No. 22-2045

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ERIN OSMON,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the U.S. District Court for the Western District of North Carolina, No. 21-353

ANSWERING BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). JA8. The district court concluded that it lacked subject matter jurisdiction under 28 U.S.C. § 2680(h) over the claims against the United States and granted summary judgment on those claims. JA135-136 (magistrate judge's recommendation to dismiss the complaint); JA155-156 (district court order adopting the recommendation). Plaintiff filed a timely notice of appeal, JA158, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Congress enacted the Federal Tort Claims Act (FTCA) to waive sovereign immunity for various tort claims arising from the actions of federal employees. Claims based on intentional torts are generally not permitted, but there is a limited exception for certain intentional torts committed by federal "investigative or law enforcement officers" who are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h).

The issue presented is whether Congress has unequivocally waived sovereign immunity for intentional torts committed by employees of the

Transportation Security Administration (TSA) who screen passengers and baggage at U.S. airports.

PERTINENT STATUTES

Pertinent statutes appear in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory Framework

A. The Federal Tort Claims Act

The FTCA is a limited waiver of sovereign immunity for claims for money damages against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of 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." 28 U.S.C. § 1346(b)(1).

Congress has not waived sovereign immunity for all torts, and the FTCA contains a number of limitations. *See* 28 U.S.C. § 2680. One limitation, commonly referred to as the "intentional torts exception," provides that district courts lack jurisdiction over "[a]ny 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). The intentional torts exception, however, contains its own exception that waives sovereign immunity for certain intentional torts committed by certain federal officers. Commonly referred to as the law enforcement proviso, this provision waives sovereign immunity for claims arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by "investigative or law enforcement officers of the United States Government." *Id.* The proviso defines "investigative or law enforcement officer" to be "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.*

The law enforcement proviso was enacted following a series of "abusive, illegal and unconstitutional 'no-knock' raids" conducted by federal narcotics agents. S. Rep. No. 93-588, at 2 (1973). The families subjected to those raids testified before Congress that plain-clothed officers broke into their homes, pointed guns at them, and caused extensive damage, and there were reports that the same officers had been involved in earlier, mistaken searches that caused substantial injury. Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. Rev. 497, 500-01

& n.7, 502-03 (1976). Under the then-existing structure of the FTCA, there was "no remedy against" the United States "if a Federal agent violates someone's constitutional rights—for instance, Fourth Amendment rights against illegal search and seizure." S. Rep. No. 93-558, at 2-3. Congress sought to address that concern and enacted the law enforcement proviso to make the government "liable for the tortious acts of its law enforcement officers when they act in bad faith or without legal justification." *Id.* at 3.

Before enacting the proviso, Congress considered three separate bills that would have amended the broad immunity conferred by the FTCA's intentional tort exception. Two of the bills waived sovereign immunity for torts committed by *all* federal employees. *See* Boger, Gitenstein & Verkuil, *supra*, at 513-15. The bill that became the law enforcement proviso, in contrast, was limited to torts committed by "investigative or law enforcement officers." Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (1974). The committee report on the bill explained that the law enforcement proviso was "the product of over 2 months of discussion" between Congress and the Executive Branch, and was designed to "submit the Government to liability" when its officers "injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause." S. Rep. No. 93-588, at 4.

B. The Statutory Authority For TSA

After the terrorist attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act, which created TSA and charged it with ensuring transportation security, including civil aviation security. *See* Pub. L. No. 107-71, 115 Stat. 597 (2001). TSA must ensure that all passengers and their property are screened prior to boarding commercial aircraft, 49 U.S.C. § 44901(a), in part to ensure that no passenger is "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." *Id.* § 44902(a)(1); *see also id.* § 44904(a), (e). To carry out these duties, Congress directed the TSA Administrator to "develop standards for the hiring and retention of security screening personnel," "be responsible for hiring and training personnel to provide security screening," and "train and test security screening personnel." *Id.* § 114(e)(2)-(4).

Generally speaking, the TSA accomplishes these responsibilities using two different groups. In the first group are "law enforcement officer[s]" designated by the TSA Administrator. 49 U.S.C. § 114(p)(1). These law enforcement officers are authorized to carry firearms, to "make an arrest without a warrant for any offense against the United States" based on probable cause, and to "seek and execute warrants for arrest or seizure of

evidence" based on probable cause. *Id.* § 114(p)(2)(A)-(C). TSA law enforcement officers include Federal Air Marshals, who "detect and apprehend persons who commit * * * criminal or terrorist acts against U.S. air carriers, airports, passengers, and crews," and TSA criminal investigators, who "plan[] and conduct[] * * * complex and often long-term criminal investigations relating to alleged or suspected violations of federal criminal law." JA73. The TSA Administrator must consult with the Attorney General to develop guidelines for how TSA law enforcement officers may use this authority. 49 U.S.C. § 114(p)(3). And if the TSA Administrator fails to comply with those guidelines, then the statutory authority for TSA law enforcement officers "may be rescinded or suspended." *Id.* § 114(p)(4).

TSA uses a second group of employees to screen the hundreds of millions of passengers that board flights at U.S. airports every year. *United States v. Aukai*, 497 F.3d 955, 956 (9th Cir. 2007) (en banc). These screeners "are not law enforcement officers and do not act as such." *Vanderklok v. United States*, 868 F.3d 189, 208 (3d Cir. 2017). Instead, TSA screeners serve a circumscribed and vital role by preventing prohibited items from being taken on commercial aircraft. Thus, TSA screeners examine passengers and baggage for "weapons or explosives," *Aukai*, 497

F.3d at 960, and other items that could pose a danger onboard a flight, such as aerosol insecticides, lithium-ion batteries, bowling pins, canoe paddles, and automobile airbags. TSA, *What Can I Bring?*, https://perma.cc/Q4ME-6KQ3.

TSA screeners are not "authorized to carry a weapon, seize evidence, make arrests, or execute a criminal investigative search." JA44-45. If a screener encounters a situation that calls for criminal investigative or enforcement activity, such as "discover[ing] an item that appears to be illegal contraband," the screener may not act on their own. JA45. Instead, the screener must request assistance from law enforcement, who "will determine whether to take action under State or local laws." 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002). Cognizant of screeners' circumscribed authority, Congress directed there must be at least one law enforcement officer at each security screening location to assist TSA screeners, 49 U.S.C. § 44901(h)(2), and airports are required to have an adequate number of local law enforcement officers on site, *id.* § 44903(c)(1); 49 C.F.R. § 1542.215.

TSA screeners also lack authority to investigate civil violations. JA45. If a screener discovers a prohibited item, "such as a baseball bat, the screener is not permitted to seize the item, but rather must give the item's

owner the option of disposing of the item, leaving it with someone" else, "taking it back to his or her vehicle, or abandoning it." JA45. If the person refuses to cooperate or attempts to bypass the screening, then "TSA screeners must call" law enforcement, and the screeners generally "are not authorized to exert force to physically restrain an individual." JA45. Any potential civil violations "are referred to, and pursued by, a separate cadre of TSA employees," not screeners. JA45

II. Factual Background And Prior Proceedings

Plaintiff Erin Osmon was a passenger on a flight departing from Asheville Regional Airport in June 2019. JA8. The complaint alleges that as plaintiff proceeded through a TSA security screening checkpoint, she "was directed into a body scanner," which "alarmed on her." JA8-9. Osmon alleges that a TSA screener informed her "that she would need to submit to a 'groin search,'" JA9, and alleges that she was touched inappropriately by the TSA screener during the pat-down search, JA10-12.

Osmon sued the United States for battery under the Federal Tort Claims Act, JA13, and the case was referred to a magistrate judge for a report and recommendation, JA4.[1] Because Osmon's FTCA claim was

[1] Osmon filed an earlier FTCA suit that was dismissed for failure to exhaust administrative remedies. JA115-116.

based on an allegation of an intentional tort, the district court concluded that the case turned on whether the FTCA's law enforcement proviso applied, and whether the TSA screener "was an 'investigative or law enforcement officer' as that term is defined in the Proviso." JA121-122. The magistrate concluded that TSA screeners "fall outside the scope of the Proviso" because they are not "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." JA135.

The magistrate based that conclusion on a thorough textual analysis of the law enforcement proviso, and determined that the proviso did not encompass TSA screeners who perform administrative searches, but not criminal investigatory searches. JA131. The magistrate first observed that the statute's "grouping of 'execute searches' with 'seize evidence, or to make arrests for violations of federal law' indicates that the Proviso is intended to pertain to actors involved in traditional law enforcement activities." JA131. That is because "[w]ords grouped in a list should be given related meaning," JA132 (quoting *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990)), and Congress chose to pair the authority to "execute searches" with "other traditional law enforcement functions," of making arrests and seizing evidence, JA131.

That connotation was buttressed by the fact that each of those powers—to execute searches, make arrests, and seize evidence—were "modified by the final phrase 'for violations of Federal law.'" JA133. That referred to violations of federal "criminal law given that the phrase also modifies 'make arrests,'" and so similarly the power to "execute searches," meant searches related to suspected criminal violations. JA133 (quotation marks omitted). Moreover, "the phrase 'execute searches' is a 'term of art' connoting investigative rather than administrative searches," as "every other statute in the United States Code that uses this phrase refers to" investigatory searches into criminal activity. JA132 (quotation marks omitted).

The magistrate further noted that Congress had "waive[d] immunity only for a subset of intentional torts"—assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. JA133-134. That choice to waive immunity for "torts typically associated with traditional police powers," but not for other intentional torts like "libel, slander, * * * or interference with contract rights," reflected the proviso's circumscribed scope. JA134 (quotation marks omitted). And this textual analysis was further confirmed by the proviso's legislative history, which demonstrated Congress's intent to waive immunity for "the type of common law

intentional torts federal officers may commit in pursuit of their law enforcement duties." JA135 (quotation marks omitted).

After the magistrate judge recommended dismissing Osmon's complaint, JA136, Osmon filed an objection with the district court, JA138-140. Osmon asked the district court "to reconsider Judge Metcalf's recommendation," and stated that she would "not repeat her entire opposition to the government's motion [to dismiss] here, but rather incorporates it by reference, as there is but one issue discussed therein and a review of the full opposition is necessary to consider this objection." JA139. The district court concluded that Osmon had failed to "make any specific objections" to the recommendation as required by 28 U.S.C. § 636(b)(1). JA154-155. The court held that "[t]o the extent that" Osmon had made a general objection, "such objection does not warrant a *de novo* review of the Magistrate Judge's reasoning." JA155. The court went on to perform a "careful review" of the magistrate's recommendation and held that it was "correct and [] consistent with current case law." JA155. Accordingly, the district court dismissed Osmon's complaint for lack of jurisdiction. JA156-157.

SUMMARY OF ARGUMENT

The FTCA generally does not waive sovereign immunity for claims based on intentional torts. Congress has provided a limited exception to that rule, known as the law enforcement proviso. 28 U.S.C. § 2680(h). The proviso is a limited waiver of sovereign immunity for certain intentional tort claims like assault and battery committed by "investigative or law enforcement officers" of the United States. *Id.* The proviso, in turn, defines those officers as those "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*

The district court correctly held that the proviso does not encompass employees like TSA screeners who lack authority to make arrests, seize evidence, or execute searches for violations of federal law. The court construed the proviso based on its text, context, and understood meaning as applying to officers with traditional law-enforcement police powers—not to TSA screeners who conduct airport screening. That reasoning is sound and supported by well-reasoned opinions from other courts of appeals. *Corbett v. TSA*, 568 F. App'x 690, 700-02 (11th Cir. 2014); *Pellegrino v. U.S. Transportation Security Administration*, 937 F.3d 164, 181-200 (3d Cir. 2019) (Krause, J. dissenting); *Iverson v. United States*, 973 F.3d 843, 855-68 (8th Cir. 2020) (Gruender, J., dissenting). Both at first glance, and

after a careful examination, the law enforcement proviso waives sovereign immunity for intentional torts committed by law enforcement officers. And there is no factual dispute that the TSA screener here was not authorized to exercise any law enforcement powers that other TSA law enforcement officials possess. *Cf.* 49 U.S.C. § 114(p).

To the extent that there is any ambiguity in the statute, that ambiguity must be resolved in favor of the United States. *FAA v. Cooper*, 566 U.S. 284, 290-91 (2012); *Peck v. United States Department of Labor*, 996 F.3d 224, 229 (4th Cir. 2021). Here, the district court appropriately adopted the best construction of the statute, and its construction is therefore at least "a plausible interpretation of the statute." *Cooper*, 566 U.S. at 290-91. Accordingly, Congress has not unambiguously waived the United States' sovereign immunity, and the district court correctly dismissed the complaint for lack of jurisdiction.

Before it reaches the merits, however, the Court may determine that dismissal of the appeal is appropriate because Osmon did not file specific written objections to the magistrate judge's report and recommendation, but instead filed a general objection that "incorporate[d]" her arguments "by reference." JA139. This Court has held that when a plaintiff fails to make specific objections to a magistrate's recommendation, the plaintiff

waives appellate review. *United States v. Midgette*, 478 F.3d 616, 621-22 (4th Cir. 2007).

STANDARD OF REVIEW

The Court reviews de novo an order dismissing an FTCA suit for lack of subject matter jurisdiction. *Clendening v. United States*, 19 F.4th 421, 426(4th Cir. 2021).

ARGUMENT

I. By Raising Only A General Objection To The Magistrate's Recommendation, Osmon Has Waived Appellate Review

After the magistrate judge issued his report and recommendation that Osmon's complaint be dismissed, JA136, Osmon was entitled to file "specific written objections to [those] proposed findings and recommendations," Fed. R. Civ. P. 72(b)(2). If Osmon had done so, then the district court would be required to "make a de novo determination of those portions of the report * * * to which objection is made," 28 U.S.C. § 636(b)(1), and Osmon could seek appellate review.

Osmon filed an objection that identified the "salient issue," JA138, and noted that other courts of appeal had addressed the question, JA139. After doing so, Osmon "asked" the district court "to reconsider Judge Metcalf's recommendation," and stated that she "will not repeat her entire opposition to the government's motion here, but rather incorporates it by

reference." JA139. Beyond that, the objection contained no substantive argument. *See* JA138-140. The district court correctly observed that Osmon had failed to "make any specific objections" to the magistrate judge's recommendation, and that any general objection she had made did not warrant de novo review under 28 U.S.C. § 636(b)(1). JA155.

As this Court has explained, the rule that a party file specific written objections to a magistrate's recommendation "does not countenance a form of generalized objection to cover all issues addressed by the magistrate judge." *United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007). And when a party fails to make such a specific objection, the party also fails to preserve that issue for appeal. *Id.* at 622. Without such a rule "litigants would have little incentive to object in the district court, and any issue before the magistrate would be a proper subject of judicial review." *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (cleaned up). Thus, "[a] general objection to the entirety of the magistrate judge's report is tantamount to a failure to object," *Tyler v. Wates*, 84 F. App'x 289, 290 (4th Cir. 2003), which waives the party's "right to appeal." *Wells v. Shriners Hospital*, 109 F.3d 198, 199 (4th Cir. 1997); *see id.* at 201 (dismissing appeal for failure to comply with this rule); *Arakas v. Commissioner*, 983 F.3d 83, 103 (4th Cir. 2020) (plaintiff "has

waived appellate review of her argument by failing to assert it as a specific objection" to the magistrate's recommendation).

Accordingly, this Court can properly dismiss the appeal. If the Court reaches the merits, it should affirm for the reasons laid out by the magistrate judge's considered decision, JA117-135, and expanded upon below.

II. Congress Did Not Waive Sovereign Immunity For Intentional Torts Committed By TSA Screeners

The district court correctly concluded that it lacked jurisdiction over Osmon's claims against the United States for intentional torts, holding that the waiver of sovereign immunity in 28 U.S.C. § 2680(h) does not encompass TSA screeners.

As the district court noted, "courts have written thoughtful and well-reasoned opinions that reach differing conclusions about this issue." JA128. The Eleventh Circuit has held that TSA screeners do not fall within the law enforcement proviso. *Corbett v. TSA*, 568 F. App'x 690, 700-02 (11th Cir. 2014). A majority of the en banc Third Circuit held to the contrary in *Pellegrino v. U.S. Transportation Security Administration*, 937 F.3d 164 (3d Cir. 2019). Judges Krause, Jordan, Hardiman, and Scirica dissented and explained why TSA screeners are not law enforcement officers under § 2680(h). *Id.* at 181-200. A divided panel of the Eighth

Circuit agreed with the *Pellegrino* majority, *Iverson v. United States*, 973 F.3d 843 (8th Cir. 2020), while Judge Gruender dissented and would have held that the law enforcement proviso does not extend to TSA screeners, *id.* at 855-68.[2]

Those differing opinions demonstrate that, at a minimum, "the statute is reasonably susceptible to divergent interpretation," *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995), and at least ambiguous. *See Herman v. Local 305, National Post Office Mail Handlers*, 214 F.3d 475, 479 (4th Cir. 2000) ("Because there are several plausible meanings * * * we believe the term is ambiguous."). As we explain below, the district court's judgment is correct in all events. But even if there were doubt about how the FTCA applies to TSA screeners, any ambiguity in the statute further confirms that the district court was correct. That is because "the United States is immune from all suits against it absent an express waiver of its immunity," which "must be strictly construed in favor of the sovereign." *Pornomo v. United States*, 814 F.3d 681, 687 (4th Cir. 2016) (cleaned up).

[2] The Ninth Circuit is also considering this question. *Leuthauser v. United States*, No. 22-15402 (9th Cir. argued Dec. 6, 2022).

Here, Congress has preserved the United States' immunity from suit for any intentional torts committed by its employees. 28 U.S.C. § 2680(h). The law enforcement proviso is a narrow exception to that rule, waiving sovereign immunity only for certain intentional torts committed by investigative and law enforcement officers who are authorized to "execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* When interpreting that waiver of sovereign immunity, "[a]ll ambiguities in the statutory text must be construed in favor of immunity" and the plaintiff must demonstrate that her claim falls within the waiver "unequivocally expressed in statutory text." *Peck v. United States Department of Labor*, 996 F.3d 224, 229 (4th Cir. 2021) (quotation marks omitted). "This standard is so central to sovereign immunity jurisprudence that the Court explicitly and routinely construes ambiguous text so as to obviate any inference of waiver." *Cunningham v. Lester*, 990 F.3d 361, 365 (4th Cir. 2021). Accordingly, the law enforcement proviso "must be strictly interpreted" because "it is a relinquishment of a sovereign immunity." *United States v. Sherwood*, 312 U.S. 584, 590 (1941) (collecting cases). And under that standard, it cannot be said that Congress has unequivocally authorized suits for intentional torts committed by TSA screeners.

A. The FTCA's Intentional Tort Exception Authorizes Suit Against "Investigative and Law Enforcement Officers" Who Possess Traditional Police Powers

In enacting the FTCA, Congress "create[d] a limited waiver of the United States' sovereign immunity" for torts committed by federal employees. *Clendening v. United States*, 19 F.4th 421, 426 (4th Cir. 2021). "But that waiver is curtailed by several exceptions," and if an exception applies "then the claim must be dismissed." *Id.* As applicable here, Congress has retained the United States' immunity for claims arising out of various intentional torts committed by federal employees, and so district courts generally lack jurisdiction to hear such claims. 28 U.S.C. § 2680(h).

The law enforcement proviso is an exception to this exception. The proviso is a limited waiver of the United States' immunity for claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by federal "investigative or law enforcement officers." 28 U.S.C. § 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.* The statute's terms thus accord with the common-sense understanding of what Congress sought to achieve with the law enforcement proviso: to provide a remedy for people

injured by federal law enforcement. S. Rep. No. 93-588, at 3 (1973) (explaining that the law enforcement proviso waives immunity "if a federal narcotics agent intentionally assaults" a person "in the course of an illegal 'no-knock' raid" on their home).

That conclusion is supported by the language Congress used in the law enforcement proviso and the FTCA's statutory scheme as a whole, all of which indicate that the law enforcement proviso applies to the usual connotations of law enforcement officers.

1. Congress limited the proviso to "investigative or law enforcement officers," rather than "employees," a term used in other subsections of 28 U.S.C. § 2680. In subsections (a) and (e), Congress addressed sovereign immunity for certain claims arising out of the "act or omission of any employee of the Government." 28 U.S.C. § 2680(a), (e). But Congress deliberately chose not to use such broad language in subsection (h) for the law enforcement proviso. When Congress uses certain language in one statutory provision but not another, that choice should be given significance. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014).

And Congress' use of the term "investigative or law enforcement officer" "naturally evokes criminal law enforcement." *Pellegrino*, 937 F.3d at 188 (Krause, J., dissenting). Congress used that same phrase elsewhere

in the U.S. Code to describe officers authorized by law to perform traditional criminal law enforcement functions. Thus, the Wiretap Act describes "[i]nvestigative or law enforcement officer" as an officer "who is empowered by law to conduct investigations of or to make arrests for offenses * * * and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7). Similarly, the Foreign Intelligence Surveillance Act prohibits electronic surveillance under color of law, but provides a defense to "a law enforcement or investigative officer" who is "engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order." 50 U.S.C. § 1809(b).

Those statutes were enacted shortly before and after the law enforcement proviso, and both demonstrate that Congress understood and intended the phrase "law enforcement or investigative officer" to cover officers who "conduct investigations relevant to criminal law enforcement." *Iverson*, 973 F.3d at 862 (Gruender, J., dissenting). And it makes sense that Congress would seek to waive sovereign immunity for the actions of such law enforcement officers but not other federal employees. Officers who perform "traditional law enforcement functions" are "expected to school themselves in the niceties of the Fourth Amendment's doctrinal

restrictions," and ought to be better able to avoid wrongdoing. *Id.* at 858, 862 (cleaned up).

2. Even viewed without reference to other statutes, the words Congress used in § 2680(h) demonstrate that the proviso applies to criminal law enforcement officers. Congress defined "investigative or law enforcement officer" to mean an officer "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). The powers to "seize evidence, or to make arrests for violations of Federal law" clearly refer to police powers in criminal investigations. *See Pellegrino*, 937 F.3d at 187 & n.7 (Krause, J., dissenting) (collecting cases). And under normal principles of statutory construction, the power to "execute searches" covers the same ground, because "words grouped in a list should be given related meanings." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (*Reading Law*) (explaining the canon *noscitur a sociis*). Applying that canon here "limits a general term to a subset of all the things or actions that it covers" according to "its ordinary meaning." *Id.* at 196. Thus, by placing the power to "execute searches" in a list with traditional police powers to "seize evidence" and "make arrests," the statute's context informs the meaning of "execute searches," and the Court

should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Wikimedia Foundation v. National Security Agency*, 14 F.4th 276, 296 (4th Cir. 2021).

The Supreme Court has applied this principle in construing other portions of 28 U.S.C. § 2680. In *Dolan v. United States Postal Service*, 546 U.S. 481 (2006), the Supreme Court interpreted the FTCA's retention of sovereign immunity for claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. § 2680(b). The plaintiff in *Dolan* sued the United States under the FTCA after the Postal Service negligently left mail on her porch that caused her to trip and fall. *Dolan*, 546 U.S. at 483. The Court explained that "[i]f considered in isolation, the phrase 'negligent transmission' could embrace a wide range of negligent acts * * * including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence." *Id.* at 486. But the Court explained that the statute should not be read so expansively because "context and precedent require a narrower reading, so that 'negligent transmission' does not go beyond negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address." *Id.* That is because § 2680(b) used the term "negligent transmission" in conjunction with "two other terms, 'loss' and 'miscarriage,'" which "limit the reach of

'transmission.'" *Id.* Because "loss" and "miscarriage" "refer to failings in the postal obligation to deliver mail" on time to the right place, the Court would not read "negligent transmission" to "swe[ep] far more broadly." *Id.* at 487. So too here, the term "execute searches" is limited by the accompanying terms "seize evidence" and "make arrests."

That conclusion is reinforced by the fact that all the powers listed in the law enforcement proviso are "for violations of Federal law." 28 U.S.C. § 2680(h). "Under conventional rules of grammar," that modifier "at the end of this list" of powers—"to execute searches, to seize evidence, or to make arrests"—will "normally appl[y] to the entire series" when it provides "a straightforward, parallel construction." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021) (quoting *Reading Law* 147). Only criminal violations would support an officer's authority to make an arrest—and accordingly the phrase "for violations of Federal law" refers to criminal violations. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) (a phrase that "applies without differentiation to all three categories" retains the same meaning when modifying each category). The law enforcement proviso is thus directed at officers with authority to enforce criminal laws through seizures, searches, and arrests.

If further textual evidence is helpful, the specific intentional torts that are covered by the law enforcement proviso—assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution—are "the types of tort claims typically asserted against" officers with traditional police powers. *Pellegrino*, 937 F.3d at 188 (Krause, J., dissenting). The proviso preserves the United States' immunity for other tort claims like libel, slander, misrepresentation, deceit, and interference with contract rights, which are not unique to law enforcement. 28 U.S.C. § 2680(h).

3. Even if the authority to "execute searches" were viewed in isolation, it still connotes the traditional police power to execute a warrant or other type of criminal search, such as a search incident to arrest. Indeed, courts have routinely referred to the execution of searches in such circumstances. *See, e.g.*, *United States v. Ramirez*, 523 U.S. 65, 69 (1998) ("[A]pproximately 45 officers gathered to execute the [search] warrant."); *Los Angeles County v. Rettele*, 550 U.S. 609, 614 (2007) ("In executing a search warrant officers may take reasonable action to secure the premises."). And "every other statute in the United States Code that uses this phrase refers to investigatory searches" and so too does "every Supreme Court and circuit case that had been published before the proviso

was enacted." *Pellegrino*, 937 F.3d at 185 (Krause, J., dissenting) (collecting statutes and cases).

In contrast, Congress has described non-criminal, administrative searches differently. Unlike a criminal, investigatory search, an administrative search requires neither individualized suspicion nor a warrant because "the primary purpose of the search[] is [d]istinguishable from the general interest in crime control" and is "other than conducting criminal investigations." *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) (quotation marks omitted). Administrative searches "are ubiquitous and include regulatory searches, administrative subpoenas, inventory searches, workplace drug testing, and border checkpoints—just to name a few." *Pellegrino*, 937 F.3d at 184 (Krause, J., dissenting) (citations omitted). When Congress refers to such activity, it generally uses terms like "inspection" or "screening," not "executing searches." *See* 29 U.S.C. § 657(a)(2) (OSHA inspectors may "inspect and investigate"); 21 U.S.C. § 374(a)(1) (FDA inspectors may "enter" and "inspect"); 42 U.S.C. § 6927(a) (EPA inspectors may "enter" and "inspect"); 22 U.S.C. § 4859 (Secretary of State "shall install * * * a walk-through metal detector or other advanced screening system at" United States diplomatic missions); *see also* 49 U.S.C.

§ 44901(a) (TSA may "provide for the screening of all passengers and property").

All this is to say that when "Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached" to that term. *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (quotation marks omitted). Thus, when "Congress chose to use the term 'execute searches,'" it meant for that phrase to mean investigative searches for violations of criminal law, as the term had been "repeatedly and consistently [understood] to the same effect." *Iverson*, 973 F.3d at 862 (Gruender, J., dissenting). That is why when Congress debated the proviso, there was no serious question that it did not cover federal employees who might conduct administrative searches. *Federal Tort Claims Amendments: Hearings on H.R. 10439 Before the Subcomm. on Claims & Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 18 (1974) (testimony of Irving Jaffe, Acting Assistant Attorney General) ("We have Department of Agriculture investigators who go into look at books and records. We have Defense Department auditors to look at books and records * * * They are not law enforcement officers even under this definition. They don't qualify."). *Accord* 120 Cong. Rec. 5287 (1974) (statements of Reps. Donohue and Wiggins) (the proviso "only applies to law enforcement

officers. It does not apply to any other Federal employees that might violate the rights of an individual"). That "legislative history" appropriately "confirm[s] the scope of a sovereign immunity waiver." *North Carolina v. United States*, 7 F.4th 160, 168 (4th Cir. 2021) (citing *Cooper*, 566 U.S. at 299).

B. TSA Screeners Are Not Law Enforcement Officers Under 28 U.S.C. § 2680(h)

1. In determining whether the law enforcement proviso applies, the court examines the powers vested in the individual by law. Thus, INS agents qualified as law enforcement officers "by virtue of the powers given them by 8 U.S.C. §§ 1225(a) and 1357," including the authority to arrest aliens unlawfully in the United States and to "the power to search conveyances in which aliens are believed to be smuggled into the country." *Caban v. United States*, 671 F.2d 1230, 1234 & n.4 (2d Cir. 1982). Veterans' Affairs police officers, authorized by 38 U.S.C. § 218(b)(1)(C) to make arrests, similarly qualify as law enforcement officers. *Celestine v. United States*, 841 F.2d 851, 852-53 (8th Cir. 1988). By contrast, parole officers do not qualify because they lack authority to make arrests, and although they can seize contraband in plain view, they may do so "only with the parolee's consent"—which is not the "seizure power contemplated by section 2680(h)." *Wilson v. United States*, 959 F.2d 12, 15 (2d Cir. 1992).

Likewise, although EEOC civil investigative agents have the power to "access" and "copy any evidence of any person being investigated" for unlawful employment practices, those agents lack "authority to execute searches, seize evidence, or make arrests for violation of federal law." *EEOC v. First Nat'l Bank of Jackson*, 614 F.2d 1004, 1007-08 (5th Cir. 1980).

Here, TSA screeners lack the legal authority to make arrests, seize evidence, or execute searches for violations of federal law. *See* JA135, JA155 (holding the same). Osmon's argument to the contrary rests solely on her contention that screeners "execute searches" for violations of federal law, but that contention misunderstands both the proviso and TSA screeners' authority. Congress directed the TSA Administrator to "provide for the screening of all passengers and property,"49 U.S.C. § 44901(a), and the Administrator does so by hiring and training "security screening personnel," *id.* § 114(e).

Congress recognized that in executing those functions, some law enforcement authority will be necessary. Congress provided that authority by allowing the TSA Administrator to designate a federal employee "to serve as a law enforcement officer." 49 U.S.C. § 114(p)(1). Those TSA law enforcement officers—like Federal Air Marshals and TSA criminal

investigators (JA73)—are granted statutory authority to "carry a firearm"; "make an arrest" for federal criminal offenses; and "seek and execute warrants for arrest or seizure of evidence * * * upon probable cause that a violation has been committed." 49 U.S.C. § 114(p)(2). These are the types of "investigative or law enforcement officers" that Congress intended to come within the scope of the proviso.

TSA security screeners, in contrast, are not. Screeners are not "authorized to carry a weapon, seize evidence, make arrests, or execute a criminal investigative search." JA45. If a screener encounters illegal contraband, they may not seize that item—instead, they must summon law enforcement to assist. JA45. Nor may they seize items that are legal but prohibited (such as knives). If a screener discovers a prohibited item, the screener "must give the item's owner the option of disposing of the item, leaving it with someone" else, "taking it back to his or her vehicle, or abandoning it." JA45. If the traveler refuses to comply, the screener "must call" law enforcement, JA45, and any potential civil violations are "referred to, and pursued by" different TSA employees. JA45. *See also* 67 Fed. Reg. 8340, 8344-45 (Feb. 22, 2002).

Osmon's entire argument on appeal rests on the proposition that because TSA screeners screen baggage and passengers to ensure safety at

the airport and on aircraft, screeners "execute searches" and are therefore law enforcement officers. The district court correctly rejected that argument, for the reasons elaborated on above, because the statutory language, read as a whole, consistently uses terms "associated with traditional police powers", JA134, and repeatedly indicated "that the Proviso is intended to pertain to actors involved in traditional law enforcement activities," JA131.

When TSA screeners examine passengers and baggage, they are not executing searches for violations of federal law. Instead, they are carrying out "an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft," *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (en banc). As the Supreme Court has recognized, the federal government can carry out that screening to "prevent[] hijacking or like damage" without individualized suspicion or "a demonstration of danger as to any particular airport or airline." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989). That is different in kind from the searches covered by the law enforcement proviso—indeed, TSA searches would violate the Fourth Amendment if their primary purpose was a "general interest in crime control." *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000). Accordingly, "it would be

unreasonable to interpret 'to execute searches' to include the TSA screener's performance of narrowly focused, consensual searches that are administrative in nature, when considered in light of the other traditional law enforcement functions (i.e., seizure of evidence and arrest) that Congress chose" to include in law enforcement proviso. *Corbett*, 568 F. App'x at 700; *accord Pellegrino*, 937 F.3d at 182-89 (Krause, J., dissenting) (making the same point); *Iverson*, 973 F.3d at 863-65 (Gruender, J., dissenting) (same).

Notably, Osmon does not offer a limiting principle for her rule that a federal employee authorized to conduct an administrative search qualifies as a "law enforcement officer" under the proviso, whose intentional torts make the United States liable in tort. It is thus unclear under Osmon's theory whether law enforcement officers include EPA agents who inspect hazardous waste sites, *see* 42 U.S.C. § 6927(a), FDA inspectors who inspect slaughterhouses, *see* 21 U.S.C. § 606(a), or any of the many other federal employees who conduct inspections. Osmon's theory would seemingly also cover the EEOC agents held *not* to be law enforcement officers in *First Nat'l Bank of Jackson*, 614 F.2d at 1007-08, because those agents may examine and copy "any evidence" related to unlawful employment practices, *see* 42 U.S.C. § 2000e-8(a). And Osmon's interpretation seemingly applies to all

federal employees who engage in activities that might be considered a search—effectively reading "execute searches" as merely "search," and rendering the term "execute" surplusage.

Osmon's argument runs into further anomalies. Unlike criminal law enforcement functions covered by the proviso, airport security screening is not necessarily performed by federal employees. The TSA Administrator may contract with a "qualified private screening company" to perform that screening instead. 49 U.S.C. § 44920(a). It would be passing strange for Congress to grant TSA screeners law enforcement authority and then allow that authority to be outsourced to a private entity—but it makes good sense that Congress would limit law enforcement authority only to those federal employees specifically designated by the TSA Administrator to act as law enforcement officers. *Id.* § 114(p). Indeed, Congress indicated as much when it addressed the differences in liability. If the TSA Administrator deputizes a State or local law enforcement official to act as a federal law enforcement officer, that deputized official "shall be treated as an employee of the Government" for purposes of the FTCA. *Id.* § 44922(e). But for private security screeners who contract with the TSA, Congress did not waive the United States' liability or otherwise reference the FTCA. To the contrary, Congress made clear that nothing in the statutory scheme would

"relieve any qualified private screening company or its employees from any liability related to its own * * * intentional wrongdoing." *Id.* § 44920(g)(3).

Given all this, "Congress could hardly be more explicit that (1) it knew it was legislating * * * against the backdrop of the FTCA; (2) it intended the terms 'employee' and 'officer' to carry the same meaning in the [TSA's statutes] and the FTCA; and (3) it intended for the TSA's 'law enforcement officers' (whether federally employed or deputized) to be treated as 'officers' subject to the proviso, but for 'screeners' (whether federally employed or contracted) to be treated as employees who are not." *Pellegrino*, 937 F.3d at 191-92 (Krause, J., dissenting).

2. The statutory text and structure make clear that the district court correctly construed the statute. And if there were doubt on that question, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *Cooper*, 566 U.S. at 290. "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Id.* at 290-91.

As this Court has explained, it is "the province of the political branches, not the courts, to weigh the costs and benefits of exposing the federal government to civil litigation" that will result in money damages. *Robinson v. United States Department of Education*, 917 F.3d 799, 801

(4th Cir. 2019). Thus, any waiver of sovereign immunity "must be unequivocally expressed in statutory text" and "cannot contain" any ambiguity. *Id.* at 801-02. That is because "[a]ll ambiguities in the statutory text must be construed in favor of immunity." *Peck*, 996 F.3d at 229 (quotation marks omitted). "In other words * * * 'if there is a plausible interpretation of the statute that would not authorize money damages against the Government,'" then the statute lacks the necessary "unambiguous and unequivocal" waiver of sovereign immunity. *Robinson*, 917 F.3d at 802 (quoting *Cooper*, 566 U.S. at 290-91).

Osmon mistakenly contends that this rule of construction does not apply, citing the Supreme Court's decision in *Dolan*. Br. 21. But that misunderstands *Dolan*, which construed an exception to the FTCA's general waiver of sovereign immunity and provided that the United States would not be liable for negligent transmission of mail. *Dolan*, 546 U.S. at 483 (citing 28 U.S.C. § 2680(b)). The Court explained that because the FTCA waives the sovereign immunity "in sweeping language," it was not necessary to strictly construe exceptions to reclaimed sovereign immunity. *Id.* at 491-92.

Here, in contrast, the law enforcement proviso is not an exception to the FTCA's waiver of sovereign immunity—the intentional torts exception

is. And there is no serious question that, absent the law enforcement proviso, the intentional torts exception in § 2680(h) would bar Osmon's battery claim. Thus, what the Court construes here is a limited waiver of sovereign immunity in the law enforcement proviso, and that "waiver[] of sovereign immunity must be strictly construed." *Wood v. United States*, 845 F.3d 123, 127 (4th Cir. 2017) (interpreting the FTCA).

In construing a similar proviso to an FTCA exception, the Ninth Circuit has made clear that "the general rule" applies and it "must interpret any remaining ambiguity * * * in favor of the United States." *Foster v. United States*, 522 F.3d 1071, 1079 (9th Cir. 2008). Foster sued the United States for damage caused to his property while it was in federal custody. *Id.* at 1073. The district court dismissed the complaint for lack of jurisdiction, holding that an exception to the FTCA applied, which retained the United States' sovereign immunity for "[a]ny claim arising in respect of * * * the detention of any goods" by a law enforcement officer. *Id.* at 1074 (quoting 28 U.S.C. § 2680(c)). Foster appealed, arguing that his claim fell within a proviso to that exception, which waived sovereign immunity if "the property was *seized for the purpose of forfeiture*." *Id.* at 1075 (quoting 28 U.S.C. § 2680(c)(1)).

The court of appeals affirmed, holding that the "re-waiver of sovereign immunity in § 2680(c)(1)-(4) applies only to property seized solely for the purpose of forfeiture," not just when "the government may have had the possibility of a forfeiture in mind." *Foster*, 522 F.3d at 1075. After construing the provision's text and considering its legislative history, the court explained that there was "some support for a narrow reading of the re-waiver of sovereign immunity." *Id.* at 1079. And as such, the proviso must be "construed in favor of the sovereign and [the Court] must interpret any remaining ambiguity * * * in favor of the United States." *Id.* Unlike *Dolan*, which "interpret[ed] the scope of an exception to the FTCA's waiver of sovereign immunity," the proviso here was "not an exception to the FTCA's waiver of sovereign immunity, but * * * an exception to the exception. That is, our task is to interpret a waiver of sovereign immunity," along with all the usual principles of construction in doing so. *Id.* *See also Smoke Shop, LLC v. United States*, 761 F.3d 779, 783-84 (7th Cir. 2014) (adopting *Foster*).

The district court's construction of the statute is both the best construction and, at a minimum, a plausible one. *Accord Corbett*, 568 F. App'x at 700-02; *Pellegrino*, 937 F.3d at 181-200 (Krause, J., dissenting);

Iverson, 973 F.3d at 855-68 (Gruender, J., dissenting). This Court should affirm.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 7,783 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word 2016.

/s/ Daniel Aguilar
Daniel Aguilar

ADDENDUM

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28 U.S.C. § 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) 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.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

> **(1)** the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> **(2)** the interest of the claimant was not forfeited;
>
> **(3)** the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> **(4)** the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) 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: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means 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.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

49 U.S.C. § 114. Transportation Security Administration.

* * *

(p) Law enforcement powers.--

(1) In general.--The Administrator may designate an employee of the Transportation Security Administration or other Federal agency to serve as a law enforcement officer.

(2) Powers.--While engaged in official duties of the Administration as required to fulfill the responsibilities under this section, a law enforcement officer designated under paragraph (1) may--

(A) carry a firearm;

(B) make an arrest without a warrant for any offense against the United States committed in the presence of the officer, or for any felony cognizable under the laws of the United States if the officer has probable cause to believe that the person to be arrested has committed or is committing the felony; and

(C) seek and execute warrants for arrest or seizure of evidence issued under the authority of the United States upon probable cause that a violation has been committed.

(3) Guidelines on exercise of authority.--The authority provided by this subsection shall be exercised in accordance with guidelines prescribed by the Administrator, in consultation with the Attorney General of the United States, and shall include adherence to the Attorney General's policy on use of deadly force.

(4) Revocation or suspension of authority.--The powers authorized by this subsection may be rescinded or suspended should the Attorney General determine that the Administrator has not complied with the guidelines prescribed in paragraph (3) and conveys the determination in writing to the Secretary of Homeland Security and the Administrator.

* * *

49 U.S.C. § 44901. Screening passengers and property.

(a) In general.--The Administrator of the Transportation Security Administration shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation. In the case of flights and flight segments originating in the United States, the screening shall take place before boarding and shall be carried out by a Federal Government employee (as defined in section 2105 of title 5), except as otherwise provided in section 44920 and except for identifying passengers and baggage for screening under the CAPPS and known shipper programs and conducting positive bag-match programs.

(b) Supervision of screening.--All screening of passengers and property at airports in the United States where screening is required under this section shall be supervised by uniformed Federal personnel of the Transportation Security Administration who shall have the power to order the dismissal of any individual performing such screening.

(c) Checked baggage.--A system must be in operation to screen all checked baggage at all airports in the United States as soon as practicable.

(d) Explosives detection systems.--

> **(1) In general.**--The Administrator of the Transportation Security Administration shall take all necessary action to ensure that--
>
> > **(A)** explosives detection systems are deployed as soon as possible to ensure that all United States airports described in section 44903(c) have sufficient explosives detection systems to screen all checked baggage, and that as soon as such systems are in place at an airport, all checked baggage at the airport is screened by those systems; and
> >
> > **(B)** all systems deployed under subparagraph (A) are fully utilized; and

(C) if explosives detection equipment at an airport is unavailable, all checked baggage is screened by an alternative means.

(2) Preclearance airports.--

(A) In general.--For a flight or flight segment originating at an airport outside the United States and traveling to the United States with respect to which checked baggage has been screened in accordance with an aviation security preclearance agreement between the United States and the country in which such airport is located, the Administrator of the Transportation Security Administration may, in coordination with U.S. Customs and Border Protection, determine whether such baggage must be re-screened in the United States by an explosives detection system before such baggage continues on any additional flight or flight segment.

(B) Aviation security preclearance agreement defined.--In this paragraph, the term "aviation security preclearance agreement" means an agreement that delineates and implements security standards and protocols that are determined by the Administrator of the Transportation Security Administration, in coordination with U.S. Customs and Border Protection, to be comparable to those of the United States and therefore sufficiently effective to enable passengers to deplane into sterile areas of airports in the United States.

(C) Rescreening requirement.--If the Administrator of the Transportation Security Administration determines that the government of a foreign country has not maintained security standards and protocols comparable to those of the United States at airports at which preclearance operations have been established in accordance with this paragraph, the Administrator shall ensure that Transportation Security Administration personnel rescreen passengers arriving from such airports and their property in the United States before such passengers are permitted into sterile areas of airports in the United States.

(D) Report.--The Administrator of the Transportation Security Administration shall submit to the Committee on Homeland Security of the House of Representatives, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Homeland Security and Governmental Affairs of the Senate an annual report on the re-screening of baggage under this paragraph. Each such report shall include the following for the year covered by the report:

(i) A list of airports outside the United States from which a flight or flight segment traveled to the United States for which the Administrator determined, in accordance with the authority under subparagraph (A), that checked baggage was not required to be re-screened in the United States by an explosives detection system before such baggage continued on an additional flight or flight segment.

(ii) The amount of Federal savings generated from the exercise of such authority.

[(3) Repealed. Pub.L. 115-254, Div. K, Title I, § 1991(d)(1)(C)(ii), Oct. 5, 2018, 132 Stat. 3628]

[(4) Redesignated par. (2)]

(e) Mandatory screening where EDS not yet available.--As soon as practicable and until the requirements of subsection (b)(1)(A) are met, the Administrator of the Transportation Security Administration shall require alternative means for screening any piece of checked baggage that is not screened by an explosives detection system. Such alternative means may include 1 or more of the following:

(1) A bag-match program that ensures that no checked baggage is placed aboard an aircraft unless the passenger who checked the baggage is aboard the aircraft.

(2) Manual search.

(3) Search by canine explosives detection units in combination with other means.

(4) Other means or technology approved by the Administrator.

(f) Cargo deadline.--A system must be in operation to screen, inspect, or otherwise ensure the security of all cargo that is to be transported in all-cargo aircraft in air transportation and intrastate air transportation as soon as practicable.

(g) Air cargo on passenger aircraft.--

(1) In general.--The Secretary of Homeland Security shall establish a system to screen 100 percent of cargo transported on passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation to ensure the security of all such passenger aircraft carrying cargo.

(2) Minimum standards.--The system referred to in paragraph (1) shall require, at a minimum, that equipment, technology, procedures, personnel, or other methods approved by the Administrator of the Transportation Security Administration, are used to screen cargo carried on passenger aircraft described in paragraph (1) to provide a level of security commensurate with the level of security for the screening of passenger checked baggage.

(3) Regulations.--The Secretary of Homeland Security shall issue a final rule as a permanent regulation to implement this subsection in accordance with the provisions of chapter 5 of title 5.

(4) Screening defined.--In this subsection the term "screening" means a physical examination or non-intrusive methods of assessing whether cargo poses a threat to transportation security. Methods of screening include x-ray systems, explosives detection systems, explosives trace detection, explosives detection canine teams certified by the Transportation Security Administration, or a physical search together with manifest verification. The Administrator may approve additional methods to ensure that the cargo does not pose a threat to transportation security and to assist in meeting the requirements of this subsection. Such additional cargo screening methods shall not include solely performing a review of information about the contents of cargo or verifying the identity of a shipper of the cargo that is not performed in conjunction with other security methods authorized under this subsection, including whether a known shipper is

registered in the known shipper database. Such additional cargo screening methods may include a program to certify the security methods used by shippers pursuant to paragraphs (1) and (2) and alternative screening methods pursuant to exemptions referred to in subsection (b) of section 1602 of the Implementing Recommendations of the 9/11 Commission Act of 2007.

[(5) Redesignated (4)]

(h) Deployment of armed personnel.--

(1) In general.--The Administrator of the Transportation Security Administration shall order the deployment of law enforcement personnel authorized to carry firearms at each airport security screening location to ensure passenger safety and national security.

(2) Minimum requirements.--Except at airports required to enter into agreements under subsection (c), the Administrator of the Transportation Security Administration shall order the deployment of at least 1 law enforcement officer at each airport security screening location. At the 100 largest airports in the United States, in terms of annual passenger enplanements for the most recent calendar year for which data are available, the Administrator shall order the deployment of additional law enforcement personnel at airport security screening locations if the Administrator determines that the additional deployment is necessary to ensure passenger safety and national security.

* * *

49 U.S.C. § 44920. Screening Partnership Program.

(a) In general.--An airport operator may submit to the Administrator of the Transportation Security Administration an application to carry out the screening of passengers and property at the airport under section 44901 by personnel of a qualified private screening company pursuant to a contract entered into with the Transportation Security Administration.

* * *

(e) Supervision of screening personnel.--The Administrator shall--

> **(1)** provide Federal Government supervisors to oversee all screening at each airport at which screening services are provided under this section and provide Federal Government law enforcement officers at the airport pursuant to this chapter; and
>
> **(2)** undertake covert testing and remedial training support for employees of private screening companies providing screening at airports.

* * *

(g) Operator of airport.--Notwithstanding any other provision of law, an operator of an airport shall not be liable for any claims for damages filed in State or Federal court (including a claim for compensatory, punitive, contributory, or indemnity damages) relating to--

> **(1)** such airport operator's decision to submit an application to the Secretary of Homeland Security under subsection (a) or such airport operator's decision not to submit an application; and
>
> **(2)** any act of negligence, gross negligence, or intentional wrongdoing by--
>
> > **(A)** a qualified private screening company or any of its employees in any case in which the qualified private screening company is acting under a contract entered into with the Secretary of Homeland Security or the Secretary's designee; or
> >
> > **(B)** employees of the Federal Government providing passenger and property security screening services at the airport.

(3) Nothing in this section shall relieve any airport operator from liability for its own acts or omissions related to its security responsibilities, nor except as may be provided by the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 shall it relieve any qualified private screening company or its employees from any liability related to its own acts of negligence, gross negligence, or intentional wrongdoing.

49 U.S.C. § 44922. Deputization of State and Local Law Enforcement Officers.

(a) Deputization authority.--The Administrator of the Transportation Security Administration may deputize a State or local law enforcement officer to carry out Federal airport security duties under this chapter.

(b) Fulfillment of requirements.--A State or local law enforcement officer who is deputized under this section shall be treated as a Federal law enforcement officer for purposes of meeting the requirements of this chapter and other provisions of law to provide Federal law enforcement officers to carry out Federal airport security duties.

(c) Agreements.--To deputize a State or local law enforcement officer under this section, the Administrator of the Transportation Security Administration shall enter into a voluntary agreement with the appropriate State or local law enforcement agency that employs the State or local law enforcement officer.

(d) Reimbursement.--

> **(1) In general.**--The Administrator of the Transportation Security Administration shall reimburse a State or local law enforcement agency for all reasonable, allowable, and allocable costs incurred by the State or local law enforcement agency with respect to a law enforcement officer deputized under this section.
>
> **(2) Authorization of appropriations.**--There are authorized to be appropriated such sums as may be necessary to carry out this subsection.

(e) Federal Tort Claims Act.--A State or local law enforcement officer who is deputized under this section shall be treated as an "employee of the Government" for purposes of sections 1346(b), 2401(b), and chapter 171 of title 28, United States Code, while carrying out Federal airport security duties within the course and scope of the officer's employment, subject to Federal supervision and control, and in accordance with the terms of such deputization.

(f) Stationing of officers.--The Administrator of the Transportation Security Administration may allow law enforcement personnel to be

stationed other than at the airport security screening location if that would be preferable for law enforcement purposes and if such personnel would still be able to provide prompt responsiveness to problems occurring at the screening location.