searches for violations of federal law would not only expand a narrowly drawn waiver of sovereign immunity but would also place the statute in tension with settled Fourth Amendment doctrine by erasing the very distinction that justifies administrative screening in the first place.

Where a statute is susceptible to competing interpretations, the constitutional avoidance canon counsels courts to adopt the construction that avoids such constitutional difficulty. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The narrow status based reading of the proviso avoids constitutional conflicts and accords with both congressional design and constitutional structure. Taken together, TSA's internal operating rules, constitutional doctrine, and judicial application all point to one conclusion: Airport screenings are not forms of criminal law enforcement because they are administrative in nature, designed to prevent security threats.

Finally, the special needs doctrine postdates the FTCA and therefore cannot supply the meaning of the proviso's text. Timing matters; Petitioner's position implicitly relies on modern Fourth Amendment jurisprudence to expand the scope of "execute searches" beyond Congress' 1974 authorization. When Congress enacted the proviso, the special needs framework had not yet been solidified as a distinct category of Fourth Amendment jurisprudence. Although certain noncriminal inspections existed at the time, the conceptual and doctrinal structure distinguishing searches conducted for purposes "beyond the normal need for law enforcement" emerged later. *T.L.O.*, 469 U.S. at 351.

The special needs doctrine developed after the proviso, so relying on it alters the statute's meaning rather than illuminating it. This would sever the criminal law connection to "search" Congress adopted in 1974, retroactively broadening a narrowly tailored waiver of sovereign immunity. In practical terms, Petitioner's suggested approach would allow subsequent judicial doctrine, rather than congressional choice, to redefine which federal employees qualify as officers. The proviso must instead be construed according to the meaning of "search" as Congress understood it at the time, not through Fourth Amendment frameworks not yet existing.

b. The FTCA and ATSA necessarily narrow the proviso's scope.

Statutory meaning is confirmed not only by legislative text and history, but also by structure. *Neal v. Clark*, 95 U.S. 704, 709 (1878). This Court instructed in *Clark*, "the meaning of a word, and, consequently, the intention of the legislature," must be ascertained by reference to the textual context. *Id.* The inquiry requires attention to the internal architecture of the FTCA and to the statute's interaction with related enactments. *Id.* Within the FTCA, the proviso operates as a narrow carveout of a broader preservation of sovereign immunity; the intentional placement counsels against expansive interpretation. Beyond the FTCA, Congress' later enactment of the ATSA provides additional structural guidance. *See generally* 49 U.S.C. § 114. Read together, these structural features confirm the proviso was not designed to sweep administrative screening personnel within its scope.

i. The FTCA's re-waiver of sovereign immunity requires strict adherence.

The internal structure of the FTCA reinforces that the proviso must be read narrowly. Section 2680(h) does not begin with a grant of jurisdiction; it begins by retaining sovereign immunity for a category of claims. 28 U.S.C. § 2680(h). The proviso then carves out a very limited re-waiver for certain enumerated torts committed by "investigative or law enforcement officers." *Id.* This placement is critical; the proviso functions as an exception to an exception, it does not invite expansion by implication. *See Foster v. United States*, 522 F.3d 1071, 1079 (9th Cir. 2008). To the contrary, its function within the statutory scheme demands restraint. As the Ninth Circuit explained while construing a re-waiver of sovereign immunity, courts "interpret not an exception to the FTCA's waiver of sovereign immunity, but instead interpret an exception to the exception," and therefore "must apply the general rule that waivers of sovereign immunity are construed in favor of the sovereign." *Id.* at 1079.

The ATSA's layered design alters the interpretive baseline. Waivers of sovereign immunity must be strictly construed in favor of the sovereign; this applies with even greater force when Congress first preserves immunity, then selectively re-waives it for a narrow class of claims. *Id.* This Court recognizes statutory schemes with layered exceptions require fidelity to Congress' chosen structure and do not permit courts to enlarge liability beyond the precise contours of consent. *See Dolan*, 546 U.S. at 491–92 (emphasizing the need to read exceptions in light of the statute's overall design and the limits Congress placed on its consent to suit).

Foster illustrates a layered waiver in concrete terms. The plaintiffs in *Foster* sought to evade the FTCA's "detention of goods" exception by characterizing seizures as "dual purpose" conduct that would fall within a narrow re-waiver of sovereign immunity. 522 F.3d at 1075. The Ninth Circuit rejected that argument, warning a broad construction of the re-waiver would "eviscerate" the exception. *Id.* at 1079. Expressly framing the inquiry as one involving an "an exception to the exception," the Ninth Circuit held Congress' decision to craft a narrow carveout necessarily required a narrow construction, else the immunity preserving provision would be rendered meaningless. *Id.*

The same structural logic applies here. Reading the law enforcement proviso broadly to encompass administrative or security screening activity untethered from criminal law enforcement authority would risk allowing the proviso to swallow the intentional tort exception. Congress rejected that result; as the legislative record confirms, the proviso "only applies to law enforcement officers" and "does not apply to any other Federal employees that might violate the rights of an individual." 120 Cong. Rec. 4080 (Mar. 5, 1974).

Dolan does not suggest otherwise; it addresses the scope of the government's initial consent to suit under the FTCA, not the expansion of a re-waiver carved out from a category of claims Congress withdrew. 546 U.S. at 492. And it did so in the context of negligence—not intentional torts preserved by § 2680(h). *Id.* Where Congress has structured liability through layered exceptions, courts return to the default rule that sovereign immunity remains intact absent a clear statement to the contrary. *See Foster*, 522 F.3d at 1079.

Strict adherence to the limits of sovereign immunity waivers are not a policy preference but a constitutional boundary. This Court has long held courts lack discretion to enlarge the government's consent to suit beyond what Congress has clearly expressed. *See Schillinger v. United States*, 155 U.S. 163, 166 (1894) ("Beyond the letter of such consent the courts may not go"); *Price v. United States*, 174 U.S. 373, 375 (1899) (rejecting equitable expansions of governmental liability). Thus, any ambiguity in the proviso must be resolved in favor of the United States because the proviso is a layered exception. Petitioner's suggested interpretation is contrary to the statute's structure and would result in a judicial expansion of sovereign immunity.

ii. The ATSA sheds light on the proviso's interpretation.

Although interpretation of the FTCA properly begins within its own text, it cannot end there. Statutory meaning—a word's significance and the legislature's intent—turns on context. *Neal*, 95 U.S. at 709. The inquiry includes consideration of other statutes addressing related subject matter. The FTCA was enacted in 1946. *See* Federal Tort Claims Act, ch. 753, § 410(a), 60 Stat. 812 (1946). More than half a century later, Congress enacted the ATSA in response to the September 11, 2001 attacks. *See* 49 U.S.C. § 114. In doing so, Congress created a new federal agency responsible for aviation security. *Id.* Critically, Congress did so without amending § 2680(h)'s proviso. That sequencing matters. Where Congress creates a new regulatory regime without amending an existing waiver, courts may not presume a silent expansion of immunity. *Foster*, 522 F.3d at 1079. Had Congress intended TSA screeners to fall within the proviso, it could have done so when it enacted the ATSA. Yet it did not.

The ATSA reflects a deliberate and consistent distinction between federal "employees" and federal "officers" vested with law enforcement authority—a distinction that mirrors the FTCA's own status based framework. *See* 49 U.S.C. § 114(p). When Congress enacted the ATSA, it expressly designated TSOs as federal employees charged with administrative screening responsibilities, while separately authorizing a distinct class of TSA law enforcement officers to carry firearms, make arrests, and conduct criminal investigations. *See* 49 U.S.C. §§ 114(p), 44903(d). Thus, the proviso does not apply to all federal employees who perform intrusive or coercive functions; it applies only to officers of the United States "empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law." 28 U.S.C. § 2680(h).

Congress' word choice was intentional; yet TSA internally refers to all screeners as officers. *Pellegrino*, 937 F.3d at 193 (Krause, J., dissenting). This unilateral decision was intended to advance workforce development objectives and improve morale—not disrupt the ATSA's power disbursement. *Id.* This explains why Officer Lurie introduced himself as a TSO but is not categorized as one under the ATSA. R. at 3. TSA's internal nomenclature, however, must not overshadow Congress' explicit design, and no deference must be given to TSA's classification. *See Loper*, 603 U.S. at 412–13.

Additionally, throughout the United States Code, Congress routinely distinguishes between federal officers, who exercise law enforcement powers, and federal employees, who merely carry out administrative or regulatory duties. *See, e.g.,* 18 U.S.C. §§ 2231, 2234, 3109; 22 U.S.C. § 2709(a)(2); 49 U.S.C. § 44901(h)(2); 49 U.S.C. §§ 114(p), 44903(d). This is not unique. Congress drew an explicit statutory line between personnel entrusted with traditional police powers and screeners whose role is preventive, programmatic, and regulatory in the ATSA like it has done in other parts of the United States Code.

Officer Lurie acknowledged his limited role—one divorced from traditional law enforcement authority. R. at 3. During the interaction with Petitioner, he first warned law enforcement would get involved and then radioed his supervisor to affirm his instructions. R. at 3.

Thus, Officer Lurie understood he did not have the same authority as a traditional law enforcement officer. The explicit distinction between the two is dispositive here.

Reading § 2680(h) to encompass TSOs would collapse the carefully drawn line by converting employees whom Congress deliberately declined to vest with law enforcement authority into "officers." The proviso's inquiry is status based—not functional. 28 U.S.C. § 2680(h). It asks whether Congress empowered the actor with law enforcement authority, not whether a particular task might colloquially be described as a "search." TSA screeners, like Officer Lurie, possess no such authority.

The Third Circuit recognized the same statutory differentiation in related contexts. *See, e.g., Vanderklok v. United States*, 868 F.3d 189, 208–09 (3d Cir. 2017). In *Vanderklok*, the court considered whether a TSA screener was protected by qualified immunity as a law enforcement officer after a passenger alleged retaliatory conduct arising from an airport screening. *Id.* at 193–94, 208–09. Recognizing serious practical concerns, the court refrained from labeling TSOs as law enforcement officers due to their lack of training on "probable cause, reasonable suspicion, and other constitutional doctrines that govern law enforcement officers." *Id.* at 208–09. Instead, TSOs are only trained to carry out administrative duties and contact law enforcement when faced with circumstances requiring action beyond their limited responsibilities. *Id.* at 209. Although *Vanderklok* arose in a different doctrinal setting, its analysis rests on the same statutory structure now before this Court and confirms Congress intentionally withheld traditional law enforcement powers from TSA screeners, reserving them instead for a distinct class of officers expressly authorized by statute.

Read in conjunction, the FTCA and the ATSA reflect Congress' intent: to preserve a narrow waiver of sovereign immunity; to confer law enforcement authority expressly and selectively; and to treat TSA screeners as federal employees performing administrative security functions, not as law enforcement officers. Nothing in the ATSA suggests an intent to disturb the FTCA's carefully designed immunity scheme, so expansion by implication is improper.

c. The proviso's legislative history highlights a targeted response to traditional police misconduct.

Although legislative history cannot override clear statutory text, it may confirm the specific problem Congress sought to address and the limits it intended to impose. *See Shannon v. United States*, 512 U.S. 573, 583–84 (1994). The legislative record surrounding the 1974 amendment to § 2680(h) confirms the proviso addresses specific transgressions of traditional law enforcement officers, not administrative federal functions. Congress enacted the law enforcement proviso in direct response to documented misconduct by federal narcotics agents. Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (1974).

The immediate catalyst for the proviso was the Collinsville raids: wrong-house, no-knock raids in which federal narcotics agents forcibly entered innocents' homes, seized no evidence, and made no arrests. S. Rep. No. 93-588, at 2–4 (1973); 119 Cong. Rec. 41, 615–16 (Nov. 30, 1973). The accompanying Senate Report confirms Congress was specifically concerned with unlawful searches, seizures, and detentions arising in the course of criminal law enforcement. S. Rep. No. 93–588, at 2–4 (1973). As the Committee explained, the amendment was "designed to prevent future abuses of the Federal 'no-knock' statute," and to provide a remedy where agents conducted searches or seizures without warrants or pursuant to warrants issued without probable cause. 119 Cong. Rec. 41, 615 (Nov. 30, 1973); *see generally* 21 U.S.C. § 879.

The procedural history of the proviso further underscores its narrow scope. The House originally passed Resolution 8245 as an immigration and border control reorganization bill. H.R. Res. 8245, 93rd Cong. (1974). Only after the Collinsville raids did the Senate amend the bill, adding the proviso. S. Rep. No. 93-588, at 2–4 (1973); 119 Cong. Rec. 41, 615–16 (Nov. 30, 1973). When the amended bill returned to the House, multiple Representatives objected, concerned the proviso was nongermane.[3] 120 Cong. Rec. 4080 (Mar. 5, 1974). Opponents in the House argued adding a waiver of sovereign immunity, a tort law issue, to a departmental reorganization bill, an administrative issue, violated the House Germaneness Rule. *Id.*

The House members' objections would have made little sense if Congress understood the proviso to reach routine screening already common at borders and ports of entry. Such screening was well established by 1974, yet no one suggested the proviso would expose those activities to FTCA liability. Their silence is telling; it confirms Congress understood the proviso to be limited to traditional police misconduct, not administrative searches undertaken for regulatory or preventive purposes. The germaneness hurdle forced proponents of the amendment to define the proviso by its criminal investigatory context. If the proviso had been a general expansion of tort liability for all federal employees, then it would have failed the germaneness test, killing the amendment.

Hearings in the House point in the same direction. Congress was expressly urged to broaden the proviso to cover other non-law enforcement federal employees, including air-traffic controllers and Federal Aviation Administration personnel, and it declined. Hearings on H.R. 10439, at 107–09. The limitation was intentional. Had TSA screeners existed at the time, they

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[3] Clause 7 of Rule XVI, commonly referred to as the "germaneness rule," embodies the straightforward principle that an amendment must relate to the same subject matter as the provision it seeks to amend. House Committee on Rules, *Basic Training: Germaneness Rule*, https://rules.house.gov/resources/boot-camp/basic-training-germaneness-rule (last visited Jan. 2, 2026). The House of Representatives adopted the germaneness rule in 1789, and it has remained unchanged since its last revision in 1822. *Id.* Unlike the House, the Senate rarely requires germaneness. Floyd M. Riddick & Alan S. Furmin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-128, at 64 (1992) ("Germaneness of amendments to bills is not required by the rules of the Senate").

would have fallen squarely within the category of non-law-enforcement federal employees Congress consciously excluded.

To be sure, legislative history cannot displace clear statutory text. *See Perrin v. United States*, 444 U.S. 37, 42–43 (1979). Here, it confirms what the text and structure already show: Congress enacted a narrow remedy for victims of traditional police abuse during criminal investigations, not a regime encompassing administrative employees. Reading the proviso to encompass administrative screening would detach the statute from the specific misconduct Congress sought to remedy and transform a narrow response to police abuse into a general tort regime for federal employees—an expansion Congress expressly declined to enact.

d. Judicial expansion of the FTCA would undermine democratic accountability and disrupt the separation of powers.

As a final policy consideration, respecting the limits Congress placed on the FTCA's waiver of sovereign immunity promotes institutional legitimacy and democratic accountability. Decisions about whether, when, and to what extent the United States may be sued are legislative judgments. *See Sherwood*, 312 U.S. at 587–88; *Wisconsin Cent. Ltd*, 585 U.S. at 284. Congress, as the branch directly accountable to the electorate, struck a careful balance in the FTCA by waiving immunity only in narrowly defined circumstances and preserving it elsewhere. *See* 28 U.S.C. § 2880(h). Courts are not free to recalibrate the balance based on perceived inequities or evolving policy preferences. *See Price*, 174 U.S. at 375 ("It matters not what may seem to this court equitable . . . we cannot go beyond the language of the statute, and impose a liability which the government has not declared its willingness to assume."); *see* also *Pellegrino*, 937 F.3d at 200 (Krause, J., dissenting). Expanding liability beyond the boundaries Congress carefully drew risks upsetting the separation of powers by transferring a fundamentally legislative choice to the judiciary.

The concern is especially acute here. Congress was never required to waive sovereign immunity at all, and the limited waiver it did enact reflects deliberate tradeoffs of fiscal exposure, governmental operations, and accountability mechanisms. Strict adherence best preserves respect for the democratic process and the constitutional structure assigning distinct roles to each branch. *Pellegrino*, 937 F.3d at 199–200 (Krause, J., dissenting).

To be sure, several courts have read the proviso more broadly, relying on plain-meaning or disjunctive analyses. *See, e.g., Iverson*, 973 F.3d 843; *Corbett v. Transp. Sec. Admin.*, 568 F. App'x 690 (11th Cir. 2014); *Leuthauser*, 71 F.4th 1189; *Osmon*, 66 F.4th 144. Those approaches illustrate precisely the danger of judicial enlargement; they risk converting a narrowly targeted statutory remedy into a general vehicle for liability untethered from congressional design. Refusing to extend the FTCA beyond its text and structure does not leave misconduct unaddressed; it simply respects Congress' choice to channel accountability through other mechanisms and to reserve further expansion of liability for legislative—not judicial—action.

II. Even if the proviso applies, the discretionary function exception independently bars jurisdiction irrespective of an alleged constitutional violation.

Even assuming arguendo the proviso applies and reinstates the FTCA's waiver of sovereign immunity, the discretionary function exception independently preserves sovereign immunity for "[a]ny claim . . . 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." *See* 28 U.S.C. § 2680(a); *Martin*, 605 U.S. at 406–07. This exception forecloses the court's exercise of jurisdiction over claims challenging conduct that (1) involves an element of judgment or choice and (2) is of the kind the exception was designed to shield: namely, decisions grounded in social, economic, or political policy. *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536–38 (1988); *United States v. Gaubert*, 499 U.S. 315, 323–33 (1991).

Petitioner alleges a constitutional violation, but that does not alter the analysis.[4] The FTCA is not a vehicle for adjudicating constitutional claims, so an alleged constitutional violation does not negate the discretionary function exception where it is otherwise applicable. 28 U.S.C. § 2674; *see F.D.I.C. v. Meyer*, 510 U.S. 471, 477–78 (1994). Accordingly, if the discretionary function exception applies, dismissal is required, irrespective of any constitutional claims. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809–10 (1984).

a. TSA screening requires discretion under Gaubert's two-prong test.

Under *Gaubert*, "the nature of the conduct, rather than the status of the actor" determines whether the discretionary function exception applies. 499 U.S. at 322 (citing *Varig Airlines*, 467 U.S. at 813). The key inquiry is objective and does not turn on whether an employee subjectively exercised discretion. *Id.* at 322–25; *see also Seaside Farm, Inc. v. United States*, 842 F.3d 853, 858–59 (4th Cir. 2016). When governing statutes, regulations, or policies leave room for judgment or choice, the exception applies at the functional level, irrespective of how discretion was exercised in a particular instance. *Id.* at 325. Airport screening exemplifies the kind of judgment-laden function *Gaubert* places at the core of the discretionary function exception.

Consistent with *Gaubert*, once the first prong is met, there is a strong presumption the second prong is also met because discretionary conduct is inherently grounded in policy considerations. 499 U.S. at 324. TSA screening functions fall within the bounds of § 2680(a). *See*

[4] Because it is not currently at issue before this Court, Respondent does not dispute whether Petitioner's constitutional rights were violated by Officer Lurie. Nevertheless, the constitutional status of filming at TSA checkpoints is unsettled because the right to record government officials in public spaces is not unlimited. *Compare Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), *with Mocek v. City of Albuquerque*, 813 F.3d 912 (10th Cir. 2015).

Pudeler v. United States, No. 3:09-cv-1543, 2013 WL 6511937, at *7 (D. Conn. Dec. 12, 2013) (holding TSA screening decisions satisfy both prongs of the discretionary function analysis because they require judgment inseparable from transportation security policy).

To be sure, Respondent does not suggest every act committed by TSA employees is insulated by the discretionary function exception. In *Zeng v. United States*, the district court allowed a negligence claim to proceed against the United States where the plaintiff's allegations involved mere carelessness by TSOs in carrying out routine procedures, rather than discretionary, policy-laden decision making. No. 14-cv-3924, 2016 WL 8711090, *7 (E.D.N.Y. Sept. 30, 2016). *Zeng* reinforces the governing rule: where a claim challenges the negligent execution of a specific, non-discretionary task, § 2680(a) may not apply. Here, as in *Zeng*, the challenged conduct involves situational judgment embedded in TSA's security mission, so the discretionary function exception bars Petitioner's suit.

i. The ATSA and TSA policies encourage flexibility.

The first step in applying the exception is to determine whether the challenged conduct was governed by a specific binding directive or instead required the exercise of judgment or choice. *See Gaubert*, 499 U.S. at 323–33. Where a statute, regulation, or policy leaves the manner of performance open by setting general objectives without prescribing a compulsory course of action, the conduct necessarily involves an element of judgment or choice within the meaning of § 2680(a). *Berkovitz*, 486 U.S. at 535–36; *Gaubert*, 499 U.S. at 322–23. The relevant inquiry is not whether action was required, *but whether it was required in a particular manner*. *See Varig Airlines*, 467 U.S. at 813–14.

In *Varig Airlines*, although the Federal Aviation Administration was statutorily mandated to promote air safety, this Court held the regulatory scheme deliberately vested inspectors with discretion in how to conduct compliance reviews. 467 U.S. at 816–20. Because the governing framework articulated general safety objectives without mandating a particular inspection methodology, the challenged conduct involved an element of judgment or choice within the meaning of § 2680(a). *Id.* at 820. The same analysis governs here.

TSA screening readily satisfies the *Gaubert* standard. *See Gaubert*, 499 U.S. at 322–23. Although Congress statutorily mandated passenger screening, it deliberately allowed for flexibility in how passenger screening is conducted. *See* 49 U.S.C. § 44901. TSA's governing framework emphasizes adaptability, variability, and responsiveness to evolving threats, reflecting an operational design dependent on real-time assessment rather than rigid commands. In response to Petitioner's conduct, Officer Lurie demonstrated the flexibility Congress anticipated by altering the queue to avoid delaying other passengers. R. at 3. TSA itself explains it "incorporates unpredictable security measures, both seen and unseen," and "adjusts processes and procedures to meet the evolving threat" in order to achieve transportation security, such that passengers "may notice changes in procedures from time to time." Transp. Sec. Admin., *Security Screening*, https://www.tsa.gov/travel/security-screening (last visited January 1, 2025). These statements confirm screening is intentionally structured to allow for judgment—not mechanical compliance.

As further evidence of TSA policy, Petitioner's complaint cites the agency's public guidance, which states:

> TSA does not prohibit photographing, videotaping or filming at security checkpoints, as long as the screening process is not interfered with or sensitive information is not revealed. Interference with screening includes but is 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, refusing to assume the proper stance during screening, blocking the movement of others through the checkpoint or refusing to submit a recording device for screening. Additionally, you may not film or take pictures of equipment monitors that are shielded from public view.

Trans. Sec. Admin., *Can I Film and Take Photos at a Security Checkpoint?*, https://www.tsa.gov/travel/frequently-asked-questions/can-i-film-and-take-photos-security-checkpoint; R. at 4. Critically, the cited guidance does not prescribe a single method of enforcement or response. Instead, it entrusts screeners with discretion to assess interference and security risks based on context, circumstances, and professional judgment. Indeed, the absence of mandatory language or fixed enforcement protocols confirms no binding directive removes discretion in this setting. *See Berkovitz*, 486 U.S. at 540–43. Officer Lurie used discretion when implementing TSA Policy. R. at 3. Indeed, when explaining to Petitioner why her disruption would not be allowed to continue, he parrots the policy's language. R. at 3.

TSA's intrinsic structure mirrors the framework discussed in *American Reliable Insurance Co. v. United States*, 106 F.4th 498 (6th Cir. 2024). There, the plaintiff alleged negligence based on the National Park Service's failure to conduct inspections, maintain fire breaks, and implement protective measures. *Id.* at 503. Although the Park Service had general responsibilities related to land management and fire suppression, no statute, regulation, or policy dictated how, when, or by what means those responsibilities had to be carried out. *Id.* at 506–16. Instead, decisions regarding inspection frequency, protective measures, and operational response were left to employee judgment. *Id.* No mandatory directive controlled the conduct, so it fell within § 2680(a). *Id.*

The same structural principle is illustrated in *Gonzalez v. United States*, 814 F.3d 1022 (9th Cir. 2016). In *Gonzalez*, two plaintiffs alleged the Federal Bureau of Investigation (FBI) negligently failed to disclose intelligence about an imminent robbery to local law enforcement, citing federal guidelines in support. *Id.* at 1025–26. The Ninth Circuit held no statute, regulation, or binding policy required disclosure, explaining the guidelines set forth only general objectives rather than mandatory commands. *Id*. at 1030–31. Because the Guidelines left decisions about whether, when, and how to share information to agent judgment, the challenged conduct fell within § 2680(a). *Id.*

So too here. Petitioner has not identified—and cannot identify—any statute or policy that dictates a fixed method, sequence, or response for a given screening encounter; nor does any provision eliminate the need for individualized assessment by TSA personnel. That conclusion is reinforced by the nature of the authority Congress delegated to TSA, an agency charged with protecting public safety in a complex and evolving environment. 49 U.S.C. § 114. As with the National Park Service in *American Reliable* and the FBI in *Gonzalez*, TSA's delegated purpose is to facilitate public security with implementation details unspecified. Where Congress entrusts an agency with safeguarding the public but declines to dictate the precise manner of execution, decisions regarding how best to pursue that mission necessarily involve judgment. *See Wood v. United States*, 845 F.3d 123, 128–30 (4th Cir. 2017).

The instant case does not involve the negligent execution of a non-discretionary, administerial task many plaintiffs allege to argue the discretionary function exception does not shield the careless performance of routine duties. *See Myers & Myers, Inc., v. United States Postal Service*, 527 F.2d 1252 (2nd Cir. 1975). That principle applies only where a specific, mandatory directive governs the conduct at issue. *Id.* But where, as here, the governing framework leaves room for judgment and requires time-sensitive, situational decision making, the conduct remains discretionary, even if alleged to have been performed negligently. *See Gaubert*, 499 U.S. at 325–26; *Seaside*, 842 F.3d at 858–60.

ii. The challenged conduct reflects policy-laden decision making.

The second step in applying the exception asks whether the judgment identified in the first prong is the type of decision Congress intended to insulate from judicial second-guessing. *Gaubert*, 499 U.S. at 322–23. Where conduct satisfies the first prong of the test, courts presume the second prong is also met because discretionary conduct is presumed to be grounded in policy consideration. *Wood*, 845 F.3d at 128; *accord Am. Reliable Ins. Co.*, 106 F.4th at 505. This inquiry does not turn on whether the decision was correct, reasonable, or even optimal, but on its nature. *Varig Airlines,* 467 U.S. at 813. When the governing framework entrusts officials with balancing competing objectives like public safety, operational efficiency, resource allocation, and risk mitigation, the resulting judgment falls squarely within § 2680(a)'s scope.

Accordingly, the focus is on whether the challenged conduct reflects policy-based decision making rather than the mechanical execution of a prescribed task. This follows the nature of the judgment involved, not from the identity or rank of the official exercising it. For example, the National Park Service in *Wood* had a general duty to ensure visitor safety, but no statute or policy dictated the specific method, timing, or manner of maintenance or repair. 845 F.3d at 128–30. Those decisions were left to the professional judgment and discretion of on-site officials and were therefore shielded by the discretionary function exception. *Id.* Similarly, in *Gonzalez*, the Ninth Circuit held the Federal Aviation Administration's public safety mission required officials to balance competing considerations: risk, resources, and operation efficiency. 814 F.3d at 1028–31. Also, in *American Reliable*, the Sixth Circuit reaffirmed where governing policy does not mandate the frequency, duration, or method of protective measures, the resulting decisions necessarily involve judgment and choice grounded in policy. 106 F.4th at 505.

Here, TSA's role is no different. Congress authorized TSA to secure the nation's transportation system and mandated passenger screening, but it did not prescribe the precise manner in which screening must be conducted. *See* 49 U.S.C. §§ 114(d)-(g), 44901(a). By design, the statutory framework embeds discretion into both agency policy and its execution. The challenged conduct therefore reflects precisely the kind of policy-laden judgment Congress intended § 2680(a) to protect.

b. An alleged constitutional violation does not defeat the discretionary function exception.

The *Gaubert* test inquiry turns on whether the governing legal framework removed discretion, not on whether the challenged conduct is later alleged to have been unlawful. *Gaubert*, 499 U.S. at 322–23. Section 2680(a) applies "whether or not the discretion involved be abused," and courts should not inquire into the correctness or legality of discretionary decisions to determine jurisdiction. *Gaubert* 499 U.S. at 338. Indeed, "[t]he inquiry is not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one." *Shivers v. United States*, 1 F.4th 924, 931 (11th Cir. 2021).

To be sure, the circuit courts and commentators alike have questioned whether the discretionary function exception, as applied after *Gaubert*, has expanded beyond its proper bounds, and have suggested the Constitution itself might operate as a source of constraint analogous to a statute or regulation withdrawing discretion. *See Martin*, 605 U.S. at 416–18 (Sotomayor, J., concurring); R. at 20 (Weiss, J., concurring). Specifically, the circuit courts are divided on whether alleged unconstitutional conduct categorically removes a claim from the discretionary function exception. *See* Olivia Goldberg, Note, *(Extra)ordinary Tort Law*, 76 Stan. L. Rev. 481, 594–95 (2024). The split turns on how courts define the relevant conduct and what qualifies as a binding constraint under *Gaubert*. *Id.* at 495.

The circuits aligned with Petitioner's suggested approach, treat alleged constitutional violations as categorically outside the discretionary function exception. *See, e.g., Xi v. Haugen*, 68 F.4th 824, 839 (3d Cir. 2023); *Loumiet v. United States,* 828 F.3d 935, 944 (D.C. Cir. 2016);

Limone, 579 F.3d at 101–02; *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nurse v. United States*, 226 F.3d 996, 1002 & n.2 (9th Cir. 2000). These decisions reason federal officials lack discretion to violate the Constitution and therefore conclude *Gaubert*'s first prong is unsatisfied. *Gaubert* 499 U.S. at 338. In contrast, the circuits aligned with Respondent reject a categorical carve-out for constitutional allegations. *See, e.g., Shivers*, 1 F.4th at 930; *Linder v. United States*, 937 F.3d 1087, 1090–92 (7th Cir. 2019). Unconstitutional conduct may be tortious, or even actionable through other remedial regimes, but it does not retroactively negate the discretion the governing framework conferred at the outset.

i. The Constitution does not change the *Gaubert* analysis.

Under Petitioner's approach, courts define "relevant conduct" at an artificially low level of generality, such as a retaliatory enforcement action or an unconstitutional investigation, and then conclude that such conduct cannot be discretionary because government officials lack discretion to violate the Constitution. *See, e.g., Raz*, 343 F.3d at 948 (treating alleged constitutional violations as per se outside the discretionary function exception); *Loumiet*, 828 F.3d at 944–445 (holding plausible constitutional violations categorically defeat § 2680(a)). This framing collapses the *Gaubert* inquiry by equating the alleged illegality of the conduct with whether discretion exists.

In contrast, Respondent's approach correctly defines the relevant conduct at the level *Gaubert* requires: the category of governmental activity Congress authorized officials to perform. *See, e.g.*, 499 U.S. at 322–23 (defining relevant conduct at the level of the governmental function authorized by statute or regulation); *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220–22 (10th Cir. 2016) (rejecting plaintiff's attempt to define conduct at the level of the alleged wrongdoing instead of the authorized governmental activity). Framed at this level, TSA screening, like other frontline security functions, clearly involves judgment and choice. Congress authorized the TSA to conduct security screening to protect aviation security, but it did not prescribe specific screening decisions. *See generally*, 49 U.S.C. § 114. In fact, no statute, regulation, or binding policy dictates precisely how individual screening encounters must be conducted. The absence of such mandatory directives is dispositive under *Gaubert*'s first prong. 499 U.S. at 324–35.

The Constitution does not alter the analysis because it does not operate as a statute, regulation, or policy that prescribes specific conduct in a given operational context. *See Marbury v. Madison*, 5 U.S. 137, 177–178 (1803) (defining the Constitution as a "superior, paramount law" distinct from "ordinary legislative acts"). It sets outer legal boundaries, defining what the government may not do—not what it must do in exercising discretion. *See, e.g.,* U.S. CONST. amend. IV (prohibiting unreasonable searches but, notwithstanding the warrant requirement, providing no explanation of a reasonable procedure).

ii. The FTCA only waives sovereign immunity for conduct analogous to private person liability.

Apart from *Gaubert*, reliance on constitutional framing fails for a more fundamental reason: the FTCA authorizes suit only where the United States, "if a private person," would be liable under state tort law. 28 U.S.C. § 2674. Constitutional claims fail that requirement because a private person cannot violate the Constitution. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477–79 (1994). As this Court held in *Meyer*, "the United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims." *Id.* at 478. That limitation is dispositive here.

The Petitioner's theory disregards structural boundaries by treating alleged First Amendment violations as *Gaubert*-displacing constraints. This permits constitutional standards to substitute for the private-person analogue Congress made jurisdictional. The FTCA waives immunity only where the government would be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Because no private individual can commit a First Amendment violation, such claims necessarily fall outside the waiver. *Meyer*, 510 U.S. at 477–78; *Linder*, 937 F.3d at 1090–91. By severing FTCA liability from the private-person analogue, Petitioner's approach transforms the limited waiver into a general constitutional damages regime Congress has repeatedly declined to enact. *See Meyer*, 510 U.S. at 477–79; 120 Cong. Rec. 4080 (Mar. 5, 1974) ("The Tort Claims Act is tied to torts, not to constitutional violations.").

The FTCA places the United States in the position of a private tortfeasor under state law; it does not render the government liable for constitutional wrongs committed by individual officers. 28 U.S.C. § 2674; *Meyer*, 510 U.S. at 477–78. Constitutional claims may be addressed through other remedial regimes, but they cannot be used to expand the FTCA's waiver of sovereign immunity or to defeat the discretionary function exception.

iii. Sovereign immunity is jurisdictional in nature.

Although the circuit courts have differed in how they label § 2680(a), but the disagreement does not alter a controlling principle: issues of sovereign immunity are inherently jurisdictional. *See Hardscrabble*, 840 F.3d at 1220 (treating § 2680(a) as jurisdictional); *but see Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000) (describing § 2680(a) as an affirmative defense). Nevertheless, this Court's precedent recognizes sovereign immunity is jurisdictional in nature. *Mitchell*, 463 U.S. at 212; *Meyer*, 510 U.S. at 475. When § 2680(a) applies, Congress has not consented to suit, and the court lacks jurisdiction regardless of the label attached to the inquiry.

Seen in that light, the oft-invoked maxim that government officials have "no 'discretion' to violate the Federal Constitution" is inapposite. *See Loumiet*, 828 F.3d at 944 (quoting *Owen v. City of Independence, Mo.*, 445 U.S. 622, 649) (invoking the principle). This principle arises in the context of qualified immunity; it does not redefine the FTCA's jurisdictional inquiry. *See*

Meyer, 510 U.S. at 485–86 (distinguishing individual constitutional remedies with FTCA liability); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971) (authorizing individual constitutional claims). The discretionary function analysis asks whether discretion was withdrawn by binding law, not whether discretion was exercised lawfully. *See* 28 U.S.C. § 2680(a). Because § 2680(a) applies "whether or not the discretion involved be abused," FTCA suits are not vehicles for testing the legality or propriety of discretionary administrative action. *Gaubert*, 499 U.S. at 322–23; *Varig Airlines*, 467 U.S. at 808, 814.

Questions under the discretionary function exception are resolved at the outset of litigation—often on a Rule 12(b)(1) motion—before discovery and well before trial. *Mitchell*, 463 U.S. at 212; *Meyer*, 510 U.S. at 475. The sequencing reflects a foundational rule of federal adjudication: jurisdiction must be established before a court may consider the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (rejecting "hypothetical jurisdiction" and holding courts must assure itself of jurisdiction before addressing the merits). Permitting allegations of constitutional wrongdoing to defeat § 2680(a) would invert that order by forcing courts to adjudicate merits questions merely to determine whether jurisdiction exists, only to dismiss for want of authority at a later stage. Jurisdiction cannot be contingent on the merits; it must come first.

Respondent's approach properly respects foundational civil procedure principles. Whether characterized as "jurisdictional" or "affirmative," when § 2680(a) applies, the operative consequence is the same across circuits: Congress has not waived sovereign immunity, and the claim cannot proceed. *See, e.g., Medina*, 259 F.3d at 223–24; *Foster*, 522 F.3d at 1079. For that reason, it is improper to consider the merits of Petitioner's claim, such as the alleged constitutional violation, before determining whether jurisdiction exists.

The threshold posture is dispositive because the discretionary function exception operates at the outset of litigation; it cannot serve as a conduit for constitutional adjudication. Constitutional claims ordinarily require factual development and merits based analysis—precisely what is inappropriate at the jurisdictional stage. *See Steel Co.*, 523 U.S. 94–95. Allowing allegations of constitutional error to defeat § 2680(a) would invert the statutory scheme by forcing courts to resolve constitutional questions in order to determine jurisdiction, contrary to Congress' design and this Court's instruction that sovereign immunity inquiries precede and remain distinct from liability determinations. *See Meyer*, 510 U.S. at 475; *Gaubert*, 499 U.S. at 322–23.

Congress expressly preserved sovereign immunity for discretionary acts "whether or not the discretion involved be abused," and in doing so foreclosed judicial inquiry into the legality of discretionary decisions through FTCA litigation. *See* 28 U.S.C. § 2680(a). Treating constitutional allegations as jurisdiction-creating prescriptions would transform the sovereign immunity waiver's limiting provision into a constitutional enforcement mechanism. Nothing in the FTCA supports such a result.

iv. Expanding the FTCA to mirror *Bivens* would result in an unprecedented expansion of sovereign immunity.

Permitting constitutional allegations to defeat the discretionary function exception would transform the FTCA into a surrogate *Bivens* action, a result inconsistent with this Court's precedent. Constitutional damages claims—such as Petitioner's—should be brought against individual officers, not the sovereign. *See*, 403 U.S. 388; *Meyer*, 510 U.S. at 485–86. This Court expressly stated expanding *Bivens* is a "disfavored judicial activity." *Egbert v. Boule*, 596 U.S. 482, 490–98 (2022). Petitioner errs by importing *Bivens* logic into a statutory waiver.

This Court rejected efforts to alter the FTCA and mirror *Bivens* by turning it into a constitutional damages statute. *Meyer*, 510 U.S. at 485–86. In *Meyer*, this Court held constitutional tort claims are not cognizable under the FTCA because the statute limits liability to circumstances in which a private person would be liable under state law. *Id*. Then, in *Egbert*, this Court reaffirmed that the judiciary may not revise statutory schemes to offset limits on *Bivens* remedies. 596 U.S. at 490–98. The absence of a *Bivens* remedy therefore does not license expansion of the FTCA.

Perceived remedial gaps do not change the analysis. If the discretionary function exception sweeps too broadly, or if the available remedies are inadequate, the fault lies with Congress. *See Price*, 174 U.S. at 375 ("it matters not what may seem to this court equitable or what obligation we may deem ought to be assumed by the government"). Here, remedy creation and expansion for constitutional violations are legislative functions. *See Wisconsin Cent. Ltd*, 585 U.S. at 284 ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences.") The narrowing, or even absence, of a *Bivens* remedy does not authorize courts to enlarge the FTCA's waiver of sovereign immunity to compensate for perceived inequities. *Price*, 174 U.S. at 375 (courts may not go beyond the "letter of such consent" to impose liability the Government has not agreed to assume).

As this Court already recognized, Congress expressed its intent to refrain from creating a constitutional damages remedy through the FTCA as expressed through its response to the Collinsville raids. *See Martin*, 605 U.S. at 420 (Sotomayor, J., concurring) ("Courts, however, should not ignore the existence of the law enforcement proviso, or the factual context that inspired its passage, when construing the discretionary function exception."). The Collinsville raids were clear violations of the Fourth Amendment but left victims without a remedy, leading Congress to pursue redress. *See id.* When faced with the opportunity to create a statutory remedy for these constitutional violations, Congress did not do so. Instead, the legislature chose only to enact the law enforcement proviso, re-waiving sovereign immunity for intentional torts committed by law enforcement officers. *See id.*; U.S.C. § 2680(h). Notably, Congress amended the FTCA with the benefit of hindsight; *Bivens* was decided three years prior to the creation of the proviso, so if Congress had intended to mirror *Bivens*, it could have easily done so. *Contrast Bivens*, 403 U.S. 388 (decided in 1971), *with* 28 U.S.C. § 2680(h) (enacted in 1974). Yet again, it did not.

Allowing constitutional allegations to expand the FTCA's waiver of sovereign immunity would contravene foundational separation-of-powers principles. THE FEDERALIST No. 81 (Alexander Hamilton). Waivers of sovereign immunity must be strictly construed in favor of the sovereign, and courts lack authority to enlarge them beyond what Congress has unequivocally expressed. *Cooper*, 566 U.S. at 290–94. Petitioner erroneously uses the FTCA as a vehicle for her constitutional claims.

CONCLUSION

The FTCA is a limited waiver of sovereign immunity, and Petitioner bears the burden of establishing her claim falls within that waiver absent any statutory exception. Here, Petitioner's false imprisonment claim falls within § 2680(h)'s intentional tort exception, and she has not properly established the law enforcement proviso applies. Congress confined the proviso to a narrow class of federal officers empowered to execute traditional law enforcement powers not statutorily provided to TSA screeners. Therefore, sovereign immunity has not been waived because TSA screeners are not officers as defined by the proviso, so Petitioner's suit is jurisdictionally barred.

Even if the proviso applies, the discretionary function exception independently preserves sovereign immunity. Operation of TSA checkpoints require discretion under an intentionally flexible framework designed to manage evolving threats, precisely the type of policy-laden decisions § 2680(a) protects. Petitioner's allegation of a constitutional violation does not affect the *Gaubert* analysis. The Constitution does not operate as a mandatory prescription, nor does it create private-person liability. Because Petitioner cannot overcome the discretionary function exception, subjection matter jurisdiction is absent.

For these reasons, the judgment below should be **affirmed**.

Respectfully submitted,

/s/ Team 255

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