

Eighty-Third Homer Albers Prize Moot Court Competition 2026

Final Round

Jake Una,
Petitioner,

v.

Valerie Duessa, Secretary of the U.S. Department
of Homeland Security; United States of America,
Respondent.

Boston University School of Law

**Eighty-Third
Homer Albers Prize
Moot Court Competition**

2026

Final Round

April 14, 2026
4:30 p.m.
Schell-O'Connor Moot Courtroom

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Boston University School of Law
in 1943 by
THE HONORABLE HARRY K. STONE and MRS. STONE
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April 6, 2026

The Hon. Michael A. Vitali
Associate Justice, Massachusetts District Court

Jesse Boodoo
Chief Legal Counsel to Governor Maura Healey

Prof. Jim Davy
Visiting Lecturer, Appellate Clinic

COUNSEL

For Petitioner
Jason Walker
Paul Constantine

For Respondent
Jocelyn Estes
David Spinelli

April 7, 2026

The Hon. Rachel E. Hershfang
Associate Justice, Massachusetts Appeals Court

The Hon. Christopher P. Hodgins
Associate Justice, Massachusetts Appeals Court

Prof. Bradley M. Baranowski
Visiting Assistant Professor

COUNSEL

For Petitioner
Hailey Sasaki
Sean Gillikin

For Respondent
Hannah Lynch
Will Cannella

FINAL ARGUMENT

APRIL 14, 2026

The Hon. Seth R. Aframe
Judge, United States Court of Appeals
for the First Circuit

The Hon. Arianna J. Freeman
Judge, United States Court of Appeals
for the Third Circuit

The Hon. Myong J. Joun
Judge, United States District Court
for the District of Massachusetts

COUNSEL

For Petitioner
Hailey Sasaki
Sean Gillikin

For Respondent
Jocelyn Estes
David Spinelli

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2026

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Trial Attorney, Committee for Public
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Rachel Beth Cohen, Esq.
Legal Educator, Health Law Scholar,
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Joshua Daniels
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Technology Services, California
School Boards Association

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Law Clerk, Supreme Judicial Court
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Catherine MacCarthy, Esq.
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Sunny Malhotra, Esq.
Senior IP Counsel, Novo Nordisk

Harper Moutal, Esq.
Trial Attorney, Committee for Public
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Jared Pliner, Esq.
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Jennine Vasquez, Esq.
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The Robert Volk Best Brief Award, which recognizes the team with the best Petitioner brief and the team with the best Respondent brief, is named in honor of Robert Volk, who led the Lawyering and Advocacy Programs (formerly the First Year Writing Program) with care and distinction for over forty years. Through this award, we honor and remember his love of teaching writing and his support for our students.

2023-2024	Petitioner: Michael Brune & Sanketh Bhaskar Respondent: Michael Gorman & Henry Drembus
2024-2025	Petitioner: Haewon Lee & Eli O’Neal Respondent: Bilal Mubarack & Drew Siegenthaler

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

Jude UNA,
APPELLANT,

v.

Valerie DUESSA, Secretary of the U.S. Department
of Homeland Security; UNITED STATES of America,
APPELLEES.

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ALB-26-01

Before ARTEGALL, BRITOMART, TALUS, Circuit Judges.

OPINION

ARTEGALL, Circuit Judge.

Appellant Jude Una sued Appellee Valerie Duessa, Secretary of the United States Department of Homeland Security (“DHS”), seeking a declaratory judgment that the United States Customs and Border Protection (“CBP”) policy for searches of electronic devices at the international border violates the Fourth Amendment. Una additionally brought a Bivens action alleging violations of her Fourth Amendment rights against the Federal Bureau of Investigation (“FBI”) agents involved in her April 3, 2025, arrest. Finally, she filed several state law claims: a tort claim for defamation against FBI Director Arthur Ate in his personal capacity and tort claims for assault, battery, false imprisonment, and false arrest against the FBI agents involved in her arrest in their personal capacities. The United States District Court for the District of Albers exercised jurisdiction over the Fourth Amendment claim against Secretary Duessa and the Bivens action pursuant to 28 U.S.C. § 1331. It exercised jurisdiction over the state law tort claims pursuant to 28 U.S.C. § 1367.

The district court granted Secretary Duessa’s motion to dismiss the Fourth Amendment

challenge to the CBP policy. The district court also dismissed the Bivens action. Finally, the district court allowed the United States' motion to substitute itself as defendant for all tort claims and then granted the United States' motion to dismiss those claims on various grounds under the Federal Tort Claims Act ("FTCA"), discussed more fully below. Una timely appealed the dismissal of the constitutional challenge to the CBP policy, the substitution of the United States as defendant in the defamation claim against Director Ate, and the dismissal of her state law tort claims under the FTCA. Una did not appeal the dismissal of the Bivens action and concedes that any arguments attempting to revive it have been waived.

Two issues are before this Court. First, Una contends that the district court erred in granting the motion to dismiss the Fourth Amendment claim against the CBP policy on two grounds. She argues that the Fourth Amendment requires probable cause and a warrant for a forensic search of an electronic device, not reasonable suspicion like the policy dictates. Further, she contends that even if reasonable suspicion is the appropriate level of suspicion, the CBP policy exceeds the scope of the border search doctrine by granting CBP officers broad authority to search not just for contraband, but for evidence of contraband or criminal activity.

Second, Una contends that the district court erred in allowing the substitution of the United States as defendant for the defamation claim against Director Ate and thus erred in dismissing Una's defamation claim. She contends that Director Ate was not acting within the scope of his employment when he allegedly defamed Una and thus the United States should not have been substituted as defendant and Una's defamation claim should not have been dismissed under the FTCA's intentional tort exception. Further, Una contends that the district court erred in granting the United States' motion to dismiss the state law tort claims originally brought against the FBI agents because the FTCA's discretionary function exception cannot apply to conduct

that violates an individual's constitutional rights.

Facts

The district court made the following factual findings, which the parties do not dispute. Una is a naturalized American citizen and is a professor of political economy at Albers University. Her research focuses on the intersection between economic development by non-governmental organizations (“NGOs”) in developing economies, human trafficking, and mass protest movements. She is a prominent scholar and a frequent critic of the United States’ foreign policy and its criminal legal system. She frequently travels abroad, sometimes for work advising NGOs and sometimes for pleasure. Her travel frequently takes her to Afghanistan, which is a hotspot of human trafficking activity.¹

On July 11, 2024, Una landed at Albers International Airport on a flight returning from Afghanistan. While going through Customs, she refused to answer a CBP officer's questions about her reason for visiting Afghanistan and her activities there. Una was permitted entry into the country regardless, but the CBP officer created a Memorandum of Information Received (“MOIR”) regarding Una in TECS.² In the MOIR, the officer stated his belief that Una acted suspiciously by flying to and from Afghanistan and being avoidant in answering questions concerning her activity there.

On August 23, 2024, Una again arrived at Albers International Airport on a flight from Afghanistan. CBP Officer Colin Marinelli asked Una a small number of primary screening questions, which she answered. Officer Marinelli and Officer Spencer Campbell then directed

¹ Global Initiative Against Transnational Organized Crime, Global Organized Crime Index 2025, § 5.1 tbl. 2 (2025), <https://ocindex.net/report/2025/section5#5-2-resilience-indicators>.

² TECS is a CBP-operated platform for federal and state officials to document suspicious interactions. See U.S. Dep't of Homeland Sec., Privacy Impact Assessment for the TECS System: Platform (Aug. 12, 2016), <https://www.dhs.gov/sites/default/files/2022-05/privacy-pia-cbp-tecs%20platform-april2022.pdf>.

Una to step into a secondary area. The officers explained that Una had been detained for a search of her belongings and provided her with a “tear sheet” explaining CBP protocol for searches of electronic devices.³ Pursuant to the CBP policy, Officer Marinelli stated that he had reason to believe Una was involved in human trafficking activity in Afghanistan. He ordered her to put her phone in airplane mode and to allow Officer Campbell to search it.

Una voiced her objection to the search but provided the officers with passwords for all password-protected areas of her phone. Officer Campbell unlocked the phone and conducted a “Logical Extraction” of the contents using a Cellebrite UFED.⁴ After creating a full forensic copy of the data stored on Una’s phone (known as an “image” of the phone), Officer Campbell returned the phone to her and allowed her to leave. Over the next two weeks, officers Marinelli and Campbell used Cellebrite Physical Analyzer to index and search the image and then reviewed the contents of the image—which, based on Una’s phone’s settings, included a year of locally stored text messages, photographs, and financial documents—before concluding that there was no further evidence on the cell phone connecting Una to any human trafficking activity or domestic criminal activity. Upon reaching this conclusion, on September 6, 2024, the officers destroyed the forensically copied image of Una’s phone and the indexed contents.

When Una returned home at 6:30 P.M. on August 23, 2024, after being released from the search with her phone, she posted a thread on X⁵ about her experience. She complained about her treatment at Customs, specifically the fact that the agents now had access to any and all of

³ See CBP Directive No. 3340-049A, Border Search of Electronic Devices (2018) (“CBP policy”).

⁴ A Cellebrite UFED (“Universal Forensic Extraction Device”) is a physical device that can connect to an electronic device to extract a complete image of the device’s contents. Cellebrite Physical Analyzer is a forensic software tool that officers connect to an electronic device to extract and generate a report of its contents.

⁵ The social media platform formerly known as Twitter.

the sensitive, embarrassing, or private information on her phone. She also posted a photo of the tear sheet and criticized the policy, tagging several administration officials, including Secretary Duessa and Director Ate.

On August 24, 2024, at 2:12 A.M., Director Ate reposted Una's thread on his personal X account and wrote:

“More lies and FAKE NEWS! I have been informed that we have found strong evidence of this loser's criminal plots on her phone. It's clear that she is a terrorist sympathizer bent on destroying American Civilization by inciting treason and assisting human trafficking networks in Afghanistan. There is ZERO TOLERANCE for criminals like her in this Great Country under this Administration. SEE YOU SOON, UNA.”

This was not the first post from Director Ate's personal account that day. Between 5:30 P.M. on August 23, 2024, when Director Ate published his first post of the day, and 2:12 A.M. on August 24, 2024, when he reposted Una's X post and commented on it, the Director posted twelve times, writing exclusively about a recently opened restaurant he visited in D.C., a concert he attended that night, Major League Baseball scores, and a bar he visited that night. Since assuming his role as FBI Director on April 1, 2021, Director Ate has posted three times about his position on his personal X account. In contrast, the Director's official account is updated three to five times a day with updates for the public on law enforcement activity.

On September 9, 2024, Una was awoken early in the morning by someone pounding on her front door. When she opened the door, she saw FBI agents with a battering ram. The agents rushed into Una's home, handcuffed Una, and then searched her home. The agents seized no property in the search but arrested Una and took her to the Albers Federal Detention Center in Albers City. On September 10, 2024, the Department of Justice announced its intention to seek formal charges against Una for inciting treason and human trafficking. That same day, Albers University suspended Una from her position, and national media reported on the incident. On

October 25, 2024, after multiple grand juries refused to indict Una, the Department of Justice announced that it would no longer be pursuing charges against Una. Una was released from custody on the same day. At a press conference on November 4, 2024, a representative of the Department of Justice acknowledged that “after more information came to light, we did not have enough evidence to secure an indictment of [Una].”

Proceedings Below and Additional District Court Findings

On January 10, 2025, Una filed suit against Secretary Duessa in her official capacity as Secretary of the U.S. Department of Homeland Security, alleging that the CBP policy governing border searches of electronic devices violated the Fourth Amendment.⁶ Una sought declaratory and injunctive relief under 28 U.S.C. § 2201 and § 2202. Una also brought a Bivens action against FBI Agents Does 1-6, who were involved in her arrest, for violating her Fourth Amendment rights. Finally, Una filed a claim for defamation against Director Ate in his personal capacity and claims for assault, battery, false imprisonment, and false arrest against FBI Agents Does 1-6 under state tort law, asserting that these tortious actions resulted in deprivations of her constitutional rights under the Fourth Amendment.⁷

On January 14, 2025, Secretary Duessa moved to dismiss the Fourth Amendment challenge to the CBP policy. On the same date, the Attorney General of the United States certified pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (“Westfall Act”), 28 U.S.C. § 2679(d)(1), that Director Ate and the FBI agents were federal

⁶ Secretary Duessa does not contest Una’s standing to seek relief declaring the CBP policy to be unconstitutional and enjoining its use. See Alasaad v. Nielsen, 419 F. Supp. 3d 142, 150-53 (D. Mass. 2019), aff’d in part, vacated in part, rev’d in part sub nom., Alasaad v. Mayorkas, 988 F.3d 8 (1st Cir. 2021) (establishing Article III standing for plaintiffs seeking the same relief against the same CBP policy).

⁷ Una filed a claim with the FBI demanding relief for all tortious conduct as required by 28 U.S.C. § 2401(b). Before commencing this action, she received a notice of final denial of the claim from the FBI.

employees who were acting within the scope of their employment when Director Ate posted on X and when the FBI agents seized, searched, and detained Una. Upon certification, the United States was automatically substituted as defendant in the actions against Director Ate and the FBI agents. The United States then immediately moved to dismiss the defamation claim on the grounds that the United States retained its sovereign immunity pursuant to the FTCA's intentional tort exception and to dismiss the assault, battery, false imprisonment, and false arrest claims on the grounds that the United States retained its sovereign immunity pursuant to the FTCA's discretionary function exception. On January 16, 2025, Una timely filed the following: (1) an opposition to Secretary Duessa's motion to dismiss the Fourth Amendment claim; (2) an opposition to the United States' motion to dismiss the defamation claim, challenging the Westfall Act certification of Director Ate; and (3) an opposition to the United States' motion to dismiss the assault, battery, false imprisonment, and false arrest claims.

On February 3, 2025, Judge Diana Guyon of the United States District Court for the District of Albers granted Secretary Duessa's motion to dismiss the Fourth Amendment challenge to the CBP policy. Judge Guyon found that Una failed to state a claim upon which relief could be sought. Judge Guyon ruled that officers Marinelli and Campbell had reasonable suspicion that Una was involved in human trafficking and that such suspicion justified the forensic search of Una's cell phone under the border search doctrine. Judge Guyon also dismissed Una's Bivens claim, holding that this case involved a novel legal context, such that a Bivens claim could not proceed. Finally, Judge Guyon rejected Una's challenge to the United States' certification that Director Ate was acting in the scope of his employment and allowed the United States to be substituted for all defendants facing tort claims. Judge Guyon subsequently granted the United States' motion to dismiss all tort claims against Director Ate and the FBI

agents based on the intentional tort and discretionary function exemptions under the FTCA.

On March 28, 2025, Una timely filed her notice of appeal for the dismissal of her Fourth Amendment challenge to the CBP policy. On appeal, Una contends that (1) a forensic search of a cell phone is invasive enough to require a warrant supported by probable cause even at the border, and (2) even if reasonable suspicion is sufficient, the border search doctrine is limited such that only reasonable suspicion of the presence of contraband justifies a non-routine border search.

On March 28, 2025, Una also timely filed her notice of appeal of the district court's grant of the United States' substitution for Director Ate in the defamation claim and the grant of the motion to dismiss all state tort claims. On appeal, Una contends (1) that the district court erred in granting the United States' motion substitute itself as defendant for the Director and then dismissing the defamation claim pursuant to the intentional tort exception of the FTCA and (2) that the claims for assault, battery, false imprisonment, and false arrest against the FBI agents should not have been dismissed under the discretionary function exception to the FTCA. Una has not appealed the dismissal of her Bivens claims.

This Court consolidated these appeals. Una filed her Appellant's brief on April 11, 2025, along with a motion for expedited briefing. This Court granted her motion that same day, and the Appellees filed their various Appellees' briefs on April 18, 2025. This Court held oral argument on May 27, 2025.

Discussion

1. Challenge to CBP Policy

This Court reviews de novo a district court's grant of a motion to dismiss. See Zherka v. Bondi, 140 F.4th 68, 72 (2d Cir. 2025). The constitutionality of a policy is a legal question

subject to de novo review. See Myers v. County of Orange, 157 F.3d 66, 74 (2d Cir. 1998).

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The Fourth Amendment generally requires that searches conducted for criminal investigation purposes must be conducted pursuant to a warrant supported by probable cause. Katz v. United States, 389 U.S. 347, 357 (1960). In the criminal investigation context, the Supreme Court has also recognized certain well-established exceptions to the warrant requirement, none of which apply here as this case falls outside that context.

Outside of criminal investigation purposes, the Supreme Court has recognized “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). To determine whether a special needs exception applies, a court must balance the government’s interest against the individual’s privacy interest in the context of the special need. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985). Other factors may also weigh on the reasonableness of a warrantless search. For example, the Supreme Court has considered the risk of abuse of discretion by the field officers conducting the search. See United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975). Additionally, for special needs-justified seizures, the Supreme Court has suggested that the effectiveness of the seizure is relevant but has offered little guidance on how to evaluate effectiveness. Brown v. Texas, 443 U.S. 47, 50-51 (1979); see also Merrett v. Moore, 58 F.3d 1547, 1551 (11th Cir. 1995).

a. Border Search Doctrine Generally⁸

⁸ The border search doctrine applies to searches at the border and their “functional equivalents,”

In the context of searches conducted at the border, “[t]he Government’s interest in preventing the entry of unwanted persons and effects is at its zenith.” United States v. Flores-Montano, 541 U.S. 149, 152 (2004). In contrast, individuals generally have a diminished expectation of privacy at the border. Montoya de Hernandez, 473 U.S. at 539. Under the special needs balancing approach, the government’s especially strong interest in regulating entry balanced against the individual’s diminished privacy interest makes routine searches at the border presumptively reasonable. See United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973). Invasive searches that rise above the level of a routine search, however, may require a higher level of suspicion. See, e.g., United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983).

Our sister circuits differ on the degree and type of invasion necessary to render a search non-routine, or so invasive as to require some degree of suspicion to support it. See United States v. Molina-Gomez, 781 F.3d 13, 19 (1st Cir. 2015) (holding that destructive property searches are non-routine); United States v. Levy, 803 F.3d 120, 123 n.3 (2d Cir. 2015) (suggesting that no property search is so invasive as to be considered non-routine); United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018) (same).

The Supreme Court has not announced a particular level of suspicion needed to justify a warrantless non-routine search. See Montoya de Hernandez, 473 U.S. at 541 n.4. Nevertheless, where circuit courts have implemented a standard for non-routine searches, they have required only reasonable suspicion, not probable cause. See, e.g., Alasaad v. Mayorkas, 988 F.3d 8, 19 (1st Cir. 2021); United States v. Oriakhi, 57 F.3d 1290, 1297 (4th Cir. 1995). Until recently, “no court has ever required a warrant for any border search or seizure;” this rule holds true for the

which include searches of passengers departing a nonstop international flight. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

federal circuit courts of appeal. United States v. Wanjiku, 919 F.3d 472, 481 (7th Cir. 2019).

Although the circuit courts that have considered the issue agree that reasonable suspicion is sufficient to justify a non-routine border search for actual contraband, they disagree as to whether reasonable suspicion can justify a border search for mere evidence of contraband. Compare United States v. Cano, 934 F.3d 1002, 1018 (9th Cir. 2019) (reasoning that the rationale underlying the border search exception does not extend to searches for evidence of contraband where the contraband is not present at the border), with Alasaad, 988 F.3d at 20 (concluding that uncovering evidence of contraband and other border-related crimes “is vital to achieving the border search exception’s purposes of controlling ‘who and what may enter the country’” (quoting United States v. Ramsey, 431 U.S. 606, 620 (1977))). Additionally, some courts have seemed to suggest that the scope of the border search doctrine is irrelevant because border officials should be able to conduct searches pursuant to any law enforcement interest. See, e.g., United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006). But see United States v. Aigbekaen, 943 F.3d 713, 721 (4th Cir. 2019). Searches of cell phones at the border implicate both questions about the invasiveness of the search and the applicability of the border search doctrine to searches for evidence of contraband or criminal activity.

b. Cell Phones and Border Searches

CBP currently follows a policy that roughly maps cell phone searches onto a “routine vs. non-routine” framework. See CBP Directive No. 3340-049A, Border Search of Electronic Devices § 5.1 (2018). Under this policy, advanced (also called forensic) searches are searches of electronics that use external tools to copy and/or analyze data from the device. Id. at § 5.1.4. Conversely, basic (also called manual) searches are any other search, most typically a scroll through the phone’s local contents by an agent. Id. at § 5.1.3. According to CBP policy,

advanced searches require “reasonable suspicion of activity in violation of the laws enforced or administered by CBP,” but basic searches may be conducted for any reason, or no reason, at all. Id. at § 5.1.4. The parties agree here the search at issue here was an advanced or forensic search.

The Supreme Court has grappled with how electronic devices, and cell phones in particular, fit into the Fourth Amendment’s privacy protections. In 2014, the Court ruled that law enforcement must obtain a warrant upon probable cause to search the digital contents of a cell phone even when the cell phone itself was collected as part of a search incident to arrest. Riley v. California, 573 U.S. 373, 386 (2014). Four years later, the Court again recognized the unique nature of cell phones when it held that law enforcement needed a warrant to obtain cell-site location information (“CSLI”) from a suspect’s wireless carrier. Carpenter v. United States, 585 U.S. 296, 316 (2018).

Our sister circuits have thus far declined to extend the rationale in Riley and Carpenter to require probable cause for border searches of cell phones and other electronic devices. See, e.g., Wanjiku, 919 F.3d at 485. Some district courts within the Second Circuit, however, have begun to recognize a warrant requirement for border searches of cell phones. See United States v. Smith, 673 F. Supp. 3d 381, 391-96 (S.D.N.Y. 2023); United States v. Sultanov, 742 F. Supp. 3d 258, 291-94 (E.D.N.Y. 2024).⁹

This case presents novel questions before this Court. Una contends that the district court erred in granting Secretary Duessa’s motion to dismiss Una’s claim that the CBP policy for searches of electronic devices is unconstitutional. As she must, Una concedes that at the time of the cell phone search, officers Marinelli and Campbell had reasonable suspicion that Una was

⁹ Both Smith and Sultanov were criminal cases that ultimately admitted the evidence obtained under the good faith exception. Smith, 673 F. Supp. 3d at 401-02; Sultanov, 742 F. Supp. 3d at 299. However, the doctrinal analysis is still the important consideration.

engaged in human trafficking. The district court found, and Una does not dispute, that the TECS hit, her repeated trips to Afghanistan, and her avoidant responses to Customs officers constituted reasonable suspicion of involvement in human trafficking. Una contends, however, and Secretary Duessa concedes, that those factors did not reach probable cause to believe that Una was involved in human trafficking.

Here, Secretary Duessa also concedes that to the extent the distinction matters, the forensic search of Una's cell phone was "non-routine." Secretary Duessa contends, however, and the district court agreed, that forensic cell phone searches may nonetheless be conducted without probable cause. Una argues that the depth of information contained within a cell phone, coupled with the especially invasive nature of a forensic search, means that even at the border, the Fourth Amendment requires a warrant supported by probable cause for a cell phone search.

Specifically, Una relies on Riley, arguing that individuals have an extraordinary privacy interest in their cell phone contents. See Riley, 573 U.S. at 403; see also Sultanov, 742 F. Supp. 3d at 284. She contends that forensic searches are uniquely intrusive compared to other property searches: "[i]t is as if a search of a person's suitcase could reveal not only what the bag contained on the current trip, but everything it had ever carried." United States v. Cotterman, 709 F.3d 952, 967-68 (9th Cir. 2013). This, she argues, makes cell phone searches even more intrusive than a search of the home, and thus renders inapplicable one of the core reasons for permitting warrantless border searches of other property. Cf. United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376 (1971). More broadly, she contends that recognizing a heightened privacy interest in cell phones even at the border comports with the Supreme Court's precedent in Riley and Carpenter. See Smith, 673 F. Supp. 3d at 396.

Secretary Duessa, in contrast, points to "the long-standing right of the sovereign to

protect itself by stopping and examining persons and property crossing into this country” as the strongest interest the government can have. Ramsey, 431 U.S. at 616; see also Flores-Montano, 541 U.S. at 152. Una attempts to undercut this reasoning by suggesting that cell phone searches do little to advance the government’s interest in preventing the entry of contraband into the country. See Brown, 443 U.S. at 50-51; Sultanov, 742 F. Supp. 3d at 285. Secretary Duessa argues for a broader framing of the government’s interest than simply preventing the entry of contraband, however. We agree that the government’s interest is broad, given that the Supreme Court has long found that “national self-protection” renders reasonable even those searches that would be “intolerable and unreasonable” if conducted away from the border. Carroll v. United States, 267 U.S. 132, 153-54 (1925).

Moreover, even if we were to frame the government’s interest narrowly, as an interest in the interdiction of contraband at the border, the fact that some contraband may still be on cell phones is enough to render forensic cell phone searches reasonable. Although “the degree to which the seizure advances the public interest” may be a factor for seizures, Brown, 443 U.S. at 50-51, that factor has never been adopted as relevant in the border search context. The Supreme Court has also instructed us not to use this Brown factor to override officials’ determinations of effectiveness with our own. Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 453 (1990).

This Court must weigh this heightened interest against an individual’s diminished expectation of privacy at the border. See Montoya de Hernandez, 473 U.S. at 539. Although forensic cell phone searches may be invasive enough to be non-routine, every circuit court to have considered the issue has held that mere reasonable suspicion is the proper standard to justify the search, as it is for any other border search. See Cano, 934 F.3d at 1015. Riley and Carpenter are inapposite, dealing as they do with entirely different exceptions to the warrant

requirement. See, e.g., id. Thus, we agree with the district court that the border search doctrine permits a warrantless forensic search at the border of a cell phone on reasonable suspicion alone.

Next, Una argues that even if a forensic search of a cell phone can be conducted at the border on reasonable suspicion, the border search doctrine only applies to warrantless searches for contraband itself. Secretary Duessa concedes that the CBP officers did not have reasonable suspicion that Una had actual contraband on her cell phone. Rather, the officers justified the search solely by their reasonable suspicion of Una's involvement in human trafficking. Secretary Duessa contends, however, and the district court agreed, that the border search doctrine extends to searches for evidence of contraband or transnational crime.

Una argues that the purpose of the border search doctrine is narrowly confined to interdiction of contraband. Cano, 934 F.3d at 1018 (collecting cases). And she is correct that historically, the border search doctrine exclusively focused on tangible items physically crossing the border. Id. The modern Supreme Court, however, has referred to the government's interest at the border more broadly as excluding "unwanted persons and effects" from the country. Flores-Montano, 541 U.S. at 15. Here, the district court agreed with Secretary Duessa that CBP officials should not be limited in the scope of their searches because the rationale for the border search doctrine draws from "the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country." Ramsey, 431 U.S. at 616. The border search doctrine must encompass evidence of contraband or transnational crime to serve the government's interest in preventing crime at international borders. See Alasaad, 988 F.3d at 19. Thus, we agree with the district court that the border search doctrine extends to the search conducted here. The district court properly dismissed Una's claim challenging the constitutionality of the CBP policy.

2. FTCA Claims

When reviewing a motion for substitution under the FTCA, we review the district court's legal conclusions de novo. Harbury v. Hayden, 522 F.3d 413, 416 (D.C. Cir. 2008). Neither party disputes the district court's factual findings. After the United States is substituted as a defendant, motions to dismiss under the FTCA are reviewed de novo. See Loumiet v. United States, 828 F.3d 935, 939 (D.C. Cir. 2016).

The FTCA "is a limited waiver of the Government's sovereign immunity." Harbury, 522 F.3d at 416. "Under the FTCA, plaintiffs may sue the United States in federal court for state-law torts committed by government employees within the scope of their employment." Id. The FTCA is the exclusive remedy for state-law tort claims against federal officials discharging their duties. See United States v. Smith, 499 U.S. 160, 163 (1991). Because the FTCA is only a partial waiver of sovereign immunity, there are several exceptions under which the government retains sovereign immunity. See 28 U.S.C. § 2680. The relevant exception for the defamation claim is that the FTCA explicitly bars recovery for certain intentional torts, including defamation.¹⁰ See § 2680(h). The relevant exception for the other intentional tort claims originally brought against the FBI agents is the discretionary function exception.¹¹ See § 2680(a).

¹⁰ The applicability of the intentional tort exception is only relevant to the claim asserted against the Director. All claims against the FBI agents are exempted from the intentional tort exception by the FTCA's law enforcement proviso. See Martin v. United States, 605 U.S. 395, 403-07 (2025).

¹¹ The applicability of the discretionary function exception is only relevant to the claims asserted against the FBI agents. First, the law enforcement proviso in § 2680(h) waives the sovereign immunity of the United States for the intentional torts brought by Una against the FBI agents. Second, the law enforcement proviso does not negate the applicability of the discretionary function exception to the FBI agents. See Martin, 609 U.S. at 403-07. Third, the discretionary function exemption is not applicable to the claims against the Director. The discretionary function exception is applicable if the tortfeasor is an employee of the United States, see § 2680(a), and would only apply if the United States is otherwise liable for the torts of that employee. See Linder v. United States, 937 F.3d 1087, 1091 (7th Cir. 2019), cert. denied 141 S.

When a federal government employee is sued for tortious conduct that happens on the job, the employee is entitled to immunity from personal liability under the Westfall Act. See Smith, 499 U.S. at 164-65. A government employee is entitled to personal immunity from such claims only if the government can be substituted as a defendant under the FTCA. See Harbury, 522 F.3d at 416-17. Because the FTCA bars recovery for certain intentional torts, if the United States is substituted as defendant in a suit claiming damages for defamation, then the plaintiff will likely be unable to recover damages because of the personal immunity of the employee and the sovereign immunity of the United States. See Smith, 499 U.S. at 166.

To avoid the federal government’s sovereign immunity from intentional tort claims, plaintiffs, like Petitioner Una in this case, typically seek to sue the federal employee in their personal capacity, asserting that the federal employee’s tortious conduct occurred outside the scope of their employment. See, e.g., Harbury, 522 F.3d at 417. A defendant-employee may be able to substitute the United States as defendant if: (1) the employee is a qualifying government official for purposes of the Westfall Act, and (2) the alleged tortious conduct was within the scope of the employee’s employment. See Carroll v. Trump, 49 F.4th 759, 760 (2d Cir. 2022).

Under the Westfall Act, the Attorney General can “certify that the employee ‘was acting within the scope of his office or employment at the time of the incident out of which the claim

Ct. 159 (2020) (asserting the point of an exception is that liability would otherwise be justified but for the exception). Here, if we agree with Una that Director Ate was not acting as an employee when he allegedly defamed Una, then the United States cannot be substituted, and the exceptions to the FTCA are irrelevant because on remand the suit will continue against Director Ate in his personal capacity. See Harbury, 522 F.3d at 417. If we agree with the United States that Director Ate was acting as an employee when he posted about Una then the United States was properly substituted. Because the United States has not waived its sovereign immunity to defamation under § 2680(h), the intentional tort exception applies, ending the FTCA analysis before reaching the question of the applicability of the discretionary function exception. See Martin, 609 U.S. at 413-14 (assuming intentional tort exception analysis occurs before discretionary function analysis).

arose.’’ De Martinez v. Lamagno, 515 U.S. 417, 420 (1995) (quoting § 2679(d)(1)). Once the Attorney General certifies that the employee was acting within the scope of their employment, the plaintiff must come forward with specific facts to rebut the certification. Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 2006). As discussed above, the Attorney General certified that Director Ate and the FBI agents are government officials acting within the scope of their employment.

a. Dismissal of the Defamation Claim

Neither party disputes that all original defendants here are qualifying government officials for purposes of the Westfall Act (the first prong of the applicable test). On appeal from the district court’s grant of the United States’ motion to dismiss the defamation claim, however, Una challenges the Attorney General’s certification as to Director Ate, asserting that the Director was acting beyond the scope of his employment when he posted allegedly defamatory statements about Una on his personal social media profile.

To determine whether a federal employee acted within the scope of their office, we look to the respondeat superior law of the state in which the alleged act occurred.¹² See Black Lives Matter D.C. v. United States, 775 F. Supp. 3d. 241, 258 (D.C. Cir. 2025) (citing Williams v. United States, 350 U.S. 857 (1955)); Ballenger, 444 F.3d at 663. Here, the parties agree that Director Ate posted while in D.C. The respondeat superior law in D.C. adheres to the traditional scope of employment inquiry set forth in the Restatement (Second) of Agency § 228. See Trump v. Carroll, 292 A.3d 220, 228 (D.C. 2023). Under the Restatement:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind [the person] is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;

¹² In Albers, and thus in this circuit for the purposes of this case, the state’s law that applies for determining the scope of employment is the place of broadcast, which in this case is Washington, D.C. The parties do not dispute that D.C. law controls the scope of employment inquiry here.

- (c) it is actuated, at least in part, by a purpose to serve the master[;] and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency § 228. Neither party contends that force was used and both parties agree that the Director posted with a purpose to serve the President. Thus, the only elements of the respondeat superior test disputed here are (1) whether Director Ate's post from his personal account is the kind of work the Director is employed to perform; and (2) whether the post occurred substantially within authorized time and space limits. Importantly, the agency test under D.C. law is conjunctive, meaning Una need only succeed on one prong to show that Director Ate was not acting within the scope of his employment. See Trump, 292 A.2d at 228.

Under D.C. law, this scope of employment analysis requires a close evaluation of the facts. See, e.g., Penn. Cent. Trans. Co. v. Reddick, 398 A.2d 27, 32 (D.C. 1979); District of Columbia v. Bamidele, 103 A.3d 516, 526 (D.C. 2014). Courts have generally found that elected officials like members of Congress were acting within the scope of their employment when they published defamatory statements. See, e.g., Ballenger, 444 F.3d at 664-66; Wuterich v. Murtha, 562 F.3d 375, 387 (D.C. Cir. 2009); Bobulinski v. Goldman, No. 24-00974, 2025 WL 1707696, at *4 (D.D.C. June 18, 2025); Does 1-10 v. Haaland, 973 F.3d 591, 602 (6th Cir. 2020). That said, the D.C. Court of Appeals has refused to announce a categorical rule that government officials are acting within the scope of their employment when they make public statements, even if the officials are elected. Trump, 292 A.3d at 239-40. Moreover, in suits against executive branch officials, the courts have evaluated the conduct of the official when determining whether they acted within the scope of their employment. See Wilson v. Libby, 535 F.3d 697, 711-12 (D.C. Cir. 2008); Smith v. Clinton, 253 F. Supp. 3d 222, 236-38 (D.D.C. 2017).

Although scope of employment is generally a question for the jury, a court may resolve the inquiry as a matter of law “only where, viewing the evidence in the light most favorable to the non-moving party, the probative facts are undisputed and where reasonable minds can draw but one inference from them.” Trump, 292 A.3d at 239 n.23 (citing Hechinger Co. v. Johnson, 761 A.2d 15, 24 (D.C. 2000) (internal quotation marks omitted)). When considering the issue of scope of employment, district courts may allow limited discovery on the issue. See Ballenger, 444 F.3d at 663. Below, the parties engaged in limited discovery and submitted matching statements of undisputed facts with their briefs on the scope of employment issue. Applying the respondeat superior law of D.C., the district court found that Director Ate was acting within the scope of his employment. Thus, the court held that the United States was properly substituted as defendant and dismissed the claim pursuant to the intentional tort exception to the FTCA. This Court must decide whether the district court correctly applied the respondeat superior law of D.C. to the undisputed facts below.

Una contends that Director Ate was not engaged in conduct “of the kind [he was] employed to perform,” and therefore he acted outside the scope of his employment and the United States cannot be substituted for him in this litigation. Restatement (Second) of Agency § 228(1)(a). This language is construed broadly to include not only expressly stated duties but also informal duties and duties incidental to explicitly authorized duties. See § 229(1), (2)(a). Tortious conduct is “incidental to” authorized conduct if the tortious conduct was “in service of carrying out an employee’s job function.” Trump, 292 A.3d at 230-31.

Una argues that communication to the public is not categorically within the scope of every federal official’s employment and contends that here, it was not in the scope of Director Ate’s employment. Cf. id. at 239-40. She seeks to distinguish cases finding that members of

Congress publishing defamatory statements were acting within the scope of their employment. See, e.g., Ballenger, 444 F.3d at 664-66. Furthermore, she contends that Director Ate was not acting within the scope of his employment because his conduct did not “occur[] substantially within the authorized time and space limits.” Restatement (Second) of Agency § 228(1)(b). Una contends that not all public officials are “always on duty” and that here, Director Ate was not “sufficiently engaged with [his] employment” when he posted. See Trump, 292 A.3d at 232-33, 239-40.

The United States contends, and the district court agreed, that Director Ate was engaged in the kind of work he was hired to perform and thus was acting in the scope of his employment. The United States contends that an employee is acting within the scope of their employment when the tortious conduct was “an outgrowth of a job-related controversy.” Id. at 232. We agree. Communicating to the public is the kind of work high-level executive branch officials are employed to perform. See, e.g., Bobulinski, 2025 WL 1707696, at *2-3; Haaland, 973 F.3d at 602. Even if communicating with the public is not a core duty of Director Ate’s position, it is at the very least incidental to his duties. See Trump, 292 A.3d at 230-31. Moreover, like members of Congress and police, high-ranking public officials are always “on duty,” so the hour of the post is irrelevant to the inquiry. See, e.g., Ballenger, 444 F.3d at 663. Accordingly, we agree with the district court that Director Ate was acting in the scope of his employment.

b. Dismissal of the Remaining Tort Claims

Another claw back of the federal government’s waiver of sovereign immunity under the FTCA is the “discretionary function” exception. § 2680(a). Under this provision, the United States retains sovereign immunity against “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a

federal agency or an employee of the Government, whether or not the discretion involved be abused.” Id. The Supreme Court has set out a two-prong test to determine whether an official’s conduct is shielded from liability by the discretionary function exception. See United States v. Gaubert, 499 U.S. 315, 322-23 (1991). First, a court must determine whether the official’s conduct “was ‘discretionary in nature’—that is, whether it involved ‘an element of judgment or choice.’” Shivers v. United States, 1 F.4th 924, 929 (11th Cir. 2021) (quoting Gaubert, 499 U.S. at 322). Second, a court must determine “whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield.” Id. (quoting Gaubert, 499 U.S. at 322-23). That is, the discretionary function exception “protects only governmental actions and decisions based on considerations of public policy.” Gaubert, 499 U.S. at 323 (quoting Berkovitz v. United States, 486 U.S. 531, 537 (1988)).

The parties agree that the second prong is satisfied, as they agree that FBI agents’ allegedly tortious conduct here was based on considerations of public policy. Una contends, however, that Gaubert’s requirement of judgment or choice was not satisfied because the FBI agents did not have lawful discretion to engage in tortious conduct that resulted in a violation of her constitutional rights. See id. at 322. The United States disagrees, arguing that Una cannot solely rely on the Constitution to demonstrate that the officials were not exercising discretion because she must point to a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” Id. (quoting Berkovitz, 486 U.S. at 536).

This is a novel question before this Court. Our sister circuits that have considered this question have split on “whether unconstitutional conduct necessarily falls outside the [discretionary function] exception.” Xi v. Haugen, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J., concurring). Several circuits hold that the discretionary function exemption cannot immunize

unconstitutional conduct because federal officials do not have discretion to violate the constitution. See, e.g., Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009); Myers & Myers, Inc. v. USPS, 527 F.2d 1252, 1261 (2d Cir. 1975); Nieves Martinez v. United States, 997 F.3d 867, 877 (9th Cir. 2021). Other circuits hold the opposite: The government is immune from liability under the exception when federal officials are engaged in discretionary functions, even unconstitutional ones. See, e.g., Linder, 937 F.3d at 1090; Shivers, 1 F.4th at 932-33.

Una has not identified a federal statute or regulation that prohibits the actions of the FBI agents. She asserts only that the Constitution is a federal policy that federal officials do not have discretion to violate. The district court adopted the minority position, holding that Una must point to a federal statute, regulation, or policy that specifically prescribes the conduct of the federal officials involved to demonstrate that the discretionary function exception is inapplicable, even when there are plausible constitutional violations. Thus, the district court dismissed Una's claims for assault, battery, false imprisonment, and false arrest pursuant to the discretionary function exception. This Court must decide whether the FTCA's discretionary function exception maintains the sovereign immunity of the United States even when a plaintiff alleges unconstitutional conduct by federal officials.

Una contends that under the FTCA, the United States waives its sovereign immunity when federal officials violate an individual's constitutional rights because federal officials are not granted discretion to violate the Constitution. She argues that "governmental conduct cannot be discretionary if it violates a legal mandate." Nurse v. United States, 226 F.3d 996, 1002 (9th Cir. 2000). Necessarily, she contends, the power of federal officials is "circumscribed by the rules that limit the bounds of [their] authority." Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187, 1197 (D.C. Cir. 1986). She asserts that the United States Constitution is a

policy that prescribes the conduct of federal officials and agents. We disagree. By its plain language, § 2680(a) is a broad, categorical statutory provision: The statute immunizes an official for “any claim” for a tort resulting from an official executing a statute “whether or not such statute or regulation be valid” and “whether or not the discretion involved be abused.” § 2680(a). The discretionary function exception exists to “prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” Gaubert, 499 U.S. at 323 (quoting United States v. Varig Airlines, 467 U.S. 797, 814 (1984)).

Moreover, in FDIC v. Meyer, the Supreme Court held that “the United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims.” 510 U.S. 471, 478 (1994). Una argues that her cause of action does not arise out of the Constitution, but rather out of state tort law, and therefore she is not attempting to hold the government liable under the FTCA for constitutional claims. We disagree. By alleging a constitutional violation through a state tort claim, Una is alleging a cause of action that could not succeed against a private individual and thus is barred by the FTCA.

Finally, the district court suggested below that if FTCA claims were permitted to proceed for allegedly unconstitutional tortious conduct that is within a federal employee’s discretion, then it would be proper to import qualified immunity doctrine into the discretionary function analysis and only allow recovery for violations of “clearly established” rights. Here, we disagree with the district court. Qualified immunity only applies when an individual faces liability in their personal capacity. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In this case, the United States is the defendant, so the risk of inhibiting these individual official’s actions through fear of liability

is not present.¹³ Regardless, we need not expressly decide this issue, as we agree with the district court that the discretionary function exception applies and that dismissal of the remaining intentional tort claims was proper.

Conclusion

For these reasons, this Court AFFIRMS the decisions of the district court below.

Dated: October 20, 2025

¹³ The district court did not consider the possibility of whether qualified immunity could apply in the intentional tort exception context, and thus, that question is not before this Court with respect to the defamation claim.

SUPREME COURT OF THE UNITED STATES

	)	
Jude UNA,	)	
Petitioner,	)	
	)	
v.	)	ALB-26-01
	)	
Valerie DUESSA, Secretary of the U.S.	)	
Department of Homeland Security;	)	
UNITED STATES of America,	)	
Respondents.	)	
	)	

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit granted.

January 16, 2026¹⁴

¹⁴ Competitors may not rely on any decisions issued or articles published subsequent to this date.

Appendix A

CBP Directive No. 3340-049A, Border Search of Electronic Devices (2018)

Section 5.1 Border Searches

- 5.1.3 Basic Search. Any border search of an electronic device that is not an advanced search, as described below, may be referred to as a basic search. In the course of a basic search, with or without suspicion, an Officer may examine an electronic device and may review and analyze information encountered at the border, subject to the requirements and limitations provided herein and applicable law.
- 5.1.4 Advanced Search. An advanced search is any search in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents. In instances in which there is reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern, and with supervisory approval at the Grade 14 level or higher (or a manager with comparable responsibilities), an Officer may perform an advanced search of an electronic device. Many factors may create reasonable suspicion or constitute a national security concern; examples include the existence of a relevant national security-related lookout in combination with other articulable factors as appropriate, or the presence of an individual on a government-operated and government-vetted terrorist watch list.

Appendix B

28 U.S.C. § 1346. United States as defendant

- (b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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. § 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.

...

- (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.