
No. 25-1726

IN THE
Supreme Court of the United States

OCTOBER 2025 TERM

WILLOW SCHIMMEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT*

*Arising From Cause No. 24-CV-21063 EYY
In the United States District Court for the District of Eastland*

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

Team 315
Chicago
Counsel for Respondent

QUESTIONS PRESENTED

- I. Section 2680(h) of the FTCA only waives sovereign immunity for six torts committed by investigative or law enforcement officers who are empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law. Transportation Security Officers are not empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law. Are Transportation Security Officers investigative or law enforcement officers under Section 2680(h)?
- II. Section 2680(a) of the FTCA immunizes the United States from liability for its federal employees' tortious yet discretionary acts, whether or not the discretion involved be abused. John Lurie, a Transportation Security Officer, exercised his discretion in asking a disruptive passenger to put her phone away at the security checkpoint. The passenger eventually complied but later alleged a violation of her First Amendment right to record. Does Section 2680(a), which contains no constitutional-claims exclusion, cover Officer Lurie's discretionary response to a perceived security threat?

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OPINIONS BELOW

The opinion and order of the United States District Court for the District of Eastland is not published but is reproduced in the record. R. at 2–11. The opinion for the panel of the Thirteenth Circuit Court of Appeals is also unpublished and reproduced in the record. R. at 12–25.

JURISDICTION

Petitioner invoked the district court’s jurisdiction under the FTCA. R. at 4–5 (citing 28 U.S.C. § 1346(b)(1)). On March 17, 2025, the district court dismissed Petitioner’s complaint for lack of jurisdiction. R. at 11. Petitioner timely filed a notice of appeal. R. at 13. The Thirteenth Circuit Court of Appeals had jurisdiction over that final order of dismissal and affirmed. R. at 20; *see* 28 U.S.C. § 1291. This Court granted the petition for writ of certiorari. R. at 26. This Court’s jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Sections 2680(a) and 2680(h) of the Federal Tort Claims Act (“FTCA”). 28 U.S.C. § 2680(a), (h).

STATEMENT OF THE CASE

I. Statement of the Facts

Petitioner’s Entitlement at Eastland International Airport. On March 18, 2024, Petitioner arrived at Eastland International Airport and queued at the airport’s sole TSA security checkpoint. R. at 2. Petitioner faced a long walk to her gate, with her flight’s boarding scheduled to close in less than one hour. R. at 2. Given Petitioner’s untimely arrival at the airport, she grew increasingly concerned with the security line’s slow progression. R. at 2. To document her concerns, Petitioner pulled out her smartphone and began recording her progress. R. at 2. Filming with her front-facing camera, Petitioner commented on the “ridiculously slow” movement of the line. R. at 2–3. Then, Petitioner began filming with her rear-facing camera, all while mocking the TSA agents and

cursing about their security efforts. R. at 3. Petitioner stated that “TSA agents [were] stopping and frisking damn near everybody after they [went] through the body scanner.” R. at 3. According to Petitioner, however, she kept her phone at chest level and did not impede any other traveler’s progress. R. at 3. Petitioner ceased her narrations for a brief moment to present identification. R. at 3. Then, she continued recording as she moved closer to the screening area, noting the “somehow even more ridiculously slow” movement of the line. R. at 3.

Officer Lurie Prioritizes Public Safety. At this point, TSA employee John Lurie (“Officer Lurie”) approached Petitioner and identified himself as a Transportation Security Officer (“TSO”). R. at 3. As a TSO, Officer Lurie was “responsible for conducting security screenings of passengers and baggage, operating screening equipment, and controlling passenger ingress and egress at security checkpoints and terminal entry and exit points.” R. at 3. Officer Lurie found Petitioner’s conduct to be disruptive and said, “We saw you’ve been filming us.” R. at 3. Officer Lurie then asked Petitioner to cease her recordings and put her phone away. R. at 3. Petitioner refused and stated her belief that Officer Lurie and his colleagues were “frisking people who didn’t need to be frisked” and “making everybody late and miserable.” R. at 3. Petitioner said she would stop recording upon reaching the screening area. R. at 3. In response to her indignance, Officer Lurie—again—instructed Petitioner to stop recording and noted that “she was bothering everybody and keeping [the TSA employees] from doing their jobs.” R. at 3. Officer Lurie further emphasized that she would not be able to progress until she ceased her disruptive behavior. R. at 3.

Vexation Meets Viscose. Officer Lurie then adjusted a retractable belt on a barrier stanchion to limit her forward progression, while allowing other passengers to continue through the line. R. at 3. Without the power to execute searches, seize evidence, or make arrests, Officer Lurie indicated that he would involve law enforcement if Petitioner’s obstinacy persisted. R. at 3. Officer

Lurie stated that he had radioed his supervisor and that he did not know what additional protective measures law enforcement would take. R. at 3. Officer Lurie reminded Petitioner that “[TSA employees] can’t let her disrupt things or record sensitive areas.” R. at 3.

The supervisor never appeared, and Petitioner failed to cease her recording in the meantime. R. at 3. Instead, Petitioner insisted that she was not recording sensitive areas and asked that she be allowed to continue, despite her defiance. R. at 3. Finally, Petitioner stopped recording and was immediately allowed to continue through security. R. at 3.

Petitioner alleges that this less-than-four-minute standoff caused her to miss her flight, rather than her late arrival to the airport. R. at 3–4. Petitioner also asserts she was forced to sprint to her gate, which caused her to sprain her ankle. R. at 3. Lastly, Petitioner claims to have suffered “considerable mental anguish” from being trapped inside the belt barrier stanchion as she continued to ignore Officer Lurie’s requests. R. at 4.

II. Course of Proceedings

The District Court. Petitioner timely commenced an action against the United States, asserting a claim for false imprisonment under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671–2680. R. at 2.¹ The FTCA waives the United States’ sovereign immunity from civil suits seeking monetary damages for its employees’ tortious acts. R. at 2. In its Rule 12(b)(1) motion to dismiss, the United States raised two exceptions to this waiver that bar Petitioner’s suit: (1) the intentional tort exception (28 U.S.C. § 2680(h)) and (2) the discretionary function exception (28 U.S.C. § 2680(a)). R. at 2.

The district court did not reach the merits of Petitioner’s false imprisonment claim. R. at 5–11. Rather, the district court erroneously found that TSOs are subject to the law enforcement

¹ It is assumed that Petitioner exhausted her administrative remedies by filing a claim against TSA under 28 U.S.C. § 2675(a), which TSA denied. R. at 4–5.

proviso. R. at 7. This finding enabled Petitioner’s claim to withstand the first exception under § 2680(h). R. at 7. The district court then addressed an argument that is no longer before this Court, given this Court’s decision in *Martin v. United States*, 605 U.S. 395, 401 (2025). R. at 13. Despite finding for Petitioner on the first exception, the district court correctly found that the second exception under § 2680(a) barred Petitioner’s suit. R. at 11. The district court ultimately dismissed Petitioner’s claim for lack of subject matter jurisdiction. R. at 11.

The Thirteenth Circuit. The Thirteenth Circuit affirmed and held the district court lacked subject matter jurisdiction over Petitioner’s claim. R. at 20. In affirming, the Thirteenth Circuit held that TSOs are not “investigative or law enforcement officer[s]” and are therefore not subject to the law enforcement proviso under § 2680(h). R. at 17. The Thirteenth Circuit based its rationale on (1) TSOs’ lack of law enforcement authority and (2) the distinction between investigatory and administrative searches. R. at 14–17. The Thirteenth Circuit also held that, even if TSOs were “officers” under the law enforcement proviso, the discretionary-function exception barred Petitioner’s claim . R. at 17. In applying the discretionary-function exception, the Thirteenth Circuit emphasized that Petitioner’s alleged constitutional violation did not change the analysis nor outcome. R. at 18–20. Judge Zerelda dissented on both issues. R. at 20–25.

Petitioner filed a petition for writ of certiorari on both issues, which this Court granted. R. at 26.

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit held Section 2680(h) of the FTCA bars Petitioner’s claim. This Court should **affirm**. Section 2680(h) waives sovereign immunity for six intentional torts committed by “investigative or law enforcement officer[s].” Within Section 2680(h), the FTCA’s law enforcement proviso defines “investigative or law enforcement officer[s]” as officers who are empowered by law to execute searches, seize evidence or make arrests for violations of federal law. While TSOs are called officers, this designation is not dispositive. Despite their job title, TSOs are not empowered by law to execute searches, seize evidence, or make arrests for violations of federal law. Thus, TSOs are not “officers” under the law enforcement proviso’s definition. Further, the FTCA does not define the term “search.” But the FTCA’s legislative history and context demonstrates the statute’s focus on traditional law enforcement functions like investigatory searches. TSOs are only empowered to conduct screenings, not investigatory searches. This distinction between investigatory and administrative searches therefore removes TSOs from the law enforcement proviso and bars Petitioner’s claim.

II.

The Thirteenth Circuit held Section 2680(a) of the FTCA also bars Petitioner’s claim. This Court should **affirm**. Section 2680(a) immunizes the United States from liability when its federal employees commit tortious yet discretionary acts. This Court created a two-part test for determining when Section 2680(a), also known as the discretionary-function exception, applies. And, under this test, Section 2680(a) applies when a federal employee’s conduct is (1) discretionary in nature and (2) susceptible to a policy rationale. Officer Lurie’s conduct satisfies both parts of this test. To shirk dismissal of her claim, Petitioner alleges a constitutional violation.

Petitioner's argument is erroneous for two reasons. First, the discretionary-function exception provides no constitutional-claims carveout; this exception applies "whether or not the discretion involved be abused." Second, the FTCA only applies to claims redressable as torts. There is no common law tort analogue for First Amendment violations of free speech. Thus, the discretionary-function exception bars Petitioner's claim, irrespective of her alleged First Amendment violation.

ARGUMENT

This Court should affirm the Thirteenth Circuit’s decision for two reasons:

- (1) TSOs are not investigative or law enforcement officers under Section 2680(h) of the FTCA.
- (2) Section 2680(a) of the FTCA bars Petitioner’s claim, irrespective of an alleged constitutional violation.

Standard of Review. Questions of law are reviewed de novo. *Monasky v. Taglieri*, 589 U.S. 68, 83 (2020). For appeals that arise from a Rule 12(b)(1) motion to dismiss, this Court accepts as true all factual allegations from the complaint.² *United States v. Gaubert*, 499 U.S. 315, 327 (1991). Then, this Court “ask[s] whether the allegations state a claim sufficient to survive a motion to dismiss.” *Id.* To survive a motion to dismiss, the complaint must allege facts to support a finding that the challenged actions do not fall within 28 U.S.C. § 2680 of the FTCA. *Am. Reliable Ins. Co. v. United States*, 106 F.4th 498, 504 (6th Cir. 2024). The party asserting jurisdiction bears the burden of establishing that a claim falls within this Court’s jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

I. TSOs ARE NOT INVESTIGATIVE OR LAW ENFORCEMENT OFFICERS UNDER SECTION 2680(H) OF THE FTCA.

The FTCA grants district courts exclusive jurisdiction over claims against the United States for “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission” of a federal employee. *Millbrook v. United States*, 569 U.S. 50, 52 (2013); 28 U.S.C. § 1346(b)(1). This statute “was designed primarily to remove the sovereign immunity of the United States from suits in tort.” *Millbrook*, 569 U.S. at 52.

While the FTCA contains a broad waiver of sovereign immunity, this waiver remains subject to several exceptions. *See* 28 U.S.C. § 2680. Among these exceptions exists the “intentional

² This standard applies because the United States’ motion constitutes a “facial attack” on jurisdictional allegations. *See* R. at 5.

tort exception.” *See id.* § 2680(h). This exception preserves the United States’ sovereign immunity against “claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” *Levin v. United States*, 568 U.S. 503, 507 (2013) (citing § 2680(h)).

But Congress amended the intentional tort exception by subsequently adding a proviso covering claims “that arise out of the wrongful conduct of law enforcement officers.” *Millbrook*, 569 U.S. at 53; Act of Mar. 16, 1974, Pub. L. 93–253, § 2, 88 Stat. 50. This so-called “law enforcement proviso” waives sovereign immunity for six intentional torts caused by the “acts or omissions of investigative or law enforcement officers.” *Millbrook*, 569 U.S. at 54. And the law enforcement proviso defines “investigative or law enforcement officers” to mean “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.” § 2680(h).

The Thirteenth Circuit correctly held that TSOs—like Officer Lurie—do not fall within the law enforcement proviso and, thus, the intentional tort exception bars Petitioner’s claim. *See R.* at 17. This Court should reach the same conclusion for two reasons. First, the FTCA’s plain text does not include TSOs. And second, both the legislative history and functions of TSOs exclude them from the proviso.

A. The FTCA’S plain text dictates that TSOs are not investigative or law enforcement officers.

The starting point for statutory interpretation “must, of course, be the language” of the statute. *See Kosak v. United States*, 465 U.S. 848, 853 (1984). And courts construe the meaning of a statute’s words in accordance with their “ordinary and natural meaning”. *See United States v. Jungers*, 702 F.3d 1066, 1071 (8th Cir. 2013). With this, courts consider “the whole statutory text.” *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). The words must be considered in

accordance with the “specific context in which that language is used, and the broader context of the statute as a whole.” *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Without this context, resulting interpretations could confer “unintended breadth to the Acts of Congress.” *See Dolan*, 546 U.S. at 486.

The law enforcement proviso waives sovereign immunity only when the “alleged tortfeasor is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” *See Pellegrino v. United States of Am. Transp. Sec. Admin., Div. of Dep’t of Homeland Sec.*, 937 F.3d 164, 182 (3d Cir. 2019) (Krause, J., dissenting) (citing § 2680(h)) (internal citations omitted). TSOs conduct screenings but do not engage in traditional law enforcement functions. Considering both the FTCA’s context and the statutory terms’ ordinary meanings, TSOs therefore fail to qualify as “investigative or law enforcement officers.” *See* 28 U.S.C. § 2680(h).

1. The plain meaning of “officer” connotes law enforcement.

A word’s usage ordinarily “accords with its dictionary definition.” *See Yates v. United States*, 574 U.S. 528, 537 (2015). But this does not render dictionary definitions “dispositive of the meaning of” a statutory term. *See id.* at 538. Circuits that have held TSOs to be “investigative or law enforcement officer[s]” relied on overly broad definitions of the term “officer” to conclude TSOs are officers of the United States. *See, e.g., Koletas v. United States*, 159 F.4th 813, 818–20 (11th Cir. 2025); *Mengert v. United States*, 120 F.4th 696, 705–06 (10th Cir. 2024); *Leuthauser v. United States*, 71 F.4th 1189, 1194–96 (9th Cir. 2023); *Osmon v. United States*, 66 F.4th 144, 147–48 (4th Cir. 2023); *Iverson v. United States*, 973 F.3d 843, 848–50 (8th Cir. 2020); *Pellegrino*, 937 F.3d at 170–72.

The word “officer” invites many broad definitions, but courts cannot cherry-pick definitions to match their preferred outcomes. In *Pellegrino*, for example, the Third Circuit relied on two definitions of “officer.” *See* 937 F.3d at 170 (citing *Officer*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971); *Officer*, BLACK’S LAW DICTIONARY (4th ed. rev. 1968)). First, the court defined an officer as someone who “serve[s] in a position of trust or authority especially as provided for by law.” *See id.* (citing *Officer*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971)). Second, the court defined an officer as “one holding a position of trust or authority.” *See id.* (citing *Officer*, BLACK’S LAW DICTIONARY (4th ed. rev. 1968)). Such broad definitions inevitably encompass employees who do **not** perform law enforcement functions. *See id.* at 190 (Krause, J., dissenting). Further, these overbroad readings fail to consider the context in which the FTCA distinguishes between employees and officers.

This Court has long counseled that the “meaning of a word, and consequently, the intention of the legislature” must be “ascertained by reference to the context” in which that word appears. *See Neal v. Clark*, 95 U.S. 704, 709 (1878). The FTCA distinguishes between an “employee” and an “officer,” addressing both terms under different waivers of sovereign immunity. *Compare* § 2680(a) (waiver of sovereign immunity for “[a]ny claim based upon an act or omission of an **employee** of the Government” (emphasis added)); *with* § 2680(h) (waiver of sovereign immunity for acts or omissions based on “investigative or law enforcement **officer[s]**” (emphasis added)).

When Congress uses “particular language in one section of a statute but omits it in another,” this Court “presumes that Congress intended a difference in meaning.” *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012) (“[A] material variation in terms suggests a variation in meaning.”). Ignoring

this clear distinction, circuits have held that TSOs are subject to the proviso, thereby creating a situation in which no distinction exists between an “employee” and an “officer.” *See Pellegrino*, 937 F.3d at 190 (Krause, J., dissenting).

This distinction also appears in TSA’s authorizing statute: the Aviation and Transportation Security Act (“ATSA”). The ATSA grants the TSA Administrator both “airport screening operations and law enforcement powers.” *See Hernandez v. United States*, 34 F. Supp. 3d 1168, 1178 (D. Colo. 2014) (citing 49 U.S.C. § 114(e) & (p)) (internal quotations omitted). TSOs—like Officer Lurie—are therefore not authorized to conduct “law enforcement activities.” *See* R. at 3; *see also* § 114(p). Rather, the TSA authorizes law enforcement officers—not TSOs—to “carry firearms at each airport security screening location” as well as make arrests and execute warrants. *See* 49 U.S.C. § 44901(h)(1); § 114(p). The ATSA further “directs that screenings . . . be carried out by a Federal Government employee” like TSOs, rather than law enforcement officers. *See Leuthauser*, 71 F.4th at 1196 (citing 49 U.S.C. § 44901(a)). Thus, the TSA’s enabling statute likewise indicates that TSOs do not perform law enforcement functions that would classify them as “investigative or law enforcement officer[s].”

Petitioner nonetheless argues that the ATSA’s definition of “employees” also includes “officers,” and TSOs are therefore investigative or law enforcement officers under the proviso. Petitioner’s argument is erroneous for two reasons. First, the ATSA defines federal “employee” by cross-referencing civil service laws. *See* § 44901(a) (providing that 5 U.S.C. § 2105 defines a federal government employee). The “commonsense proposition” is that “officers” are employed by the United States, but this alone should not “detract from the significance of Congress’s choosing different words.” *See Pellegrino*, 937 F.3d at 192 (Krause, J., dissenting). Second, this Court has held that the proviso “focuses on the *status* of persons whose conduct may be

actionable.” *See Millbrook*, 569 U.S. at 56 (emphasis added). Given this focus, the FTCA directs courts to examine the “particular law that empower[s] employees of the relevant agency.” *See Iverson*, 973 F.3d at 858 (Gruender, J. dissenting) (internal quotations omitted); *see also Metz v. United States*, 788 F.2d 1528, 1532 (11th Cir. 1986) (holding that proviso cannot be expanded to include governmental actors who are not law enforcement officers). The ATSA therefore fails to provide the “status” necessary for TSOs’ conduct to be actionable under the FTCA.

Moreover, the argument is unpersuasive that TSOs constitute “officers” because of their job title and uniform. *See Leuthauser*, 71 F.4th at 1195; *Pellegrino*, 937 F.3d at 170. TSA began referring to TSA screeners as “TSOs” in 2005 to “improve morale and foster upward mobility opportunities within [the] profession.” *See Pellegrino*, 937 F.3d at 193 n.14 (Krause, J., dissenting). Thus, TSOs’ job titles are not dispositive of their “officer” status. *Id.* Further, the FTCA defines “officer.” *See* § 2680(h) (“‘[I]nvestigative or law enforcement officer’ means any officer of the United States who is empowered by law to execute searches, to seize evidence, and to make arrests for violations of Federal law.”). TSOs are not empowered to perform any law enforcement functions and are therefore not “officers” under the FTCA. *See id.*

The ATSA also vests different powers in TSA screeners versus TSA law enforcement officers, further evidencing the distinction between “officers” and “employees.” *Compare* 49 U.S.C. § 114(e) (describing screening procedures conducted by employees), *with* 49 U.S.C. § 144(p) (defining law enforcement powers). Some circuits have nonetheless ignored both the FTCA’s and ATSA’s distinctions in holding that TSOs are officers. *See, e.g., Leuthauser*, 71 F.4th at 1196; *Pellegrino*, 937 F.3d at 170–72; *Iverson*, 973 F.3d at 848–51. This disregard authorizes a waiver of sovereign immunity that is not “unequivocally expressed in statutory text.” *See F.A.A.*

v. Cooper, 566 U.S. 284, 290 (2012). Moreover, any statutory ambiguities concerning who is an “investigative or law enforcement officer” should be construed in favor of the sovereign. *See id.*

Petitioner argues that the presumption against waiver of sovereign immunity is inapplicable here. But this Court explained in *Dolan* that “unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the [FTCA].” 546 U.S. at 492 (citing *Kosak*, 465 U.S. at 853, n.9). This Court’s statement did not establish the canon’s inapplicability in the FTCA context, but instead, the canon’s unhelpfulness with the facts of *Dolan*. *See Iverson*, 973 F.3d at 866–67 (Gruender, J., dissenting). The case before the Court does not pose the risk of defeating the FTCA’s central purpose. Instead, this case asks the Court to apply the plain language of the FTCA, which excludes TSOs from the definition of “investigative or law enforcement officer.” *See* § 2680(h). If this Court identifies an ambiguity within § 2680(h), the ambiguity should be resolved in favor of the United States. *See F.A.A.*, 566 U.S. at 290.

2. The words surrounding “investigative or law enforcement officer” demonstrate the proviso’s law enforcement focus.

Even if TSOs are “officers” of the United States, they are not subject to the proviso unless they are “empowered by law to execute searches, to seize evidence, and to make arrests for violations of Federal law.” *See* § 2680(h). The question before this Court then becomes: what did Congress mean by the phrase “to execute searches”? *See id.*

The FTCA fails to define the phrase “to execute searches.” *See id.* Undefined statutory terms should not be read in isolation; rather, their meaning derives from a consideration of the “whole statutory text.” *See Dolan*, 546 U.S. at 486. The interpretive canon of *noscitur a sociis*—to know something by its accompanying words—helps illustrate the meaning of “to execute searches” as used in the FTCA. This Court employs *noscitur a sociis* when deciphering a list of

undefined terms. *See, e.g., Dolan*, 546 U.S. at 486–87 (applying associated-words canon to § 2680(b)). This reasoning applies with equal force here.

Beginning with context, “execute searches” appears in a list—followed by “to seize evidence” and “to make arrests.” *See* § 2680(h). Both phrases “to seize evidence” and “to make arrests” typically represent “police powers” that contemplate investigatory searches, not administrative searches. *See Pellegrino*, 937 F.3d at 188 (Krause, J., dissenting). Also, the plain meaning of “execute searches” connotes traditional law-enforcement activity. *See Mengert*, 120 F.4th at 721 (Tymkovich, J., dissenting); *see also Search*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“[a]n examination of a person’s body . . . conducted by a law-enforcement officer *for the purpose of finding evidence of a crime.*” (emphasis added)) (internal quotations omitted).

The Third and Eighth Circuits declined to apply *noscitur a sociis* when considering the law enforcement proviso, finding the plain language clear and the list of three duties disjunctive. *See Iverson*, 973 F.3d at 852; *Pellegrino*, 937 F.3d at 174–75. But, in *Dolan*, this Court applied *noscitur a sociis* to a disjunctive list in the FTCA. *See* 546 U.S. at 485. This Court reasoned that “negligent transmission,” as used in § 2680(b), was **limited** by the terms “loss” and “miscarriage”—both of which appeared in a list with “negligent transmission.” *See id.*; § 2680(b) (barring claims arising out of the “loss, miscarriage, or negligent transmission of letters or postal matter”). Thus, this Court declined to apply the same limitations on *noscitur a sociis* as did the Third and Eighth Circuits. *See Dolan*, 546 U.S. at 481, 486. This Court instead emphasized that “[a] word is known by the company it keeps” and that *noscitur a sociis* “is often wisely applied when a word is capable of many meanings to avoid the giving of unintended breadth of the Acts of Congress.” *Id.* (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

Ignoring the context in which “to execute searches” appears inevitably runs the risk of giving “unintended breadth” to the FTCA. *Id.* And such “unintended breadth” would violate the canon against waiving sovereign immunity. *See F.A.A.*, 566 U.S. at 290–91; SCALIA & GARNER, READING LAW 285 (“[S]uit will not lie against the government unless there is a clear waiver of immunity for *the subject matter in question.*” (original emphasis)). This Court should therefore apply *noscitur a sociis* to prevent a waiver of sovereign immunity that Congress did not intend.

Applying *noscitur a sociis* to § 2680(h) reveals that “to execute searches” is best understood as a “traditional law enforcement duty,” which TSOs are not statutorily authorized to engage in. *See Pellegrino*, 937 F.3d at 199 (Krause, J., dissenting); § 114(p)(2) (designating “officers” as those empowered to carry a firearm, make arrests, and seek and execute search warrants). TSOs are not empowered “[1] to execute searches, [2] to seize evidence, or [3] to make arrests for violations of Federal law.” *See* § 2680(h); 49 U.S.C. § 44901(a). These three functions collectively refer to law enforcement powers and should therefore be interpreted together. *See United States v. Rabinowitz*, 339 U.S. 56, 61 (1950) (explaining that law enforcement officers can “*search* the place where the *arrest* is made in order to find and *seize* things connected with the *crime*” (emphasis added)). It would therefore be “unreasonable” to conclude that TSOs’ duties satisfy the proviso’s requirements, given the “criminal law enforcement connotation” associated with seizing evidence and making arrests. *See Weinraub v. United States*, 927 F. Supp. 2d 258, 263 (E.D.N.C. 2012).

The proviso’s parallel construction likewise supports the conclusion that “to execute searches . . . for violations of Federal law” invokes a traditional police power. *See* § 2680(h). An “investigative or law enforcement officer” is a person who is “empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” *See id.* When a

modifying phrase like “for violations of Federal law” follows a “straightforward, parallel construction that involves all nouns or verbs in a series,” the modifying phrase changes each term’s meaning. *United States v. Miles*, 75 F.4th 1213, 1222 (11th Cir. 2023) (citing SCALIA & GARNER, READING LAW 147) (internal quotations omitted).

The phrase “for violations of Federal law” modifies the three requirements for an individual to qualify as an “investigative or law enforcement officer.” *See id.* This Court previously held that a phrase following a “single, integrated list” modifies each term in that list. *See Jama v. ICE*, 543 U.S. 335, 344 n.4 (2005). So, if the phrase “for violations of Federal law” did not modify the three aforementioned requirements, then it would impose one meaning for “to make arrests” and another for “to execute searches.” *See Pellegrino*, 937 F.3d at 199 (Krause, J., dissenting) (citing *Clark v. Martinez*, 543 U.S. 371, 378 (2005)) (“To give the [] same words a different meaning for each category would be to invent a statute rather than interpret one”); *United States v. Bass*, 404 U.S. 336, 339–40 (1971) (applying the series-qualifier canon). This reading of § 2680(h) would fail to give meaning to Congress’s intent and provide an unexpressed waiver of sovereign immunity. *See F.A.A.*, 566 U.S. at 290.

The phrase “execute searches” logically draws meaning from the term it defines—here, “investigative or law enforcement officer.” *See* § 2680(h). There is no dispute that “investigative” or “law enforcement” evokes criminal law enforcement. *See Law Enforcement*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“The detection and punishment of violations of the law.”); *see also* SCALIA & GARNER, READING LAW 228 (“[T]he meaning of [a] definition is almost always closely related to the ordinary meaning of the word being defined.”); *id.* at 232 (“[T]he word being defined is the most significant element of the definition’s context.”).

With this connection to criminal law enforcement, courts have held the proviso covers federal officers—as those engaged in traditional law enforcement activities. *See, e.g., Celestine v. United States*, 841 F.2d 851, 852–53 (8th Cir. 1988) (per curiam) (Veterans’ Administration police officers); *Hoston v. Silbert*, 681 F.2d 876, 879 (D.C. Cir. 1982) (per curiam) (U.S. Marshals); *Brown v. United States*, 653 F.2d 196, 198 (5th Cir. 1981) (F.B.I. agents); *Hernandez v. Lattimore*, 612 F.2d 61, 64 n.7 (2d Cir. 1979) (federal corrections officers).

TSA agents do not, and by statute cannot, engage in traditional law enforcement activities. *See, e.g., Welch v. Huntleigh USA Corp.*, No. 04-663 KI, 2005 WL 1864296 at *5 (D. Or. Aug. 4, 2005) (“[TSA] screeners do not have authority to detain individuals and must call law enforcement officers to search, seize, and arrest individuals if illegal items are found.”). Moreover, TSA agents do not search for “contraband under Federal law,” rendering their searches purely administrative. *See Walcott v. United States*, No. 13-CV-3303, 2013 WL 5708044, at *2 (E.D.N.Y. Oct. 18, 2013). While TSA agents may discover “evidence of crimes,” these discoveries do not alter the searches’ administrative nature. *See Iverson*, 973 F.3d at 864 (Gruender, J., dissenting) (citing *New York v. Burger*, 482 U.S. 691, 716 (1987)).

Federal employees are not subject to the law enforcement proviso when engaged in ***non-traditional*** law enforcement functions. *See, e.g., EEOC v. First Nat’l Bank of Jackson*, 614 F.2d 1004, 1007–08 (5th Cir. 1980) (finding EEOC employees not subject to proviso despite maintaining the right to examine and copy evidence during unlawful employment practices investigations). Other circuits have applied this same reasoning in holding that federal employees are not subject to the proviso. *See, e.g., Wilson v. United States*, 959 F.2d 12, 15 (2d Cir. 1992) (per curiam) (parole officers); *Moore v. United States*, 213 F.3d 705, 710 (D.C. Cir. 2000) (federal prosecutors); *Solomon v. United States*, 559 F.2d 309, 310 (5th Cir. 1977) (per curiam) (security

guards); *Johnson v. United States*, 547 F.2d 688, 691 (D.C. Cir. 1976) (per curiam) (Veterans' Administration hospital physicians).

B. The law enforcement proviso's focus on federal law enforcement officers excludes TSOs.

This Court has counseled that “the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify those circumstances which are within the words and reason of the exception.” *Dolan*, 546 U.S. at 492. The law enforcement proviso's history illustrates that TSOs and similar federal employees were not the focus of the proviso's enactment. See Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. Rev. 497, 500–05 (1976).

The FTCA developed after St. Louis Office of Drug Abuse Law Enforcement officers served no-knock warrants on citizens. *Id.* These citizens, while negatively affected, were unable to sue the government for the federal officers' torts. See *id.* After years of backlash, Congress debated a new proposal that would extend a waiver of sovereign immunity for torts committed by *all* federal employees. *Id.* at 510–17. But Congressional members viewed this initial proposal as too broad. *Id.* Congress only wanted to ensure there was a “remedy against the Federal Government for innocent victims of Federal **law enforcement** abuses.” *Caban v. United States*, 671 F.2d 1230, 1235 (2d Cir. 1982) (citing S. Rep. No. 93-588, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 2789, 2792) (emphasis added).

Legislative history cannot, standing alone, provide all statutory meaning. See *Pellegrino*, 937 F.3d at 196 (Krause, J., dissenting). But, here, the history “simply corroborates what the text itself conveys.” *Id.* The legislative history reveals that Congress intended for the proviso to cover law enforcement functions like investigative searches, not administrative searches.

Petitioner argues that TSOs execute searches for violations of federal law. But this argument fails because it conflates administrative and investigative searches. *See Koletas*, 159 F.4th at 821–24. The use of “to execute searches” refers to an investigative search—conducted on the basis of individualized suspicion—not an administrative search. TSOs conduct the latter. The distinction between administrative and investigative searches is not a novel concept in Fourth Amendment jurisprudence; Congress knew of this distinction when the FTCA was enacted. *See Eve Brensike Primus, Disentangling Administrative Searches*, 111 Colum. L. Rev. 254, 260 (2011) (“[T]he concept of administrative searches first entered the law in the 1960s.”).

An administrative search is “for non-law-enforcement purposes such as employee drug screenings, building inspections, and other administrative inspections.” *Special-Needs Doctrine*, BLACK’S LAW DICTIONARY (12th ed. 2024); *see also Administrative Search*, BLACK’S LAW DICTIONARY (12th ed. 2024) (origin date of 1960). This distinction arises when a search does not require a warrant or individualized suspicion because the inspection is “a less hostile intrusion than the typical policeman’s search for the fruits and instrumentalities of a crime.” *See Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 530, 538 (1967). Additionally, the “primary purpose of the search [] is [d]istinguishable from the general interest in crime control.” *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 420 (2015) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000)) (internal quotations omitted).

This Court has recognized that TSO screenings fall squarely within the meaning of an administrative search. *See Chandler v. Miller*, 520 U.S. 305, 323 (1997); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989). And circuits have held the same. *See, e.g., United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (TSOs conduct screenings for “an

administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft[s].” (internal quotations & citations omitted)).

TSA’s own management directive likewise distinguishes between “administrative/special needs searches” and situations in which “possible criminal activity” is uncovered. *See* TSA Mgmt. Directive No. 100.4 ¶¶ 6. B–C. TSA Management Directive No. 100.4 provides that “all administrative and special needs searches are “tailored to the transportation security purpose for which they are conducted.” *Id.* at ¶ 6B1. And searches may not be “conducted to detect evidence of crimes unrelated to transportation security.” *Id.* at ¶ 6C1. Any evidence of potential criminal wrongdoing shall be referred “to a supervisor or a law enforcement official for appropriate action.” *Id.* As such, TSOs are only allowed to perform administrative screenings for transportation security, not to conduct searches for violations of federal law.

Congress employed a term of art when it utilized the word “search” in § 2680(h). *See Pellegrino*, 937 F.3d at 186 (Krause, J., dissenting). And Congress does not use the term “search” when it vests federal employees with the power to conduct administrative searches. *See* 49 U.S.C. § 44901(a) (TSA screeners conduct “screening[s]”); 29 U.S.C. § 657(a)(2) (OSHA inspectors may “inspect and investigate”); 21 U.S.C. § 374(a)(1) (FDA inspectors may “enter” and “inspect”); 42 U.S.C. § 6927(a) (EPA inspectors may “enter” and “inspect”). Thus, the use of “execute searches” signifies Congress’s intent to address investigatory searches rather than administrative searches.

Also, a ruling that TSOs conduct screenings for violations of federal law poses a potential constitutional issue. Administrative searches are conducted without individualized suspicion, whereas investigatory searches require it. *See Mengert*, 120 F.4th at 722 (Tymkovich, J., dissenting). This Court has referred to TSA screenings as “blanket *suspicionless* searches calibrated to the risk.” *Chandler*, 520 U.S. at 323 (emphasis added). But TSA agents cannot

constitutionally search for federal law violations without individualized suspicion. *See id.* This Court should therefore adopt the interpretation that aligns with constitutional principles *i.e.*, TSA screeners do not conduct investigatory searches. *See id.* (emphasizing that courts prefer the interpretation that “sustains constitutionality” when construing statutes with multiple interpretations.).

II. SECTION 2680(A) OF THE FTCA BARS PETITIONER’S CLAIM, IRRESPECTIVE OF AN ALLEGED CONSTITUTIONAL VIOLATION.

Both the district court and the Thirteenth Circuit correctly held that the discretionary-function exception immunizes the United States from tort liability, despite Petitioner’s plausibly alleged constitutional claim against Officer Lurie.³ *See R.* at 3–11, 18–20. This Court should affirm the lower courts’ dismissals for two reasons. First, Officer Lurie’s conduct satisfies *Gaubert/Berkovitz’s* two-part test. *See Gaubert*, 499 U.S. at 322–23; *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). And second, the discretionary-function exception contains no constitutional-claims exclusion.

A. Officer Lurie’s conduct satisfies *Gaubert/Berkovitz’s* two-part test.

The discretionary-function exception applies when a federal employee’s conduct fulfills the two-part *Gaubert/Berkovitz* test. *See Gaubert*, 499 U.S. at 322–23; *Berkovitz*, 486 U.S. at 536. And, as both lower courts recognized, this determination provides the sole means for determining the United States’ tort liability. *See R.* at 11, 18.

In 1946, Congress enacted the FTCA and simultaneously created the discretionary-function exception. *See* 28 U.S.C. § 2680(a). The drafters devised this “highly important exception” to immunize the United States against liability for its employees’ tortious yet discretionary acts. *See*

³ The United States did not contest the plausibility of Petitioner’s constitutional claim in prior proceedings. *See R.* at 10.

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 809–10 (1984). This exception preserves the United States’ sovereign immunity in honor of the principle that “the United States, as sovereign, is generally immune from suits seeking money damages.” *Dep’t of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 48 (2024). And this immunity remains intact regardless of whether federal employees abuse their discretion. *See* § 2680(a) (“whether or not the discretion involved be abused”).

Forty-two years later, in *Berkovitz v. United States*, this Court addressed the discretionary-function exception to resolve ambiguities surrounding its application. *See* 486 U.S. at 536. This Court held that a federal employee’s conduct must “involve[] an element of judgment or choice” to be discretionary. *See id.* Further, the discretionary action must be “based on considerations of public policy.” *See id.* at 537. But a workable standard still did not exist. This Court therefore revisited the issue—and provided the standard—in *Gaubert v. United States*. *See* 499 U.S. at 323.

Under this standard, courts must first determine whether the conduct “involv[es] an element of judgment or choice” and is thereby “discretionary.” *Id.* at 322. This inquiry focuses not on the actor’s status but, instead, on the nature of his or her conduct. *See id.* Also, conduct becomes non-discretionary if a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *See id.* (citing *Berkovitz*, 486 U.S. at 536). Second, courts must determine whether the conduct involves judgment “of the kind the discretionary-function exception [is] designed to shield.” *See Gaubert*, 499 U.S. at 322–23. And judgment becomes “of the kind” when “based on considerations of public policy.” *See id.* This two-part test serves as the blueprint for assessing the discretionary-function exception’s applicability.

1. Officer Lurie’s conduct involves an element of judgment or choice.

Courts often reach differing conclusions regarding the discretionary nature of a federal employee’s conduct. *See Xi v. Haugen*, 68 F.4th 824, 842–43 (3d Cir. 2023) (Bibas, J., concurring). Justice Bibas cites several instances where courts disagreed over the discretionary-function exception’s applicability to certain activities like road maintenance, tree hazard management, and clean water upkeep. *See id.* (collecting cases). To reconcile these divergent holdings, Justice Bibas suggests that courts take a high-level approach and regard “the *kind* of activity the officer was performing when the challenged action occurred, not the action itself.” *See Xi*, 68 F.4th at 842–43 (Bibas, J., concurring) (original emphasis).

Under any approach, however, this variance dissipates when federal guidelines are not mandatory and instead grant decision-making power to federal employees. *See, e.g., Gaubert*, 499 U.S. at 322–23 (holding conduct as discretionary where federal employees were “not bound to act in a particular way.”). Such is the case here. Petitioner points to one statement from TSA’s website—and nothing more—to support her claim that Officer Lurie lacked authority to limit her progression through the security checkpoint. *See R.* at 4. Not only does this statement impose no general duty on TSA agents, but it grants them considerable discretion. The statement reads:

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 the 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-photossecurity-checkpoint> (last visited Dec. 20, 2025) (emphasis added).

Millions of passengers pass through TSA security checkpoints every day. In fact, 2.58 million people passed through TSA security checkpoints on March 18, 2024: the date Petitioner visited Eastland International Airport. *See* TRANS. SEC. ADMIN., *TSA Passenger Throughput for 2024*, <https://www.tsa.gov/travel/passenger-volumes/2024> (last visited Dec. 20, 2025); *see also* R. at 2. With this passenger volume, TSA agents must respond to an endless stream of safety threats within minutes. And TSA agents can make mistakes. But the discretionary-function exception applies “even if discretion has been exercised erroneously.” *See Gaubert*, 499 U.S. at 338 (Scalia, J., concurring) (citations omitted). Further, TSA policy accounts for this possibility of error by affording its agents substantial latitude in making judgment calls. *See e.g., Pudeler v. United States*, No. 3:09 CV 1543 JGM, 2013 WL 6511937, at *7 (D. Conn. Dec. 12, 2013) (“Congress generally has left it to the [TSA] to prescribe the details of the screening process.” (citing *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011))).

When Petitioner began filming at the TSA checkpoint and cursing to her camera, *she* may have believed her actions were harmless. *See* R. at 2–3. But Officer Lurie—a public safety defender—may not have shared her same sentiments. *See, e.g., Rendon v. Trans. Sec. Admin.*, 424 F.3d 475, 477–48, 481 (6th Cir. 2005) (holding a passenger interfered with a TSA screener’s performance of duties when the passenger began using profanity and exhibiting uncooperative behavior at TSA screening checkpoint); *see also* 49 C.F.R. § 1540.109 (prohibits interfering with, assaulting, threatening, or intimidating [TSA] screening personnel in the performance of their screening duties).

Other TSA regulations acknowledge the various dangers that security checkpoint disruptions can impose, including:

- “A disruptive individual may be attempting to discourage the screener from being as thorough as required.
- A screener may . . . need to summon a checkpoint screening supervisor and law enforcement officer, taking them away from other duties.
- A screener encountering such a situation must turn away from his or her normal duties to deal with the disruptive individual, which may affect the screening of other individuals.”

Tobey v. Jones, 706 F.3d 379, 398 (4th Cir. 2013) (Wilkinson, J., dissenting) (citing 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002) (internal quotations omitted & cleaned up)). Officer Lurie had a **choice** in how he responded to Petitioner’s behavior, and he prioritized safety. *Cf. Ying Jing Zeng v. United States*, No. 14CV3924DLIMDG, 2016 WL 8711090, at *6 (E.D.N.Y. Sept. 30, 2016), *aff’d*, 696 F. App’x 42 (2d Cir. 2017) (deeming TSA’s decisions regarding baggage inspection to be “clearly grounded in the public policy of keeping airports and airplanes safe[.]”). TSA policy did not mandate any particular response. Thus, his conduct “[fell] squarely within the discretionary-function exception.” *See Shivers v. United States*, 1 F.4th 924, 929 (11th Cir. 2021).

Myriad courts evaluated similar activities and reached the same result when applying this reasoning. *See, e.g., S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 335 (3d Cir. 2012) (holding officials’ decision to be discretionary where the policy statements “vested officials with broad discretion”); *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1221–223 (10th Cir. 2016) (holding federal employees’ actions to be discretionary where Checklist did not mandate a particular course of action); *Joiner v. United States*, 955 F.3d 399, 405 (5th Cir. 2020) (holding government’s actions to be discretionary when they did not violate a stated policy). And this Court should conclude the same.

2. Officer Lurie’s judgment or choice is susceptible to policy analysis.

When federal guidelines permit discretion, a strong presumption arises that the federal employee’s actions were grounded in policy considerations. *See Gonzalez v. United States*, 814 F.3d 1022, 1032 (9th Cir. 2016); *Wood v. United States*, 845 F.3d 123, 128 (4th Cir. 2017). This presumption aligns with the exception’s purpose of “prevent[ing] judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” *See Gaubert*, 499 U.S. at 323; *see also* Gregory C. Sisk, *Immunity for Imaginary Policy in Tort Claims Against the Federal Government*, 100 Notre Dame L. Rev. 729, 742 (2025). To rebut this presumption, Petitioner must establish that Officer Lurie’s conduct is not the **kind** of conduct that can susceptibly grounded in policy rationales. *See Gaubert*, 499 U.S. at 324–25; R. at 8–9. Petitioner fails to do so.

After Petitioner arrived late to Eastland International Airport—with boarding scheduled to close in less than one hour—she progressed through the airport’s **sole** TSA security checkpoint. *See* R. at 2–3. Due to Petitioner’s increasing vexation, she began filming and concurrently cursing at her camera. *See* R. at 3. Officer Lurie responded by instructing her to stop recording and informing her that she could not proceed through security until she cooperated. *See* R. at 3. She refused. *See* R. at 3. Officer Lurie then adjusted a retractable belt to stop her progression and indicated that he may involve law enforcement if she continued to resist. *See* R. at 3. This standoff was reasonable, lasting less than four minutes. *See* R. at 3; *see also Corbett v. Trans. Sec. Admin.*, 568 F. App’x 690, 698 (11th Cir. 2014) (holding one-hour TSA screening reasonable where “[the passenger] was primarily to blame for that screening lasting as long as it did”).

In determining the discretionary-function exception’s applicability, courts need not ascertain whether federal employees **actually** considered policy rationales. *See “Nothing but Mischief”: The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 Admin. L.

Rev. 1275, 1327 (2002). Instead, courts look at whether their decision was *susceptible* to policy rationales. *See id.*; *see also Gaubert*, 499 U.S. at 335 (1991) (Scalia, J., concurring) (holding a decision protected where it is “one that *ought* to be informed by considerations of social, economic, or political policy” (emphasis added)). Officer Lurie’s conduct clears this low threshold.

First, Officer Lurie was “faithfully performing one of the most essential functions in our post-9/11 age: protecting air passengers from the threat of air terrorism.” *Tobey*, 706 F.3d at 394 (Wilkinson, J., dissenting). Second, “[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention.” *See Dyer v. Smith*, 56 F.4th 271, 280 (4th Cir. 2022) (citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)). And third, imposing liability on TSA agents for discretionary conduct would seriously hinder governmental operations, contravening one of the discretionary-function exception’s primary purposes. Laney Ivey, *It’s Time to Resolve the Circuit Split: Unconstitutional Actions by Federal Employees Should Not Fall Within the Scope of the Discretionary Function Exception of the Ftca*, 73 Mercer L. Rev. 1351, 1358 (2022) (footnotes omitted).

Officer Lurie’s conduct is susceptible to many policy factors, which are sufficient—standing alone—for purposes of passing the second part of the *Gaubert/Berkovitz* test. *See, e.g., Myers & Myers, Inc. v. U. S. Postal Serv.*, 527 F.2d 1252, 1256 (2d Cir. 1975) (concluding same for the decision of whether or not to renew star route contracts). And Officer Lurie’s alleged abuse of discretion does not change this result. *See Linder v. United States*, 937 F.3d 1087, 1091 (7th Cir. 2019) (“[W]hen some legal doctrine creates discretion, the fact that the discretion was misused and a tort ensued does not lead to liability for the [federal employee].”). This principle holds true here, given the high-intensity context. *See Seaside Farm, Inc. v. United States*, 842 F.3d 853, 862

(4th Cir. 2016) (“There is little room for leisured hindsight when the decision must be made under the pressure of events and, in many cases, on the basis of imperfect information.”).

B. The discretionary-function exception contains no constitutional-claims exclusion.

Officer Lurie’s conduct falls within the discretionary-function exception, irrespective of Petitioner’s alleged constitutional violation. *See* 28 U.S.C. § 2679(b)(2)(A) (explaining that the FTCA “does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States.”). Nonetheless, Petitioner would have this Court include an unwritten carve-out within the exception. *See* R. at 18. Petitioner’s argument flies in the face of statutory interpretation. *See Joiner*, 955 F.3d at 404 (“[O]ur objective when construing an exception to the FTCA is to identify those circumstances which are *within the words and reason* of the exception—no less and no more.” (cleaned up & emphasis added)). Petitioner’s argument also contravenes the FTCA’s aim, which is only intended to redress tort claims that *private* persons could likewise violate. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994).

1. The discretionary-function exception’s plain text includes no constitutional carve-out.

The discretionary-function exception applies—and the United States retains its sovereign immunity—when federal employees abuse their discretion. *See* Emily B. Garza, *Discretionary Disfunction and Shivers v. United States: Consequences of Assuming the Intent of Congress*, 10 Tex. A&M L. Rev. 359, 375–76 (2023); *Recovering the Lost Meaning of the Federal Tort Claims Act’s “Discretionary Function Exception,”* 138 Harv. L. Rev. 654, 670 (2024). And the plain text reflects as such. *See* § 2680(a) (“whether or not the discretion involved be abused”). Despite the text’s clear command, Petitioner contends that Officer Lurie’s alleged First Amendment violation forecloses the exception’s applicability. *See* R. at 4. Not so.

Per the text, the discretionary-function exception broadly exempts the United States from tort liability arising from its employees’ exercise of discretionary functions. *See Shivers*, 1 F.4th at 928. This directive is unambiguous and categorical. *See id.* at 930. Only Congress, not the courts, can waive sovereign immunity. *See Ramirez v. Reddish*, No. 2:18-CV-00176-DME-MEH, 2020 WL 1955366, at *30 (D. Utah Apr. 23, 2020), *aff’d*, 104 F.4th 1219 (10th Cir. 2024). Thus, if Congress wanted to specify a *degree* of abuse that would not fall within the exception, it could have done so. *See Shivers*, 1 F.4th at 930. Without this specification, “Congress left no room for the extra-textual ‘constitutional-claims exclusion’ for which [Petitioner] advocates.” *See id.* (citing *Millbrook*, 569 U.S. at 56–57). The statute’s plain language refutes Petitioner’s argument.

This conclusion is likewise consistent with the FTCA’s purpose. Rather than addressing pure constitutional violations, the FTCA provides plaintiffs with an opportunity to redress specific injuries arising from *tortious* conduct. *See Welch v. United States*, 409 F.3d 646, 652–53 (4th Cir. 2005) (applying same argument to § 2680(a)’s due care exception). *Bivens* provides the proper avenue for claimants to allege constitutional violations against individual federal employees. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). The United States acknowledges the decreasing viability of *Bivens* claims, particularly with regard to First Amendment retaliation. *See Egbert v. Boule*, 596 U.S. 482, 486, 498–99 (2022). But this unfortunate development does not transform the FTCA into an opportunity for redressing pure constitutional injuries. *See Hernandez v. United States*, 939 F.3d 191, 205 (2d Cir. 2019) (“The FTCA has not waived [the Government’s] sovereign immunity with respect to claims that its employees have committed constitutional torts under the federal constitution.” (alterations adopted & quotations omitted)). For these reasons, Petitioner’s constitutional tort claim is not cognizable

under the FTCA. *See F.D.I.C.*, 510 U.S. at 478; *Lozada-Manzano v. United States*, 75 F.4th 31, 40 (1st Cir. 2023); *Davila v. Lang*, 343 F. Supp. 3d 254, 272 (S.D.N.Y. 2018).

2. The FTCA redresses tort violations, not constitutional grievances.

Both lower courts recognized the negative policy implications of reading an unwritten exclusion into a statute. *See R.* at 11, 18–19. This recognition applies with particular force where the alleged constitutional violation is neither cognizable nor redressable under state tort law. *See* Olivia Goldberg, *(Extra)ordinary Tort Law: Evaluating the Federal Tort Claims Act As A Constitutional Remedy*, 76 Stan. L. Rev. 481, 507 (2024) (“Only those constitutional violations that can be reframed as torts are redressable under the FTCA.”) (footnotes & citations omitted).

First, inquiries into the constitutionality of a federal employee’s conduct would not “further the purposes served by the discretionary function exception.” *Ramirez*, 2020 WL 1955366, at *29. Congress did not create this exception to address constitutional violations. *See id.* at *29 n.32. (“28 U.S.C. § 2680(a) specifically does not limit the assertion of sovereign immunity only to acts that are constitutional.”). Instead, Congress sought to immunize the United States from potential liability arising from its federal employees’ policy-driven discretionary conduct. *See id.*

Second, judicial review of potential constitutional violations could expose the government to unintended liability that the FTCA aims to guard against. *See* Brian Shea, *The Parent Trap: Constitutional Violations and the Federal Tort Claims Act’s Discretionary Function Exception*, 52 B.C.L. Rev. E-Supplement 57, 64 (2011). Specifically, “[i]t is easy to allege that federal employees acted beyond the scope of their authority when claiming a constitutional violation.” *Egbert*, 596 U.S. at 500. And, in the realm of TSA employees, “[a] passenger may turn out to be harmless, but the Constitution cannot possibly be construed to require TSA agents to take that gamble.” *Tobey*, 706 F.3d at 399 (Wilkinson, J., dissenting).

And third, legislative amendment—rather than judicial activism—should resolve statutory ambiguities. See Jonathan R. Bruno, *Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 Harv. J. on Legis. 411, 450 (2012). The FTCA does not define the term “discretionary.” See 28 U.S.C. § 2671. Congress remains the proper branch to fill this definitional gap, not the courts. See Garza, *Discretionary Disfunction*, at 379; Daniel Raddenbach, *Unconstitutional but Authorized: The Federal Tort Claims Act Should Not Immunize the United States When Federal Officers Violate the Constitution*, 106 Minn. L. Rev. 1119, 1158–59 (2021). Otherwise, courts would be “inject[ing] judicial gloss into an exception to the FTCA’s waiver of sovereign immunity, something which lies solely within the discretion of Congress.” Ramirez, 2020 WL 1955366, at *30.

3. Even if this Court recognizes a constitutional carve-out, it is inapplicable to Petitioner’s pure constitutional claim.

Courts disagree on whether the “clearly established” standard should apply to constitutional tort violations alleged under the FTCA. Compare *Xi*, 68 F.4th at 839 (rejecting qualified immunity standard), with *Butz v. Economou*, 438 U.S. 478, 507 (1978) (adopting qualified immunity standard).⁴ There is also significant disagreement among circuits regarding constitutional tort claims alleged under the FTCA. Compare *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (unconstitutional conduct falls outside discretionary-function exception), *Myers & Myers*, 527 F.2d at 1261 (same), *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (same), *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (same), *Loumiet v. United States*, 828 F.3d 935, 939 (D.C. Cir. 2016), and *Xi*, 68 F.4th at 824, with *Linder*, 937 F.3d at 1090

⁴ The United States adopts the Third Circuit’s approach in finding that the qualified immunity doctrine should not extend beyond *Bivens* and § 1983 claims. See, e.g., *Owen v. City of Indep., Mo.*, 445 U.S. 622, 672–73 (1980) (discussing qualified immunity in § 1983 context).

(unconstitutional conduct falls inside discretionary-function exception), *Shivers*, 1 F.4th at 930 (same), and *Lozada-Manzano*, 75 F.4th at 40 (same).

But a simple distinction reconciles this apparent conflict: the FTCA covers only those constitutional claims redressable as torts under the FTCA. *See Hernandez*, 939 F.3d at 205. The inquiry then becomes: Does the constitutional claim have a direct tort analogue? If the answer is yes, the FTCA claim falls outside the discretionary-function exception. If the answer is no—as is the case here—the FTCA claim falls within the discretionary-function exception.

In practice, both Fourth and Eighth Amendment claims are redressable as torts under the FTCA. *See Goldberg, (Extra)ordinary Tort Law*, at 507 n. 200 (citing John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 1021 (2008)). Plaintiffs can reframe Fourth Amendment claims, for example, as false arrest, trespass, assault, or battery. *See id.* at 507. Similarly, plaintiffs can reframe Eighth Amendment claims as negligence, assault, or battery. *See id.*

The First and Fifth Amendments, on the other hand, pose more difficulty. *See id.* at 510. But these constitutional violations may overlap with tort law in certain instances. Plaintiffs can restate First Amendment retaliation claims, for example, as invasion of privacy or intentional infliction of emotional distress. *See id.* at 507. Fifth Amendment claims, similarly, may be reframed as assault or battery (if they involve physical abuse) or intentional infliction of emotional distress (if they involve psychological abuse). *See id.* at 511.

In circuits that recognized constitutional tort violations under the FTCA, plaintiffs' claims were at least partially premised on one of these redressable amendments. *See, e.g., Raz*, 343 F.3d at 948 (alleging First and Fourth Amendment violations); *Xi*, 68 F.4th at 840 (alleging Fourth and Fifth Amendment violations); *Limone*, 579 F.3d at 102 (alleging Fifth Amendment violation);

Loumiet, 828 F.3d at 939 (alleging Fifth Amendment violation and First Amendment retaliation). These holdings would therefore persist under this proposed distinction.

One claim remains, however, that has no common-law tort equivalent: a First Amendment free speech violation. *See Kiiskila v. United States*, 466 F.2d 626, 627–28 (7th Cir. 1972) (holding Colonel’s actions discretionary despite violating plaintiff’s First Amendment free speech rights); *see also* Raddenbach, *Unconstitutional but Authorized*, at 1157 n.247 (“A First Amendment chill on the freedom of speech and assembly often does not have a common-law tort analogue.”).

Petitioner alleges this precise claim here. *See* R. at 4. The discretionary-function exception covers Petitioner’s false imprisonment claim. But, in an admittedly creative fashion, Petitioner attempts to evade this coverage by alleging a constitutional grievance cloaked as a tort claim. This effort to backdoor constitutional damage into the FTCA cannot stand. *See Cohen v. United States*, 640 F. Supp. 3d 324, 344 (S.D.N.Y. 2022), *aff’d sub nom. Cohen v. Trump*, No. 23-35, 2024 WL 20558 (2d Cir. Jan. 2, 2024) (denying plaintiff’s FTCA claim that alleged “defendants did imprison [plaintiff] for the lawful exercise of his First Amendment rights”). For these reasons, this Court should **affirm** the lower courts’ dismissals of Petitioner’s claim for lack of subject matter jurisdiction. *See Davila*, 343 F. Supp. 3d at 272.

CONCLUSION & PRAYER

This Court should **affirm** the judgment of the United States Court of Appeals for the Thirteenth Circuit, dismissing Petitioner’s claim due to lack of subject matter jurisdiction.

Dated: January 5, 2026

Respectfully Submitted,

/s/Counsel for Team XXX

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned counsel hereby certify that this brief and its separate accompanying certification was electronically served pursuant to Article 9 upon the ABA Law Student Division.

Dated: January 5, 2026

Respectfully Submitted,

/s/Counsel for Team 315

COUNSEL FOR RESPONDENT