No. 25-1726

In the Supreme Court of the United States

WILLOW SCHIMMEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM # 899
BROOKLYN, NY
COUNSEL FOR RESPONDENT

January 5, 2026

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The law enforcement proviso in 28 U.S.C. § 2680(h) of the Federal Tort Claims Act waives immunity for intentional torts committed by "investigatory or law enforcement officer[s]," defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law." The plain text and legislative history establish that the proviso only carves out officers with traditional law enforcement powers. TSA screeners are neither officers nor given law enforcement powers. The question presented is: Should this Court stretch the definition of "investigatory or law enforcement officer" to include TSA screeners, thus waiving sovereign immunity for Petitioner's intentional tort claim?

II. The discretionary function exception in 28 U.S.C. § 2680(a) immunizes the government when an employee who commits a state law tort can act with discretion in their position. Petitioner insists that any plausibly-alleged constitutional violation voids the discretionary function exception. The statutory scheme, plain text, and Supreme Court precedent clarify that neither the FTCA nor § 2680(a) address alleged unconstitutional conduct.

The question presented is: Did Congress nevertheless intend for any plausibly-alleged constitutional violation to automatically override the discretionary function exception and waive sovereign immunity?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Legislative Materials:

Administrative Materials:

Other Authorities:

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. Federal Tort Claims Act (FTCA)

It is foundational law that the United States is immune from suit unless Congress states otherwise. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). For much of the Nation's history, sovereign immunity absolutely protected the federal government from liability for its employees' conduct; for recourse, plaintiffs instead petitioned Congress for private bills of compensation. *See* S. Rep. No. 79-1400, at 30 (1946). Acknowledging that inefficiency, Congress enacted the Federal Tort Claims Act ("FTCA"). 28 U.S.C. §§ 1346(b), 2671–2680. The FTCA waives sovereign immunity and grants federal district courts jurisdiction to hear money damages claims for injuries:

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b)(1). In other words, a plaintiff can sue the federal government when a federal employee commits a state law tort within the scope of their duties. It does not provide a cause of action for constitutional torts. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994).

Further, Congress circumscribes the government's waiver of sovereign immunity through thirteen enumerated exceptions. *Id.* § 2680(a)–(n). When an exception applies, sovereign immunity re-attaches and courts lack subject-matter jurisdiction. *Martin v. United States*, 605 U.S. 395, 414 (2025). This framework operates as a threshold jurisdictional inquiry. *See id.* at 401. When a claim is filed, the plaintiff must identify a valid waiver of immunity under the FTCA, and the government can defeat jurisdiction by showing that the claim falls under any exception. *Id.* at 414. Two exceptions are central here: the intentional tort exception and the discretionary function exception.

1. Intentional Tort Exception

28 U.S.C. § 2680(h), known as the "intentional tort exception," *Millbrook v. United States*, 569 U.S. 50, 52 (2013), reimmunizes the government for:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Id. § 2680(h). Here, Congress intended to preserve sovereign immunity for intentional torts because they "would be difficult to defend," and "it would be unjust to make the Government liable [for them]." *See Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. 22 (1940) (testimony of Mr. Holtzoff, Special Assistant to the Attorney General).

Almost thirty years later, this belief shifted. In Collinsville, Illinois, Justice Department agents executed warrantless "no-knock" raids into two separate homes. S. Rep. No. 93-588, at 2 (1974). The agents "kicked in the doors without warning, shout[ed] obscenities, and threaten[ed] the occupants with drawn weapons," only to later discover that they had raided the wrong residences. *Id.* At the time, claimants had no relief against the Government when "a Federal agent violate[d] someone's . . . Fourth Amendment rights against illegal search and seizure." *Id.* at 2-3. In response, Congress enacted the "law enforcement proviso," which re-waives immunity for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by "investigative or law enforcement officers." *Id.* § 2680(h). Congress further defines "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*

2. Discretionary Function Exception

Second, 28 U.S.C. § 2680(a) preserves immunity for:

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

Id. § 2680(a). In other words, the government is immune when a federal employee exercises due care in executing a specific statute or can act with discretion according to their position or duty.

Congress designed the discretionary function exception to prevent "judicial second-guessing of legislative and administrative decisions grounded in social, economic, or political policy" through tort law. *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)). It "intended [the exception] to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity," particularly where a plaintiff asserts "that the statute or regulation authorizing the project was invalid." *Dalehite v. United States*, 346 U.S. 15, 29-30 n.21 (1953) (citing H.R. Rep. No. 2245, 77th Cong., 2d Sess. at 10 (1942)). Congress emphasized that it was "not desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." H.R. Rep. No. 2245 at 10.

Courts use a conjunctive test to apply the discretionary function exception. First, courts examine whether the conduct involved "an element of judgment or choice." *Gaubert*, 499 U.S. at 322. Conduct is not discretionary when "a federal statute, regulation, or policy specifically prescribes a course of action" because then "the employee has no rightful option but to adhere to the directive." *Id.* Second, courts consider if the judgment is "based on considerations of public policy" associated with that job. *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988). If both elements are met, the government is immune from liability.

* * *

The FTCA reflects a constant battle over sovereign immunity and its limits. The statutory scheme proceeds as follows: the United States is presumptively immune from suit; Congress waives immunity through the FTCA for certain torts; and then Congress reimmunizes the government through enumerated exceptions in 28 U.S.C. § 2680. Additionally, Congress waives sovereign immunity for certain intentional torts only if committed by a limited class of law enforcement officers. *Id.* § 2680(h). This "ping-ponging" structure of waiver, claw back, and re-waiver determines whether courts have jurisdiction over a claim.

B. Aviation and Transportation Security Act (ATSA)

The FTCA is not the only legislation relevant here. Following the September 11, 2001, terrorist attacks, Congress overhauled the nation's aviation security system by passing the Aviation and Transportation Security Act of 2001 (ATSA). 49 U.S.C. §§ 114, 44901–44944. The ATSA centralized airport security within the Transportation Security Administration ("TSA") under the Department of Transportation ("DOT") and later under the Department of Homeland Security ("DHS"). *See id.* § 114(a).

The ATSA established uniform standards for passenger screening, baggage inspection, and threat detection. It requires the federal government to assume direct responsibility for screening all passengers and property at airports, which replaced the private screener system previously allowed. *Id.* § 44901(a); *see also* Michael Moss, *A Nation Challenged: Airport Security; U.S. Airport Task Begins With Hiring*, N.Y. Times, Nov. 23, 2001, at A1. The ATSA does permit a "Screening partnership program," where airport operators apply to allow "private screening compan[ies]" to "carry out the screening of passengers and property at the airport." *Id.* § 44920.

The ATSA also distinguishes between TSA screeners and TSA law enforcement officers. While § 44901 governs screening functions, Congress separately authorizes the TSA Administrator to designate certain employees as "law enforcement officer[s]" empowered to carry firearms, make warrantless arrests for federal offenses, and seek and execute warrants. *Id.* § 114(p)(1)–(2). In addition, Congress requires "at least 1 law enforcement officer at each airport security screening location." *Id.* § 44901(h)(2). Taken together, the ATSA treats screening personnel and law enforcement officers as separate roles with different responsibilities and powers.

II. FACTUAL BACKGROUND

This complex jurisdictional question arises because an airline passenger missed her flight by one minute. Record ("R.") at 4.

On the morning of March 18, 2024, TSO Lurie, a TSA screener at Eastland International Airport, was ushering travelers through the airport's sole security checkpoint. R. at 3. The line moved slowly through the checkpoint, as Lurie and other screeners managed the throng of passengers descending on the airport. *Id.* Suddenly, Lurie noticed an agitated passenger standing in line who was recording the checkpoint and speaking loudly to herself. *Id.* Concerned, Lurie approached her. *Id.*

The agitated passenger, Petitioner Willow Schimmel, arrived at the airport less than an hour before her flight stopped boarding. *Id.* at 2. Petitioner joined the security checkpoint line and grew frustrated with its slow pace. *Id.* Petitioner then started video recording with her smartphone. *Id.* As the line progressed, Petitioner continued recording and narrating, alternating between herself and the checkpoint area while holding her phone at chest level. *Id.* Briefly stopping to present identification, Petitioner then resumed recording, complaining about the slow-moving queue as she moved towards the checkpoint. *Id*. at 3.

Approaching Petitioner, Lurie asked her to stop recording and put her phone away. *Id*. Petitioner refused, claiming she had a right to record, and criticized Lurie and his colleagues for frisking too many people. *Id.* Lurie again instructed Petitioner to stop recording, adjusting a retractable belt barrier to prevent her from proceeding while other passengers moved around her. *Id.* Lurie further warned Petitioner that he would "get law enforcement involved" if she continued because recording could disrupt screening operations or reveal sensitive information. *Id.* Lurie also contacted his supervisor who never appeared. *Id.* The standoff lasted only four minutes. *Id.* Petitioner ultimately stopped recording and Lurie permitted her to continue through the checkpoint. *Id.* She passed through screening without further incident. *Id.*

III. PROCEDURAL HISTORY

In October 2024, Petitioner filed her FTCA action against the United States in the U.S. District Court for the District of Eastland. R. at 4–5. She alleges a single claim of false imprisonment under Eastland common law, which requires a plaintiff to show she was "(1) intentionally confined within a bounded area (2) by someone who asserted legal authority to do so but who (3) actually lacked legal justification." *Id.* at 4. Petitioner alleges that Lurie falsely imprisoned her when he delayed her for four minutes, causing Petitioner to run to her gate, injure her ankle, and miss her flight. *Id.* at 3–4. Petitioner also claims she suffered mental anguish from the four-minute encounter. *Id.* Petitioner seeks compensatory damages. *Id.*; 28 U.S.C. § 2674.

To support her claim, Petitioner alleges Lurie lacked legal authority to stop her because the First Amendment and TSA policy protected her right to record the checkpoint. R. at 4. The complaint cites the agency's webpage for authority:

> 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.

Can I Film and Take Photos at a Security Checkpoint?, Transp. Sec. Admin. https://www.tsa.gov/travel/frequently-asked-questions/can-i-film-and-take-photos-security-checkpoint.

The United States moved to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) because both the intentional tort exception and the discretionary function exception barred Petitioner's claim. R. at 5. The district court granted the motion, holding that the discretionary function exception applied and deprived the court of jurisdiction. *Id.* at 6.

The United States Court of Appeals for the Thirteenth Circuit affirmed, concluding that the FTCA did not waive sovereign immunity for Petitioner's claim. *Id.* at 12.

First, the Thirteenth Circuit held that § 2680(h)'s law-enforcement proviso does not apply to TSA screeners. *Id.* at 17. The court focused on Congress's definition of "investigative or law enforcement officer" as an "officer of the United States empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* at 14. Reading that language together, the court concluded that the proviso targets officers who exercise traditional criminal law-enforcement powers. *Id.* at 15. The court next reasoned that TSA screeners are not "officer[s] of the United States" because the FTCA and ATSA distinguish between "officers" and "employees." *Id.* at 15–16. Finally, the court discussed how, read in context, "execute searches" connotes criminal investigatory searches—a power only traditional law enforcement officers have—while screeners conduct administrative searches. *Id.* at 16.

Second, the court held that § 2680(a)'s discretionary function exception applied regardless of Petitioner's alleged constitutional violation. *Id.* at 20. The court first reasoned that the FTCA remediates violations of state law torts and not constitutional torts. *Id.* at 18. Thus, carving out constitutional violations "transform[s] Congress's carefully bounded tort claims act into a free-ranging constitutional claims act." *Id.* at 19. Next, the court explained Petitioner's construction would read an atextual limit into § 2680(a) despite the exception applying "whether or not the discretion be abused." *Id.* at 19. After disposing of Petitioner's constitutional carveout, the court affirmed that the discretionary function exception barred Petitioner's claim. *Id.* at 20.

Petitioner appealed, petitioning for certiorari, which this Court granted. *Id.* at 26.

SUMMARY OF THE ARGUMENT

I. The Thirteenth Circuit correctly reasoned that the law enforcement proviso in 28 U.S.C. § 2680(h) does not extend to TSA screeners. The proviso waives sovereign immunity when federal "investigative or law enforcement officers" commit certain intentional torts. Since TSA screeners are not "investigative or law enforcement officers," this Court should hold that the law enforcement proviso does not apply to TSA screeners and that § 2680(h) bars Petitioner's claim.

First, TSA screeners are not "officers of the United States." "Officer" means one who holds a position of significant authority. TSA screeners do not carry such authority. Congress cements that distinction when alternating between "employee" and "officer" throughout the FTCA. And Congress continues that distinction in the ATSA. There, Congress lets the TSA empower employees with law enforcement powers but does not extend that authority to screeners. The ATSA further mandates law enforcement presence at checkpoints—an odd result if screeners are officers. In two different statutes, Congress clarifies that officer means a position of authority higher than mere airport screeners. Conversely, Petitioner's capacious rule presumes most federal employees are officers. Congress did not intend the proviso to produce that absurd result.

Second, even if screeners are "officers," they are not empowered to perform the law enforcement functions—executing searches, seizing evidence, or making arrests for violations of federal law—listed in 28 U.S.C. § 2680(h). Screeners undisputedly cannot seize evidence or make arrests, so Petitioner's argument turns on "executing searches." This language is fatal to her rule. To state the obvious, TSA screeners screen—they do not conduct law enforcement searches. Also, this Court has labeled such screenings as administrative rather than criminal investigatory searches. Not only does Petitioner contradict this understanding, but she also injects constitutional uncertainty into the proviso because if TSA screeners "execute searches . . . for violations of federal law," then screeners would need particularized suspicion to search any passenger or bag.

Legislative history confirms that the proviso applies only to traditional law enforcement officers. Congress acted because federal law enforcement agents violated victims' Fourth Amendment rights when executing erroneous no-knock raids. Congress could have extended the proviso to all federal employees, as other failed amendments proposed, yet it chose not to. Congress also refused to carve out employees conducting administrative or regulatory inspections. It follows that Congress did not intend TSA screeners to come within the proviso.

Finally, even if the provision is ambiguous, this court should still affirm because waiving sovereign immunity must be "unequivocally expressed in statutory text." As such, ambiguity in the law enforcement proviso is construed to maintain sovereign immunity—a presumption Petitioner's rule contradicts.

II. The Thirteenth Circuit correctly held that the discretionary function exception in 28 U.S.C. § 2680(a) bars Petitioner's claim. The FTCA waives sovereign immunity when a federal employee commits a state law tort. Section 2680(a) reimmunizes the federal government when an employee acts according to their discretionary function. Since Congress did not intend for constitutional violations to become actionable under the FTCA and void § 2680(a), this Court should hold that the discretionary function exception applies regardless of any plausibly-pled constitutional violation.

To start, the FTCA's statutory scheme establishes that Congress did not intend for alleged constitutional violations to waive sovereign immunity. In § 1346(b)(1), Congress specified that the FTCA only remediated torts where the government could be liable as "a private person" under "the law of the place" where the tort occurred—neither of which apply to the Constitution. Congress repeats that language in other FTCA provisions to cement that plain result. And when Congress does reference the Constitution, it does so to exclude it from the FTCA entirely. It follows then that Congress did not intend constitutional violations to come within the FTCA.

The plain text of § 2680(a) confirms that understanding. There too, Congress omits any reference to constitutional allegations. Further, contemporaneous definitions of "discretionary function" cement that Congress aimed to reimmunize the government whenever a federal employee can exercise judgment—not when their conduct plausibly violates the Constitution. And even if Congress did consider the Constitution in § 2680(a), it was only to clarify that such allegations do not void the discretionary function exception.

Supreme Court precedent interpreting the FTCA crystallizes that result. This Court has explicitly held that constitutional torts are not cognizable under the FTCA. Allowing any plausible constitutional violation to waive sovereign immunity would undercut that precedent. And this holding is for good reason, as this Court has identified that the FTCA is poorly equipped to resolve constitutional grievances. Moreover, this Court interprets the discretionary function exception to exclude the Constitution entirely. That makes sense since, as this Court identified, Congress sought to avoid challenging the constitutionality of legislative and administrative conduct through tort.

Petitioner's construction skirts this settled understanding to a disastrous result. To start, Petitioner invents an implied private damages remedy for constitutional violations and presumes a constitutional carveout to § 2680(a) that the text does not provide. Further, Petitioner assumes Congress waives sovereign immunity on implied terms. Petitioner's rule also turns § 2680(a)'s jurisdictional bar on its head because it requires litigating the merits of a constitutional allegation—which frequently overlap with state law torts—prior to determining jurisdiction. Finally, Petitioner's rule ignores and even undermines alternate channels of constitutional recourse.

Even if Congress intended constitutional violations to void § 2680(a) (it did not), it requires claimants to raise violations of clearly-established constitutional rights—a standard that Petitioner's claim still fails to meet.

III. This Court should ignore Petitioner's request to invade Congress's authority to establish and waive sovereign immunity. Since Congress solely decides when sovereign immunity is waived, this Court should hesitate to expand the scope of that waiver absent further legislative direction. Both Congress's careful construction of the FTCA as a limited waiver of sovereign immunity, and its frequent amendments to the FTCA to calibrate that waiver, make clear that Congress is best suited to resolve policy issues arising from the statutory text.

Thus, this Court should affirm the Thirteenth Circuit's decision below. Doing so adheres to the text and purpose of § 2680(h) and § 2680(a) and preserves Congress's primary authority to determine when sovereign immunity is waived.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY APPLIED THE INTENTIONAL TORT EXCEPTION TO PETITIONER'S FTCA CLAIM BECAUSE THE LAW ENFORCEMENT PROVISO DOES NOT APPLY TO TSA SCREENERS.

This Court should affirm the Thirteenth Circuit and hold that TSA screeners are not investigative or law enforcement officers under 28 U.S.C. § 2680(h). First, TSA screeners are neither "officers" nor "empowered to execute searches . . . for violations of federal law." *Id.* Second, the legislative history confirms Congress intended to carve out only federal criminal law enforcement officers in the proviso. Third, this Court should resolve any remaining ambiguity in favor of preserving sovereign immunity.

A. The Plain Text of 28 U.S.C. § 2680(h) Establishes That TSA Screeners Are Not Investigatory or Law Enforcement Officers.

Analyzing § 2680(h) begins and ends with "the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). The plain text controls because only these words represent the law Congress adopted and the President approved. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020). Plainly, the law enforcement proviso in § 2680(h) removes sovereign immunity for "acts or omissions of investigative or law enforcement officers of the United States Government," who commit certain intentional torts. *Id.* § 2680(h). The statute further defines "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id*. Therefore, TSA screeners must be "investigative or law enforcement officers" as defined in the statute. They are not.

1. TSA Screeners Are Not "Officers."

Petitioner claims that Lurie is an "officer" under § 2680(h). That is wrong. Congress intended "officer" to mean someone who holds a heightened position of authority, and TSA screeners do not meet that definition for at least five reasons.

First, dictionary definitions of "officer" show Congress intended the proviso to apply to positions of authority. Since "officer" is not itself defined, it takes its ordinary contemporaneous meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). "Officer" means "one who holds an office of trust, authority, or command." *Officer, Webster's Third New International Dictionary* (1976). Plainly, TSA screeners do not hold an office of trust, authority, or command. Instead, they perform operational roles, such as carrying out standardized screening. Screeners do not supervise others, set policy, or command compliance in the manner associated with traditional officers. Nor are they vested with continuing sovereign authority; their role is confined to conducting routine administrative screenings. *See* 49 U.S.C. § 44901(a). In ordinary usage, such constrained employees are not "officers" but employees performing basic tasks.

Second, Congress's varied use of "officer" and "employee" throughout the FTCA confirms that these positions are meaningfully different. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (explaining that "the language and design of the statute as a whole" informs textual meaning). To start, the FTCA waives sovereign immunity for torts "caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b)(1). Congress then used "employee" in other procedural and jurisdictional FTCA provisions. *E.g.*, *id.* §§ 2672, 2674–2676. Congress also used "employee," throughout § 2680: § 2680(a) bars actions where an "employee" acts with discretion, and § 2680(e) excludes claims concerning "any employee" administering the Trading with the Enemy Act.

But when Congress enacted the law enforcement proviso, it departed from that broad language and injected the term "officer." *Id.* § 2680(h). That shift in terminology is meaningful. When Congress uses different words in adjacent provisions of the same statute, courts presume that the difference was intentional. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014). Reading the statute as a whole confirms that Congress understood "employee" as a general category and "officer" a narrower one. If "officer of the United States" simply meant any federal employee, Congress would not have to abandon the FTCA's default use of employee. Courts must avoid interpretations that render statutory language superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). The more natural and textually faithful reading is that Congress chose the narrower term "officer" precisely to limit the proviso's reach. It reserved "officer" for a distinct class of federal officials vested with a heightened position of authority, not frontline TSA screeners.

Third, Congress distinguishes between "officer" and "employee" in the ATSA's statutory language itself. That distinction is as critical here as it is in the FTCA. *See Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (explaining that laws pertaining to the same subject "should be construed as if they were one law"). The ATSA provides that airport "screening[s] . . . shall be carried out by a Federal Government employee (as defined in section 2105 of title 5)." 49 U.S.C. § 44901(a). Section 2105, in turn, immediately follows the statutory definition of "officer" in 5 U.S.C. § 2104, which Congress chose not to incorporate into the ATSA. That choice reflects a straightforward structural judgment: screeners are rank-and-file federal employees, not officers of the United States. The ATSA then reinforces that distinction when authorizing the Administrator to designate certain employees as "law enforcement officer[s]," vesting them with the authority to carry firearms, make warrantless arrests, and seek and execute warrants. 49 U.S.C. § 114(p)(1)–(2). Congress thus knew how to confer officer status and chose not to do so for screeners. *See*

Corbett v. Transp. Sec. Admin., 568 F. App'x 690, 701 (11th Cir. 2014) (per curiam). Even further, Congress required "at least 1 law enforcement officer" at each checkpoint. § 44901(h)(2). That mandate would make little sense if screeners themselves were already officers. Read naturally, the statute contemplates two distinct roles at the checkpoint: screening employees who conduct administrative screening functions, and law enforcement officers who provide security and exercise authority when necessary. This separation confirms that TSA screeners are not officers under the ATSA's own terms.

Further, the ATSA distinguishes screeners from officers when delegating screening authority. Through the ATSA's "screening partnership program," Congress lets airports use private contractors to screen passengers. § 44920(a). But Congress did not let the TSA delegate airport law enforcement functions to any private contractors. *Id.* Even as Congress gave the federal government greater authority over aviation security, it still allowed non-federal employees to perform screening functions. That choice makes little sense if passenger screening involved the exercise of sovereign authority or the holding of a federal "office," as Congress would not vest private contractors with an office of significant trust.

Fourth, Petitioner's capacious definition of "officer" is untethered from any meaningful limit. Petitioner defines "officer" as anyone "charged with a duty." So, as petitioner contends, TSA screeners qualify as officers because they perform public duties. Taken seriously, that definition reaches too far. If "officer" means any federal employee "charged with a duty" or entrusted with responsibilities, then every federal employee becomes an officer—clerks processing benefits, inspectors reviewing paperwork, analysts drafting reports, and custodial staff safeguarding federal buildings alike. Congress could not have intended the law enforcement proviso to hinge on such an all-encompassing concept, especially where the FTCA elsewhere repeatedly and deliberately uses the broader term "employee" when it wants to reach that universe. Courts may ignore interpretations that produce results so absurd that Congress could not possibly have intended them. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). This case presents exactly that circumstance. Petitioner's reading extends the proviso to nearly all federal personnel, despite Congress's decision to limit it to a narrow class of "officers." At minimum, a reading that collapses "officer" and "employee" is the result that statutory context and common sense forbid.

Fifth, Petitioner's reliance on the word "any" modifying "officer of the United States" cannot salvage its rule. Such general terms are limited "to those objects to which the legislature intended to apply them." *United States v. Palmer*, 16 U.S. 610, 631 (1818). And "the word 'any,' considered alone, cannot answer" interpretive questions because it "can mean different things depending upon the setting." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004). Context supplies the operative limits. *See Palmer*, 16 U.S. at 631. Here, context reveals "any" is limited to officers "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). This modifies only a defined subset of federal officers, not the entire federal workforce. Reading "any" broader would invert the text, allowing a general modifier to overwhelm the term Congress took pains to qualify.

2. Even if TSA Screeners Are "Officers," They Are Not "Empowered by Law to Execute Searches . . . for Violations of Federal Law."

TSA screeners are not officers. But even if this Court disagrees, it should nevertheless affirm because screeners are not "empowered by law to execute searches . . . for violations of Federal law." *Id.* § 2680(h). Properly read, the proviso covers officers vested with traditional police powers. Screeners possess none of those powers. Petitioners' contrary reading ignores statutory context, settled interpretive canons, and this Court's consistent treatment of airport screening as an administrative activity.

As a threshold matter, the proviso applies only to officers “empowered by law” to carry out the enumerated functions. That phrase demands an affirmative grant of legal authority from Congress—not merely the performance of a task. *See Millbrook*, 569 U.S. at 56 (explaining that the law enforcement proviso “focuses on the status of a person whose conduct may be actionable, not the types of activities that may give rise to a tort claim against the United States”). TSA screeners do not have an affirmative statutory directive that dictates their authority. Rather, the TSA Administrator is charged with ensuring the screening is “*carried out* by a Federal Government employee.” 49 U.S.C. § 44901(a) (emphasis added).

Instead of TSA screeners following an affirmative grant of legal authority from Congress, they must adhere to Standard Operating Procedures (SOP) issued by the TSA Administrator. *See, e.g.*, *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011) (“Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public.”). These informal guidelines are not statutory grants of authority. The SOP specifies how TSA screeners carry out the Administrator's duty by outlining who to screen, why, and how. *Id.* § 44901(a). Where Congress intended to confer authority within TSA, it did so expressly—authorizing the Administrator to designate law enforcement officers with the power to arrest, carry firearms, and execute warrants. *Id.* § 114(p). The absence of any comparable authorization for screeners confirms that they are not “empowered by law” within the meaning of the proviso.

The remaining statutory language does not save Petitioner. Congress continues to define investigative or law enforcement officers as those empowered to “execute searches, to seize evidence, or to make arrests,” 28 U.S.C. § 2680(h). As this Court understands, such actions reflect traditional law-enforcement powers associated with criminal investigation. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (describing search and seizure authority as tools of crime prevention and detection); *United States v. Watson*, 423 U.S. 411, 416–17 (1976) (describing arrest power as a hallmark of law enforcement). Read together, these enumerated powers invoke a sense of criminal law enforcement. And applied here, TSA screeners fall outside the carveout because they do not perform such law enforcement functions.

Plainly, TSA screeners cannot make arrests or seize evidence for violations of federal law. The TSA Administrator may designate "law enforcement officers" with the power to carry firearms, to "make an arrest without a warrant for any offense against the United States" based on probable cause, and to "seek and execute warrants for arrest or seizure of evidence" based on probable cause. 49 U.S.C. § 114(p). But screeners possess no such power. *See id* § 44901(a). If a screener discovers a suspicious item, they must notify a law enforcement officer. Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002) (codified at 49 C.F.R. § 1540.109). Law enforcement officers are positioned nearby because federal law requires their presence at each screening location. *Id.* § 44901(h)(1). Only they can seize evidence, not screeners. As such, Petitioner cannot claim that screeners make arrests and seize evidence.

Petitioner therefore stakes everything on the word "searches." She argues that screeners "execute searches" because they physically inspect persons and property. Under this view, the mere act of examining bags or passengers—regardless of purpose or legal consequence—triggers the proviso. That construction is flawed for at least two reasons.

First, Petitioner's construction violates the canon of *noscitur a sociis*. Under that canon, a listed term's meaning is limited by its listed companions. *Yates v. United States*, 574 U.S. 528, 543 (2015). Here, "execute searches" appears alongside "seize evidence" and "make arrests"—both law-enforcement functions. Read in context, "execute searches" refers to searches undertaken as part of a law-enforcement mission: searches designed to uncover violations of federal law and support criminal prosecution. It does not encompass regulatory screenings conducted to prevent dangerous items from boarding aircraft. Petitioner's reading strips "searches" of that context and lets it cover any inspection whatsoever. In doing so, she ignores the surrounding words that bound "search" to its contextual meaning. So this Court should reject Petitioner's isolated interpretation.

Second, Petitioner presumes "or" is read disjunctively. That is wrong. This Court has recognized that "or" can connect items in a list conjunctively rather than disjunctively when listed terms share a common purpose or limit. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) ("statutory context can overcome the ordinary, disjunctive meaning of 'or.'"). Here, the three powers listed in § 2680(h) are a unified set of law enforcement functions. There is no textual or logical reason to treat them as entirely separate categories. Thus, the Court should read the three functions conjunctively. And read conjunctively, screeners fall outside these listed terms because they plainly cannot seize evidence or make arrests.

Even if read disjunctively, the proviso still does not apply because screeners do not "execute searches" as Congress intended in § 2680(h). Properly understood, "execute searches" invokes Fourth Amendment criminal law functions. The Framers stated as much when securing the people's right "against unreasonable searches and seizures," or searches without a warrant or probable cause. U.S. Const. amend. IV; *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983). Further, other statutes in the U.S. Code use "execute searches" to mean criminal investigatory searches. *E.g.*, 18 U.S.C. § 2231(a); 22 U.S.C. § 2709(a)(2). As such, Congress knows what it means when it uses "execute searches"—it means traditional criminal investigatory searches conducted by law enforcement under the Fourth Amendment. *Pellegrino v. U.S. Transp. Sec. Admin.*, 937 F.3d 164, 185 (3d Cir. 2019) (en banc) (Krause, J., dissenting). Petitioner cannot escape that Congress uses "execute searches" as a term of art to specify criminal investigatory searches.

Applying that understanding here, screeners do not "execute searches" as Congress intended. The ATSA charges the TSA Administrator with *screening* all passengers and property. 49 U.S.C. § 44901(a). "Screen" means "to examine systematically in order to discover suitability for admission or acceptance," and "to select or separate." *Screen*, *Oxford English Dictionary* (2d ed. 1989). And the ATSA itself defines "screening" as "a physical examination or non-intrusive methods of assessing whether cargo poses a threat to transportation security." *Id.* § 44901(g)(4). So screening means something less than the law enforcement "search" Congress intended: it reflects a narrower, less exacting examination. Congress could have granted TSA screeners law enforcement powers as it has done with other federal employees. *See, e.g.* 8 U.S.C. § 1357(a) (immigration officers); 38 U.S.C. § 902 (Department of Veterans Affairs police); 18 U.S.C. § 3050 (Bureau of Prisons officers). But it did not. As such, screeners cannot "execute searches" as Congress intended it to mean in the proviso.

To the extent screeners do "search," they are only empowered to conduct administrative searches—not law enforcement searches. Administrative searches advance public functions rather than enforce criminal laws, so probable cause is not required. *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). Courts have classified airport screenings as permissible administrative searches. *E.g., Chandler v. Miller*, 520 U.S. 305, 323 (1997) (using airport searches as an example of reasonable "blanket, suspicionless searches calibrated to the risk"); *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (en banc) (same). The TSA recognizes this distinction and conveys it to employees, defining "administrative search" as one that furthers a "specified non-law enforcement government purpose, such as to determine compliance with TSA regulations" or preventing carrying threat items. TSA Management Directive No. 100.4 ¶ 4(A). Airport screenings are within a general regulatory scheme and do not require individualized suspicion or probable cause. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000). As a result, screener's administrative searches fall outside the scope of the proviso because the proviso applies only to criminal law enforcement searches.

Petitioner's interpretation also assumes the ending text "for violations of Federal Law" modifies only "make arrests." Yet that reading is incompatible with both context and common sense. An antecedent modifier can apply to all listed terms when context indicates a broader application. *Lockhart v. United States*, 577 U.S. 347, 351–52 (2016). Here, executing searches, seizing evidence, and making arrests are all acts in response to suspected legal violations. It makes little sense to assume that officers would execute searches and seize evidence were it not for a violation of federal law. Context clarifies that "for violations of Federal law" applies to all three listed terms. Under that reading, screeners plainly fall outside the proviso. Their screening activities only determine whether passengers or property may enter a sterile area of an airport. They prevent violations of federal law from occurring; they do not execute searches for violations of federal law. *See City of L.A. v. Patel*, 576 U.S. 409, 420 (2015); *Pellegrino*, 937 F.3d at 187 (Krause, J., dissenting). So screeners cannot search "for violations of Federal Law."

On the other hand, Petitioner's definition constitutionally imperils TSA screenings. This Court interprets statutes to avoid rendering them constitutionally suspect. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012). If TSA screeners indeed "execute searches for violations of federal law"—rather than conducting administrative searches of passengers and baggage to ensure safe air travel—then their searches would primarily serve a criminal function. If so, screeners need probable cause to search passengers. *See Edmond*, 531 U.S.

at 44 (requiring particularized suspicion when the primary purpose of a narcotics interdiction checkpoint was to uncover crimes). That makes no sense, since screeners do not and could not conduct searches with particularized suspicion for all passengers. *Chandler*, 520 U.S. at 323. If Petitioner's interpretation holds true, a Fourth Amendment violation arises whenever a screener opens a bag to search for violations of federal law because they act without particularized suspicion. *See Mengert v. United States*, 120 F.4th 696, 721–22 (10th Cir. 2024) (Tymkovich, J., dissenting). All said, rather than undermine administrative searches and breed constitutional doubt, this Court should instead exclude TSA screeners from the law enforcement proviso.

B. Legislative History Confirms That The Law Enforcement Proviso Does Not Apply to TSA Screeners.

The law enforcement proviso establishes that TSA screeners are not "investigatory or law enforcement officers" as defined by Congress. As such, this Court need go no further to affirm the Thirteenth Circuit. *Bostock*, 590 U.S. at 654. If it chooses to do so, the legislative history crystallizes that Congress did not intend for screeners to fall under the law enforcement proviso.

To start, the law enforcement proviso was passed to resolve a discrete problem: federal law enforcement agents committing violent no-knock raids. In April, 1973, Federal narcotics agents kicked down two doors in Collinsville, Illinois, detained two families at gunpoint, ransacked both homes, and, after realizing they raided the wrong addresses, left without explanation or apology. Andrew H. Malcolm, *Drug Raids Terrorize 2 Families–by Mistake*, N.Y. Times, Apr. 29, 1973, at 1, 43. The "Collinsville Raids" exposed a flaw in the FTCA. As it stood, victims of federal agents' "abusive, illegal, and unconstitutional 'no-knock' raids" were left without remedy. S. Rep. No. 93-588, at 2 (1973). Put another way, Congress was concerned that citizens had no remedy when "a Federal agent violate[d] someone's constitutional rights—for instance, Fourth Amendment rights against illegal search and seizure" when conducting raids. *Id.* at 2–3.

But Congress was not concerned about non-law enforcement officers like TSA screeners when it amended § 2680(h). Nor should it have been, because screeners are not law enforcement officers. Obviously, screeners do not carry out "no-knock" warrants and hold suspects at gunpoint. Nor are screeners authorized to execute search warrants. Screeners are also not the sort of law enforcement agents whose tortious conduct led Congress to amend the FTCA. Instead, Congress was focused on abuses arising from "search and seizures that are conducted without warrants or with warrants issued without probable cause"—core law enforcement activities. S. Rep. No. 93-588, at 4 (1974). So Congress's rationale makes sense when applied to FBI agents, narcotics officers, and other law enforcement officers who may commit those torts when conducting those law enforcement activities. *See, e.g. Hernandez v. Lattimore*, 612 F.2d 61, 64 n.7 (2d Cir. 1979) (applying law enforcement proviso to federal correctional officers because they can make arrests); *Solomon v. United States*, 559 F.2d 309, 310 (5th Cir. 1977) (refusing to apply proviso because security forces at military base had no law enforcement powers). But it makes little sense to stretch that rationale to TSA screeners who are unlike the law enforcement agents whose conduct concerned Congress.

The unadopted amendments to § 2680(h) further clarify that the proviso applies only to traditional law enforcement conduct. Congress fielded three distinct proposals to narrow the FTCA's intentional tort exception. *See* John Charles Boger et al., *The Federal Tort Claims Act Intentional Torts Amendement: An Interpretative Analysis*, 54 N.C. L. Rev. 497, 513–15 (1976). Two of those bills eliminated sovereign immunity for intentional torts committed by all federal employees. *Id*. Congress rejected that broader approach. Instead, it narrowed the amendment to torts committed by "investigative or law enforcement officers." Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974). When Congress weighed carveouts to § 2680(h), it feared enacting a carveout that swept too broadly. That Congress rejected a broader waiver and instead restricted the proviso confirms it intended to apply to only those with traditional criminal law enforcement power—not federal employees like TSA screeners who perform administrative duties.

Legislators further specified that the proviso would not extend to federal employees engaged in administrative or regulatory inspections. That is telling. During amendment hearings, the Acting Assistant Attorney General explained that employees, such as Department of Agriculture investigators and Department of Defense auditors, are authorized to "go into look at books and records." *Federal Tort Claims Amendments: Hearings on H.R. 10439 Before the Subcomm. on Claims & Governmental Relations of the H. Comm. on the Jud.*, 93d Cong. 18 (1974). Although such inspections could lead to intentional torts, those employees were "not law enforcement officers even under this definition." *Id.* Like those inspectors and auditors, screeners conduct administrative and regulatory screenings. That places them squarely outside the sort of traditional law enforcement officers Congress intended the carveout to reach. *See supra* Section I.A.2. As such, Congress limited the proviso to a narrow subset of government workers: federal law enforcement officers with traditional police powers. All said, the legislative history confirms that Congress did not intend the law enforcement proviso to apply to TSA screeners.

C. This Court Should Construe Any Remaining Ambiguity in the Law Enforcement Proviso to Preserve Sovereign Immunity.

The statutory text reveals that TSA screeners are not investigatory law enforcement officers under § 2680(h). The legislative history confirms that result. To the extent any ambiguity remains, this Court should construe that ambiguity to preserve sovereign immunity and affirm.

Ambiguity arises when there are multiple plausible interpretations of statutory text. *See, e.g. U.S. v. R.L.C.*, 503 U.S. 291, 298 (1992); *c.f. Sebelius v. Cloer*, 569 U.S. 369, 380 (2013) (finding no ambiguity because the statutory text was clear). And in the context of sovereign immunity, "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992)). When the Government offers an interpretation that plausibly bars claimants from receiving money damages, courts at least consider that text ambiguous. Courts then turn to legislative history, *see supra* Section I.B., or certain applicable presumptions about government liability.

One "axiom[atic]" presumption is that the Government, as sovereign, "is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Price v. United States*, 174 U.S. 373, 375–76 (1899). When the statutory text is unclear, "any ambiguities in the statutory language are to be construed in favor of immunity." *Cooper*, 566 U.S. at 290 (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)). That is to avoid enlarging "the Government's consent to be sued . . . beyond what a fair reading of the text requires." *Id.* at 290 (citation omitted). The government presumptively does not waive sovereign immunity when the text is not clear. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see Libr. of Cong. v. Shaw*, 478 U.S. 310, 319 (1986).

Applying that principle here, this Court should presume Congress did not waive sovereign immunity because the statute is at least ambiguous. Ambiguity arises at two points. First, "officer" has been defined both broadly to include any employee charged with any duty and narrowly to refer to traditional law enforcement officers. *Compare Mengert*, 120 F.4th at 696 (holding that TSA screeners are officers) *with Corbett,* 568 F. App'x at 701–02 (holding that screeners are not officers). Second, "execute searches" has been defined both broadly to mean any examination to "find or discover" certain contraband and narrowly to mean criminal law enforcement searches. *Compare Iverson v. United States*, 973 F.3d 843, 851–52 (2020) (holding that TSA screeners "execute searches") *with Hernandez v. United States*, 34 F. Supp. 3d 1168, 1178–82 (D. Colo. 2014) (holding that screeners do not "execute searches"). The narrower textual readings faithfully reflect text and purpose. *See supra* Sections I.A.1, 2. But these conflicting interpretations at least plausibly suggest that Congress "did not authorize monetary damages against the government" in this context. *Cooper*, 566 U.S. at 290 (citation omitted). And since this Court strictly construes that ambiguity in favor of preserving sovereign immunity, it should presume that screeners do not fall within the law enforcement proviso. That presumption avoids enlarging the law enforcement proviso—and accordingly the government's waiver of sovereign immunity—when Congress has not explicitly stated otherwise. All said, Petitioner's intentional tort claim still fails because ambiguity in the law enforcement proviso presumptively favors sovereign immunity.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT BECAUSE THE DISCRETIONARY FUNCTION EXCEPTION APPLIES REGARDLESS OF ANY PLAUSIBLY-ALLEGED CONSTITUTIONAL VIOLATION.

Schimmel's intentional tort claim fails because TSA screeners are not "investigatory or law enforcement officers" under § 2680(h). Should this Court conclude otherwise, the discretionary function exception in § 2680(a) still applies. *See Martin*, 605 U.S. at 414. That exception immunizes the government whenever an employee has discretion to make independent judgments or choices consistent with the policy of their position. *Id.* § 2680(a).

All but conceding that TSA screener Lurie acted with discretion under § 2680(a), Petitioner instead claims the discretionary function exception automatically fails because she has raised a plausible constitutional violation. That is wrong. The FTCA does not waive sovereign immunity for constitutional torts. *Meyer*, 510 U.S. at 478. It makes no difference whether that constitutional allegation is raised as a claim or, as Petitioner suggests, smuggled in as an anticipatory defense to discretion. The result is the same: the federal government is not liable for state law torts based on its employee's discretionary conduct regardless of any plausibly-alleged constitutional violation. The FTCA's common-sense scheme, § 2680(a)'s plain text, and this Court's precedent demand that result. Petitioner's contrary rule ignores that settled conclusion and spawns its own host of problems. And if Congress did include the Constitution in § 2680(a), Petitioner's claim still fails because she does not assert any clearly-established constitutional right. This Court should affirm.

A. Congress Has Never Intended a Constitutional FTCA Claim.

According to Petitioner, the discretionary function exception fails because Lurie plausibly violated the First Amendment. That is wrong under both the FTCA's common-sense statutory scheme and the specific text of the discretionary function exception itself. Put simply, Congress left no room for an implied constitutional carveout to sovereign immunity.

1. The FTCA's Statutory Scheme Establishes That Constitutional Violations Do Not Override Sovereign Immunity.

The FTCA itself is a proper starting point for analyzing Congress's intent because the "language and design" of the statute as a whole illuminates the discretionary function exception's meaning. *Cartier, Inc.*, 486 U.S. at 291. Taken as a whole, the FTCA waives sovereign immunity for state law torts and reimmunizes the government in certain instances. And in doing so, Congress either omits the Constitution or clarifies that it does not upset the FTCA's balance of sovereign immunity. Since any common-sense reading of the FTCA establishes that it has nothing to do with constitutional violations, this Court can start and end its analysis here and affirm the court below.

Start with the jurisdiction-granting provision of the FTCA. Congress immediately asserts that any waiver of sovereign immunity applies only to state-law torts—not constitutional violations. Under this provision, Congress waives sovereign immunity for tort claims "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.* § 1346(b)(1). Both "private person" and "law of the place" plainly exclude constitutional claims. First, the Constitution does not bind private persons. Erwin Chemerinsky, *Constitutional Law* 532 (7th ed. 2023). So Congress included "private person" to establish that the FTCA does not waive sovereign immunity for constitutional violations. Second, Congress uses "law of the place" to exclude constitutional violations because the Constitution applies to any jurisdiction as the supreme law of the land. U.S. Const. art. VI. By specifying the applicable law, Congress intended only state law torts to fall under § 1346(b)(1). Put together, Congress intentionally limits the Government's liability to state law torts where its employees would be liable as private persons. It makes little sense that Congress would then imply a constitutional carveout when the FTCA's jurisdiction-granting provision excludes the Constitution outright.

But that is not all. Congress then reinforces in two more provisions that the FTCA does not redress constitutional violations. That repetition is critical. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."). First, the provision empowering administrative agencies to settle claims specifies that such power only applies when "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.* § 2672. Second, the damages-limiting provision repeats that the United States is only liable "to the same extent as a private individual under like circumstances." *Id.* § 2674. This repetition fortifies that Congress intended the FTCA to only remediate state law torts actionable against the government as a private individual. It again constrains the statute from including the Constitution at any point.

In fact, Congress knew exactly how and when to waive sovereign immunity for constitutional allegations. It did so in the jurisdictional provision preceding § 1346(b)(1) for nontort claims. In the "Little Tucker Act," Congress waives sovereign immunity for civil actions against the United States "founded . . . upon the Constitution . . . in cases not sounding in tort[.]" *Id.* § 1346(a)(2). Explicitly referencing the Constitution under this provision reinforces that Congress did not then implicitly resolve constitutional violations in the FTCA. Scalia & Garner, *supra*, at 107. Even further, Congress cabins § 1346(a)(2) to constitutional claims "not sounding in tort"—ensuring that sovereign immunity was not waived for constitutional torts in this provision. So Congress makes doubly certain that constitutional violations do not arise under the FTCA. Petitioner is wrong to presume otherwise.

Further, the only other place in the FTCA that mentions the Constitution does so only to exclude such claims from the statute's scope. That word choice is intentional. *See U. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 353 (2013). In the FTCA exclusivity provision, the Government assumes exclusive liability for the tortious conduct of government employees acting within the scope of their office or employment, preempting claims against the employees themselves. *Id.* § 2679(b)(1). But the provision does not extend to claims "brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2). Congress thus retains sovereign immunity for officials who violate the Constitution. This carveout is for good reason: Congress never intended the government to assume liability for alleged constitutional violations in the first place. Permitting constitutional violations to nevertheless arise in the discretionary function exception ignores that Congress outright excluded the Constitution in the FTCA.

2. The Plain Text of § 2680(a) Confirms that Same Conclusion.

Reading the FTCA as a whole establishes that Congress did not intend the FTCA to create a Constitution-based damages remedy against the federal government. Unsurprisingly, the discretionary function exception's plain text holds no different.

When determining § 2680(a)'s plain meaning, undefined words in the statute are interpreted according to "their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021) (citation omitted). Contemporaneous dictionary definitions best indicate ordinary meaning. *See Arave v. Creech*, 507 U.S. 463, 472 (1993). And since "only the words on the page constitute the law adopted by Congress and the President," this Court does not import words into the statute to alter its meaning. *Bostock*, 590 U.S. at 654. Applying these canons of construction, the plain text unambiguously ignores the Constitution at two points.

First, the discretionary function exception omits any reference to the constitutional carveout that Petitioner demands. That omission is intentional. *See* Scalia & Garner, *supra*, at 93–94. If Congress wanted to qualify this exception with a constitutional limit, like a "constitutionally-permissible discretionary function," it could have done so. Yet Congress did not because it did not intend the discretionary function exception to include the Constitution at all. That omission is even more telling since Congress provides explicit carveouts in other provisions of § 2680: it carves out certain intentional torts committed by law enforcement officers under § 2680(h), and certain civil forfeiture claims under § 2680(c). Despite Congress explicitly including exceptions elsewhere, no carveout appears in § 2680(a). As such, this Court should not "transcend the judicial function[]" and read in Petitioner's constitutional exception. *Iselin v. United States*, 270 U.S. 245, 251 (1926).

Second, the contemporaneous meaning of "discretionary function" cements that Congress did not intend for constitutional claims to void § 2680(a). Discretionary means acting "according to the dictates of [one's] own judgment and conscience, uncontrolled by the judgment or conscience of others." *Discretion*, *Black's Law Dictionary* (3d ed. 1933); *see also Discretion*, *Webster's New Collegiate Dictionary* (3d ed. 1927) ("[L]iberty or power of deciding or acting according to one's own judgment or as one thinks fit."). Function means an "office" or "duty."

Function, *Black's Law Dictionary* (3d ed. 1933). Together, "discretionary function" concerns only whether an employee is given the ability to make their own judgments according to their job position. If the employee can make independent choices as they see fit, the government does not assume liability for their tortious conduct. But that definition has nothing to do with whether an employee exercises that discretion in a constitutionally permissible way.

At bottom, the plain text forecloses Petitioner's constitutional carveout. But even if Congress implied the Constitution into § 2680(a), Congress did so only to prevent such allegations from short-circuiting the exception. This is evident in three ways.

First, Congress intended the discretionary function exception to apply to "any claim" predicated on an employee's discretionary function. In the absence of qualifying language, "any" is an expansive modifier. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). Further, "claim" is a "broad, comprehensive word" applying to "any demand held or asserted as of right." *Claim*, *Black's Law Dictionary* (4th ed. 1951); *Claim, Black's Law Dictionary* (3d ed. 1933). Put together, the exception immunizes the Government for any claim so long as an employee had discretion to act. And as explained above, an employee's discretionary function has nothing to do with the Constitution. So, Petitioner's implied constitutional claim or allegation would contradict that broad starting point of this proviso.

Second, any alleged constitutional violation would filter out through the qualifying condition "whether or not the discretion involved be abused." *Id.* § 2680(a). Abused means "to make excessive or improper use of a thing, or to employ in a manner contrary to the natural or legal rules for is use." *Abuse*, *Black's Law Dictionary* (3d ed. 1933). Indeed, an employee who plausibly violates the First Amendment acts contrary to the legal rules that discretion affords. Yet as explained above, this provision clarifies that the discretionary function exception applies regardless of how an employee wields their discretion. *See Shivers v. United States*, 1 F.4th 924, 931 (11th Cir. 2021). So plausibly-unconstitutional conduct would not override the discretionary function exception because the unconstitutional abuse of that discretion does not void § 2680(a). All said, Petitioner is wrong both to assume that the Constitution comes into the statute at all, and that it would not wash out through this qualifier.

Third, reading that qualifier to sift out constitutional allegations comports with the companion due care provision. *See F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959) (explaining that the Court reads statutory provisions as a "harmonious whole."). That provision immunizes the government when federal employees execute specific statutory mandates "whether or not such statute or regulation be valid." *Id.* § 2680(a). A constitutional challenge may invalidate a statute or regulation as unconstitutional. But so long as an employee follows that possibly unconstitutional statute, the exception applies. *See, e.g. Welch v. United States*, 409 F.3d 646, 652–53 (4th Cir. 2005). So too with the parallel limiting condition in the discretionary function exception; it applies when an employee unconstitutionally abuses their discretion. On the other hand, reading in a constitutional-claims exception imports tension between the two provisions—a result this court avoids. *Scalia & Garner*, *supra*, at 180. If, as Petitioner claims, the Constitution removes discretion, regardless of whether the discretion was abused, then the due care provision should also fail whenever an employee acts under an unconstitutional mandate. Such a reading either puts the provisions in conflict or renders both limiting conditions meaningless—an even more unacceptable result. *See United States v. Butler*, 297 U.S. 1, 65 (1936) (explaining that statutory text "cannot be meaningless, else they would not have been used."). Rather than breed conflict, this Court should read the provisions harmoniously and ignore Petitioner's construction.

B. This Court Has Never Authorized a Constitutional FTCA Claim.

This Court need go no further to affirm the Thirteenth Circuit because the statutory text is clear. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). If it does, Supreme Court precedent confirms what that text provides: Congress plainly excludes the Constitution from the FTCA and § 2680(a).

As a starting principle, this Court applies stare decisis with "enhanced force" when interpreting statutes. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). This is because "Congress is free to change this Court's interpretation of its legislation" should it disagree with its application. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). So Supreme Court precedent interpreting the FTCA applies with greater strength because it concerns the statute itself.

Start with *Meyer*. There, the Supreme Court considered whether constitutional claims were cognizable under § 1346(b) such that a claimant had an independent claim against the FDIC under its "sue-and-be-sued" waiver of sovereign immunity. 510 U.S. at 475. The Court held that constitutional torts were not cognizable because the "'law of the place' means law of the State – the source of substantive liability under the FTCA." *Id.* at 477 (citation omitted). And since "federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right," the "United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims. *Id.* at 478. So this Court has explicitly read constitutional violations out of the FTCA. That precedent forecloses Petitioner's argument. Conversely, permitting any constitutional violation to invalidate § 2680(a) functionally voids *Meyer* because then, any FTCA claim based on alleged constitutional violations would become actionable.

That approach makes sense because, as this Court has clarified, the FTCA is poorly suited to redress constitutional violations. In *Carlson v. Green*, this Court held in part that the FTCA does not pre-empt constitutional claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of*

Narcotics, 403 U.S. 388 (1971), because the FTCA is "not a sufficient protector of the citizens' constitutional rights." 446 U.S. 14, 23 (1980). The Court reasoned that the FTCA was not an "equally effective remedy for constitutional violations" because it extends liability only to state tort laws, prohibits punitive damages, and is a poor deterrent to unconstitutional conduct. *Id.* at 19–23. It follows that the FTCA does not arrogate *Bivens* because Congress did not intend the FTCA to resolve constitutional violations in the first place. Distorting § 2680(a) into a vehicle for constitutional redress contradicts that settled understanding.

Unsurprisingly, then, the Constitution is absent when this Court interprets the discretionary function exception. The Court in *Berkovitz*, 486 U.S. at 531, established a two-part test for applying the discretionary function exception, which it confirmed in *Gaubert*. 499 U.S. at 324. The first element turns on whether the employee's conduct involves "an element of judgment or choice"—not whether the exercise of that discretion is constitutionally permissible. *Berkovitz*, 486 U.S. at 536 (citing *Dalehite*, 346 U.S. at 34). The Court correctly identified that conduct itself is irrelevant because discretion turns on whether the "nature of the conduct" involves independent choice. *Id.* The test, however, is not based on the constitutionality of that choice. The second element, which considers whether such discretion adheres to an agency's policy prerogatives, is no different. *Id.* at 537. There, the Court identified that when discretion is "grounded in social, economic, and political policy," the exception applies and the court does not "second-guess[]" those policy decisions. *Id.* (quoting *Varig Airlines*, 467 U.S. at 814). The upshot is that such policy determinations consider only specific goals of an employee's agency. The policy decisions at issue are not abstract constitutional concerns. All said, this Court applies § 2680(a) without concern for the constitutionality of discretion or policy.

Moreover, this Court excludes the Constitution when distinguishing between discretionary and non-discretionary conduct. That is dispositive. *See Castro v. United States*, 560 F.3d 381, 393 (5th Cir. 2009) (Smith, J., dissenting). The *Berkovitz* Court explained that conduct is not discretionary "when a federal statute, regulation or policy specifically prescribes a course of action to follow." 486 U.S. at 537. That language disables Petitioner's rule twice over. First, the Court omits the Constitution when stating that only a "statute, regulation, or policy" removes discretion. *Id.* As such, the Court agrees that Congress did not intend the Constitution to void discretion, or else it would have explicitly said so. Second, the Court adds the post-prepositional modifier "specifically prescribes." *Id.* at 536. That language makes sense with respect to statutes, regulations, and agency policies because those sources of law can specify certain conduct that an employee must follow. But applying that modifier to the Constitution makes no sense because the Constitution does not specifically prescribe conduct in the same way that laws or regulations do. Instead, the Constitution delegates powers to Congress to prescribe conduct through legislation, which in turn authorizes executive agencies to prescribe conduct through regulation and policy. *See* U.S. Const. art. I, §§ 1, 8; 5 U.S.C. §§ 551 et seq. All said, this Court's analysis of § 2680(a) excludes Petitioner's constitutional carveout.

Legislative history concerning the discretionary function exception further buries Petitioner's rule. The Court in *Dalehite* explained that Congress intended "to preclude any possibility that [§ 2680(a)] might be construed to authorize suit for damages against the Government growing out of an authorized activity." 346 U.S. at 28 (quoting H.R. Rep. No. 2245, 77th Cong., 2d Sess., p. 10). Further, Congress did not intend for § 2680(a) to "test the validity of or providing a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion" or to test "the constitutionality of legislation, or the legality of a rule or regulation . . . through the medium of a damage suit for tort." *Id*. Stated plainly, Congress did not intend for claimants to raise constitutional allegations here as a means to secure private damages. Permitting a plausibly-pled constitutional violation to void sovereign immunity perversely lets claimants challenge the validity of discretionary acts and the constitutionality of the law or rule justifying that discretion. That result is incompatible with Congress's intent when passing § 2680(a) as adopted by this Court.

And the circuit courts that have wrestled with the statutory text and such precedent agree. The Seventh Circuit in *Linder v. United States* correctly reasoned that the Constitution "has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations." 937 F.3d 1087, 1090 (7th Cir. 2019) (per Easterbrook, J.); *see also Kiiskila v. United States*, 466 F.2d 626, 627–28 (7th Cir. 1972). The Eleventh Circuit in *Shivers* did the same, recognizing that § 2680(a)'s text did not provide for an "extratextual 'constitutional-claims' exclusion," which made sense because the FTCA addresses only state law torts. 1 F.4th at 930. The *Shivers* court also concluded that § 2680(a) concerned only whether an employee's conduct involved judgment or choice, not "how poorly, abusively, or unconstitutionally" that judgment was exercised. *Id.* at 931. This Court should consider this circuit precedent because it actually takes the FTCA on its terms.

*   *   *

Without her constitutional escape hatch, Petitioner's false imprisonment claim fails under § 2680(a). First, Lurie acted with discretion because no TSA policy specifically prescribed his ability to stop passengers from recording at the TSA checkpoint. Petitioner points only to a TSA webpage discussing videotaping at security checkpoints to dispute discretion. Transp. Sec. Admin., *supra*. Yet the policy lets screeners prohibit videotaping if it interferes with the screening process or reveals sensitive information. *Id.* Moreover, "interference with screening" is qualified by a non-exhaustive list of examples, and what constitutes sensitive information is not defined. *Id.* As such, Lurie was acting with discretion when he stopped Petitioner. *See, e.g. Pudeler v. United States*, No. 3:09-cv-1543(JGM), 2013 WL 6511937, at *7 (D. Conn. Dec. 12, 2013). Second, Lurie's discretion was exercised according to TSA policy interests. Lurie stopped Petitioner because she was disrupting the checkpoint and recording sensitive areas. R. at 3. Those concerns implicate the TSA's prerogative to maintain security at airport checkpoints. *Dyer v. Smith*, 56 F.4th 271, 280 (4th Cir. 2022). In sum, the discretionary function exception applies and the government is immune from Petitioner's tort claim.

C. Allowing Any Plausible Constitutional Violation to Waive Sovereign Immunity is Wrong.

Deriding both text and precedent, Petitioner nevertheless asserts that her constitutional allegation automatically defeats the discretionary function exception. That is wrong for at least five reasons.

First, Petitioner incorrectly suggests that Congress implied a private damages remedy whenever the Constitution is plausibly violated. Plainly, only Congress may authorize constitutional monetary damage suits against the government. *See Egbert v. Boule*, 596 U.S. 482, 491 (2022) ("At bottom, creating a cause of action is a legislative endeavor."). Congress has explicitly provided such a remedy in two instances. First, Congress authorizes suits against state and local officials and municipalities who violate constitutional rights. 42 U.S.C. § 1983; *Monell v. Dept. of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 694 (1978). Second, Congress permits money damages against the federal government for constitutional claims not sounding in tort under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Yet Congress has not provided any damages remedy for constitutional torts under the FTCA. So, Petitioner's implied FTCA constitutional damages remedy makes little sense since Congress has not explicitly provided that right. *See supra* Section II.A.

Similarly, this Court has not implied an FTCA constitutional damages remedy. *See supra* Section II.B. And the one place where the Court has implied monetary damages for constitutional violations, *Bivens* claims, is the exception which proves that rule. *Bivens* permitted a damages remedy against government officials who violated the plaintiff's Fourth Amendment rights. *Bivens*, 403 U.S. at 397. Since then, this Court has constrained *Bivens* remedies to give "utmost deference to Congress' preeminent authority" to develop constitutional causes of action. *Egbert*, 596 U.S. at 491–92. That hesitancy is telling. This Court has not and should not arrogate Congress's authority to establish constitutional causes of action.

Second, Petitioner claims the Constitution only rebuts discretion. But there is no support in the statutory text for that proposition. *See supra* Section II.A.2. And more egregiously, Petitioner bases that argument on a single Supreme Court case irrelevant to the FTCA. In *Owen v. City of Independence*, a slight majority held that a state municipality does not have absolute immunity from damages when a plaintiff sues under 42 U.S.C. § 1983. 445 U.S. 622, 657 (1980). The majority reasoned that a "municipality has no 'discretion' to violate the Federal Constitution[.]" *Id.* at 649. But that case concerns a § 1983 claim that explicitly authorizes constitutional damages suits—it has nothing to do with the FTCA, which authorizes damages only for state law torts. 28 U.S.C. § 1346(b)(1). Moreover, *Owen* actually cuts against Petitioner. There, the Court rejected an implied limit on § 1983 claims against state municipalities that Congress had not provided. *Owen*, 445 U.S. at 625. So too here. Petitioner injects an implied limit to the discretionary function exception without any directive from Congress. Just as an implied limit was rejected in *Owen*, so too should this Court reject an implied constitutional limit to the discretionary function exception.

Petitioner further founds her rule on fundamentally-flawed circuit court opinions. *Pooler v. United States* stated in unattributed dicta that "federal officials do not possess discretion" to violate constitutional rights. 787 F.2d 868, 871 (3d Cir. 1986). Other circuits then adopted that dicta or parroted each other. *E.g.*, *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Xi v. Haugen*, 68 F.4th 824, 838 (3d Cir. 2023); *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009). And the only circuit conducting any analysis still relied on the "clear weight" of faulty circuit court decisions and *Owen. Loumiet v. United States*, 828 F.3d 935, 943–945 (D.C. Cir. 2016). All to say, this Court should ignore these poor circuit decisions that fail to grapple with text and precedent.

Third, Petitioner violates the cardinal command that Congress must explicitly waive sovereign immunity. When the Court construes a condition on waiving sovereign immunity, it "should not take it upon [itself] to extend the waiver beyond that which Congress intended." *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979). So the Federal Government's "liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Price*, 174 U.S. at 375–76. Petitioner is wrong to state that there is an implied constitutional exception to § 2680(a). Petitioner is doubly wrong to presume that such an implied exception could waive sovereign immunity when this Court has made clear that such waivers "are not to be implied." *Soriano v. United States*, 352 U.S. 270, 273 (1957). As such, this Court should maintain § 2680(a)'s scope to preserve sovereign immunity when Congress has not explicitly provided otherwise.

Fourth, Petitioner's rule creates a merits-first approach to determining jurisdiction under § 2680(a). That is absurd. Section 2680(a) is a jurisdictional bar applied before discovery. *See, e.g. Gaubert*, 499 U.S. at 324–25 (applying § 2680(a) under a motion to dismiss); *Berkovitz*, 486 U.S. at 545 (same). And as applied, § 2680(a) asks only whether an employee has "the discretion . . . to act according to one's judgment of the best course"—not whether the employee permissibly exercised that discretion. *Dalehite*, 346 U.S. at 34. Yet Petitioner's rule leaps over jurisdiction to the constitutional merits. So a Court applying Petitioner's rule must conduct a full-blown merits analysis of a claimant's constitutional allegation—before any discovery—all to determine whether the government has waived sovereign immunity in the first place. *Ramirez v. Reddish*, No. 2:18-cv-00176-DME-MEH, 2020 WL 1955366, at *29 (D. Utah Apr. 23, 2020), *aff'd* 104 F.4th 1219 (10th Cir. 2024). That analysis ignores § 2680(a)'s role as a threshold jurisdictional filter for torts involving discretionary conduct.

Further, Petitioner's flawed conflation of jurisdiction and merits is no hypothetical concern. Because many constitutional claims overlap with state law torts, courts could litigate the merits of a substantive FTCA state law tort and a constitutional allegation before determining jurisdiction. Consider that Fourth Amendment unconstitutional arrests are substantively identical to false arrest torts, unconstitutional searches to trespass, and excessive force to battery. Olivia Goldberg, Note, *(Extra)ordinary Tort Law*, 76 Stan. L. Rev. 481, 507–08 (2024). Eighth Amendment excessive force claims correlate to assault or battery torts and deliberate indifference claims with negligence. *Id.* at 508. And First Amendment claims overlap with invasion of privacy, intentional infliction of emotional distress, or, as here, can dictate elements of state law torts. *Id.* at 510–11. Courts determining subject matter jurisdiction must analyze the merits of the substantive tort—as a part of their constitutional rebuttal analysis—before even gaining subject matter jurisdiction over that tort. That result renders the FTCA's jurisdictional bar a nullity. *Ramirez*, 2020 WL1955366, at *29, n.33; *cf. Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (explaining in the context of Article III standing courts may not consider a legal claim's merits before establishing standing). Congress would never intend that backwards analysis.

Indeed, look no further than this case to see that flawed analysis in practice. The Eastland false imprisonment tort requires that a claimant was "(1) intentionally confined within a bounded area (2) by someone who asserted legal authority to do so but who (3) actually lacked legal justification." R. at 4. Petitioner's claim hinges on element three because Lurie used his authority as a TSA screener to block Petitioner from proceeding. *Id.* at 3–4. And that element relies on Petitioner's First Amendment allegation since Lurie had authority to act under the relevant TSA recording policy. *Id.* at 4; *see supra* Section II.B. So, under Petitioner's construction, both jurisdiction and merits turn on whether her First Amendment right to record was violated. As such, any court adopting Petitioner's rule must determine the merits of her First Amendment claim—which could resolve her substantive tort claim—before assuming jurisdiction. Again, Petitioner's rule produces a result Congress could not have ever intended.

Petitioner's merits-first rule even harms plaintiffs. For example, a prisoner brings an FTCA negligence claim against federal prison guards. To defeat § 2680(a), the prisoner also asserts an Eighth Amendment deliberate indifference claim. So the prisoner must show the guards acted with subjective recklessness. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a court would evaluate the negligence claim and the Eighth Amendment deliberate indifference claim together. And since meeting the substantive tort requires a lower culpability standard than the constitutional violation, the prisoner could prove their tort claim but nevertheless have their claim dismissed if recklessness is not satisfied. *Shivers*, 1 F.4th at 934. Petitioner's flawed approach confuses district courts who have to apply that counterintuitive jurisdictional analysis and even frustrates claimants who raise such constitutional allegations.

Fifth, Petitioner ignores that claimants can redress constitutional grievances through other channels. Start with non-monetary relief. Under the Administrative Procedure Act, claimants can seek injunctive and declaratory relief for agency actions "contrary to [a] constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). And claimants can assert facial or as-applied

First Amendment challenges to unconstitutional statutes. *See, e.g. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 321 (2010). While not monetary damages, claimants can still redress constitutional violations without completely re-engineering the FTCA.

And damages remedies for constitutional violations still exist. Claimants can use the Tucker Act and Little Tucker Act, codified at 28 U.S.C. § 1491(a)(1) and 28 U.S.C. § 1346(a)(2), to seek damages for constitutional claims not sounding in tort. Further, claimants can assert constitutional torts against state officers to recover compensatory and punitive damages. 42 U.S.C. § 1983; *see Carlson*, 446 U.S. at 22 (citation omitted). Moreover, the Supreme Court has implied a private damages remedy against federal officials for unconstitutional conduct. *Bivens*, 403 U.S. at 397. At bottom, Petitioner is frustrated that she has no path to receive money damages for her alleged constitutional grievance. That may be so. But it makes no sense to contort the FTCA to meet her demands when there are ample alternative channels to redress constitutional grievances.

Petitioner's rule even renders one such alternative channel redundant. *Bivens* claims are a "complementary source of liability" to the FTCA because the FTCA does not remediate constitutional violations. *See, e.g. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (citation omitted). But if Petitioner's rule held true, these doctrines converge and plaintiffs could recover monetary damages from the government itself. Put another way, "there would be no reason for aggrieved parties to bring damages actions against individual officers" through *Bivens*. *Meyer*, 510 U.S. at 485. Thus, petitioner's rule uses *Bivens* to bootstrap constitutional claims directly against the government—a result Congress never intended and this Court should reject.

D. At Most, Only Violations of Clearly Established Constitutional Rights Should Override the Discretionary Function Exception.

Text and Supreme Court precedent clarify that Congress did not intend to waive FTCA sovereign immunity for plausible constitutional allegations. Petitioner's atextual rule does not overcome that authority. Should this Court disagree, it should nevertheless hold that only violations of clearly-established constitutional rights override § 2680(a). And Petitioner's alleged First Amendment violation still fails under that standard.

Requiring that plaintiffs identify clearly-established constitutional rights comports with another limit on constitutional damages remedies: qualified immunity. Qualified immunity shields public officials from liability when their "conduct does not violate a clearly-established constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity applies unless "existing precedent" has "placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Applying qualified immunity to FTCA constitutional allegations would accord doctrinal consistency with other circumstances where claimant seek monetary damages for alleged constitutional violations. So just as government officials are only liable for violating clearly-established constitutional rights, so too should this standard apply to claims against the government.

Applying that standard here, Petitioner's claim fails because there is no clearly-established First Amendment right to record TSA screeners at security checkpoints. While there is a general First Amendment right to record public officials in public spaces, *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011), qualified immunity requires that a claimant identify a clearly-established constitutional right as "particularized to the facts of [that] case." *White v. Pauly*, 580 U.S. 73, 79 (2017). So there must be controlling precedent or a "robust consensus" among courts establishing a First Amendment right to record TSA security checkpoints. *al-Kidd*, 563 U.S at 731. There is none. *See Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002, 1075–76 (D.N.M. 2014), *aff'd*, 813 F.3d 912 (10th Cir. 2015) (applying qualified immunity because there was no clearly-established

First Amendment right to record TSA agents at airport screening checkpoints); *Reyes v. Lavoie*, No. 3:24-cv-01174-MPS, 2025 WL 2777120, at *8 (D. Conn. Sept. 29, 2025) (same). So Petitioner's claim still fails because no clearly-established constitutional right is implicated.

III. PETITIONER'S CONSTRUCTION CREATES SEPARATION OF POWERS CONCERNS AND INVADES CONGRESS'S DOMAIN.

Petitioner's construction—which bloats the law enforcement proviso and handicaps the discretionary function exception—waives sovereign immunity beyond what Congress ever intended. Plainly, Congress, not the judiciary, decides when sovereign immunity is waived. *See Mitchell*, 463 U.S. at 212. This Court has constantly reiterated that it does not rewrite statutory text to achieve policy outcomes. *Shelby Cnty. v. Holder*, 570 U.S. 529, 554 (2013). Remodeling statutes based on extratextual concerns risks "amending statutes outside the legislative process." *Bostock,* 590 U.S. at 654-55. As such, this Court should not encroach on Congress's law-making domain.

Evidently, Congress has already established its capacity to waive sovereign immunity under the FTCA. The FTCA is a limited waiver of sovereign immunity, so Congress must clearly speak to broaden that waiver any further. *See Cooper*, 566 U.S. at 290. Congress crafted a detailed statutory scheme that includes both a general waiver of sovereign immunity, 28 U.S.C. § 1346(b)(1), and enumerated exceptions to that waiver, § 2680(a)–(n). Where Congress has already calibrated that waiver against a broad set of exceptions, courts should not disturb that balance and enlarge the government's liability through such exceptions. *See BP P.L.C. v. Mayor & City Council of Balt.*, 593 U.S. 230, 239 (2021).

Look no further than Congress's subsequent FTCA amendments to confirm it is better suited to resolve sovereign immunity issues. Congress amended § 2680(h) in response to unconstitutional searches and seizures, reflecting a deliberate policy choice about intentional-tort liability and Congress's willingness to fine-tune the FTCA. *See supra* Section I.B. Additionally, the Westfall Act evidences how Congress recalibrates when the judiciary strays from the statutory text. After *Westfall v. Erwin*, 484 U.S. 292, 300 (1988), exposed federal employees to personal liability, Congress immediately amended the statute. *Compare id.* § 2679 (1946) *with id.* § 2679. That law made the FTCA the exclusive remedy for such state law torts and restored employee immunity. *Id.* Both amendments clarify that Congress stands ready to address issues arising in the FTCA. So this Court should avoid annexing Congress's authority to modify the FTCA.

At bottom, even if the statutory text yields undesirable policy outcomes, only Congress should remedy that result. *Rayonier Inc. v. United States*, 352 U.S. 315, 320 (1957). Expanding FTCA liability for TSA screening is exactly the sort of policy choice committed to the legislative branch. *See Kimble*, 576 U.S. at 456. As it has done before, Congress can amend the FTCA if it believes liability should attach to screeners' discretionary conduct. But the judiciary should not upset Congress's balance of immunity in the FTCA under the guise of statutory interpretation.

CONCLUSION

Both the intentional tort exception and the discretionary function exception bar Petitioner's FTCA claim. Section 2680(h) bars subject matter jurisdiction because TSA screeners are not "investigative or law enforcement officer[s]" so the intentional tort exception voids Petitioner's false imprisonment claim. Section 2680(a) bars subject matter jurisdiction because TSO Lurie acted according to his job's discretionary function, which applies regardless of any plausible constitutional violation. These interpretations align with the statutory text, applicable precedent, and legislative purpose of the FTCA. Accordingly, the Government respectfully requests that this Court affirm the Thirteenth Circuit's decision below.