



The Fourth Amendment and Airports

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THE FOURTH AMENDMENT AND AIRPORTS

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Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Applications

The Fourth Amendment is specifically designed to ensure that searches and seizures of property are not conducted arbitrarily. This principle touches the lives of citizens most often when they are traveling. The impact of the Fourth Amendment of the United States Constitution on security restraints at commercial airports is one that calls into question the limits of authority of both the federal government through the Transportation Security Administration (TSA) and state and local law enforcement officials who assist in overseeing security at these airports. The screening of passengers and property at passenger checkpoints at U.S. commercial airports is the responsibility of TSA, with the airport operator assisting as necessary. As responsibility shifts from TSA to the local airport operator and law enforcement, there is potential for misunderstandings.

This legal digest discusses the Fourth Amendment generally as it pertains to its application to people, houses, papers, and effects. The digest focuses on the application at airports and respective court decisions. It specifically discusses expectations of privacy at airports, airport administrative inspection actions, and law enforcement actions. This digest will assist airport operators by providing the background and application of the Fourth Amendment as they review their procedures with their attorneys.

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THE FOURTH AMENDMENT AND AIRPORTS

By Jodi L. Howick, Howick Law, PLLC

INTRODUCTION

The United States Constitution, Amendment Four, states

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This constitutional requirement grew out of concerns raised during the history of the American colonies. Prior to the Revolutionary War, English revenue officers in the colonies had used “writs of assistance” to conduct general government searches solely at the discretion of the officer, and thus arbitrarily. These general searches were contrary to established principles under English law, and opposition to them was “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.”¹ When America’s founders later wrote the Fourth Amendment, they incorporated protective restraints on the government’s search and seizure power.² The “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”³ As such, the amendment’s “proper function is to constrain [government], not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.”⁴

This digest considers how the courts have applied Fourth Amendment concepts at airports. It begins in Section I by presenting a general overview of Fourth Amendment principles. That section first considers the amendment’s purpose and when it applies. It notes that the amendment lists four matters as

subject to its protection—persons, houses, papers, and effects—but the Supreme Court recognizes that this list only creates a “baseline” of properties where society accepts that people have a right to secure their privacy if they choose to do so. The amendment’s protections apply when people make actual efforts to secure individual privacy against government intrusions and society accepts those expectations of privacy as being reasonable, making them legitimate. Section I then reviews general requirements under the Fourth Amendment’s two clauses, discusses some exceptions that the courts recognize as still fulfilling the purpose of the amendment, and notes the general consequences of a Fourth Amendment violation. Readers who work with Fourth Amendment issues on a regular basis may wish to skim this section since it reviews general concepts that can apply at airports and elsewhere.

The bulk of the digest, however, discusses airport-specific Fourth Amendment issues that airport proprietors may encounter. It first notes that courts begin a Fourth Amendment analysis by considering the context where a government action occurs. Section II considers the general context of an airport and reviews precedent confirming that airports have long been understood to be places where the government must search people and private belongings to protect the safety of air travel. As such, case law establishes that the context of an airport substantially diminishes the legitimacy of individual privacy expectations.

Section III then discusses how the Fourth Amendment addresses administrative inspection actions at an airport, whether conducted by the Transportation Security Administration (TSA) or by the airport proprietor. Under the Fourth Amendment, regulations can authorize these administrative searches and seizures when actions are limited to measures that protect safe air travel by screening passengers and baggage for threats. Administrative actions thus differ from law enforcement actions, where officers investigate an individualized suspicion of wrongdoing. Section III reviews cases that establish that both administrative and law enforcement actions are affected by the constitutionality of an airport administrative search program and by the proper scope of a search as actually conducted. The

¹ See *Boyd v. United States*, 116 U.S. 616, 625 (1886) (discussing the early history of the Fourth Amendment).

² See *generally id.* See also *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1253 (2012) (J. Sotomayor, dissenting) (noting the Fourth Amendment’s history and purpose); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (discussing the purpose of the Fourth Amendment’s two clauses).

³ See *Schmerber v. California*, 384 U.S. 757, 767 (1966) (considering the values protected by the Fourth Amendment).

⁴ *Id.* at 768.

section explains that when the government conducts a valid administrative search, it discovers information lawfully, and once information is lawfully known it can also be used by law enforcement officers to investigate suspected wrongdoing.

Section IV then reviews how the courts consider administrative searches that are not valid. Under those circumstances information is discovered illegally, and law enforcement officers cannot rely on a constitutional violation as their basis for taking action. This section also reviews other aspects of law enforcement action at an airport. It notes Fourth Amendment concepts when officers respond to an airport disturbance and use informant information from TSA and others. It also discusses the law enforcement basis for stopping passengers at airports to investigate suspicious activity and the basis for stopping baggage and other effects as well.

This digest provides an overview of common Fourth Amendment principles that airport proprietors may encounter. These principles serve as a starting point for additional research and may help focus an airport proprietor's administrative and law enforcement actions. They also may provide a general understanding that is useful to an airport proprietor in other ways, such as when examining risk and liability issues.

I. GENERAL FOURTH AMENDMENT OVERVIEW

This section is a brief summary of basic Fourth Amendment principles that apply at airports and elsewhere. It is not a comprehensive review of Fourth Amendment issues, but instead focuses on core principles that may be important in an airport setting. Both law enforcement actions and administrative inspection actions must address these basic principles. Airport attorneys may also need to use basic principles such as these to evaluate the Fourth Amendment implications of changing airport security practices, where new procedures can outpace court decisions. Readers who are already familiar with these core principles may wish to skim this section since it presents general information.

A. Purpose of the Fourth Amendment

The Fourth Amendment's purpose is to protect against an arbitrary use of the government's search and seizure power. That purpose grew out of the experiences of America's early colonists. They were subject to writs of assistance imposed under English law that allowed government revenue officers to search suspected places based simply on the officer's own discretion and to look randomly for smuggled

goods, libel, or other potential crimes.⁵ The colonists pointed out that the arbitrary power exercised under such a writ placed "the liberty of every man in the hands of every petty officer," and John Adams noted that opposition to these writs constituted the "first scene of the first act of opposition to the arbitrary claims of Great Britain" in the struggle for independence.⁶ Thus:

To prevent the issue of general warrants on "loose, vague or doubtful bases of fact," the Framers established the inviolable principle that..."no Warrants shall issue, but upon probable cause...and particularly describing the...things to be seized." That is, the police must articulate an adequate reason to search for specific items related to specific crimes.⁷

This purpose shaped the requirements drafted into the Fourth Amendment, and it continues to guide the amendment's interpretation as courts evaluate new contexts and harmonize the amendment with other bodies of law. At its core, the amendment is a balance of several fundamental principles reflecting its purpose: every person's individual right to secure privacy in a manner that society accepts as reasonable; the right to move about freely; the public's interest in ensuring that government can pursue law enforcement effectively; and the Constitution's guiding principle that government actions must be taken for a justifiable public purpose rather than for reasons that are arbitrary, capricious, or illegal.⁸

B. What Is a Fourth Amendment Intrusion?

When the government pursues an intrusion, the courts first determine whether that intrusion is subject to the Fourth Amendment's protections before applying the standards required by the amendment. The Supreme Court begins by determining "whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he [sought] to preserve [something] as private."⁹

⁵ See generally *Boyd v. United States*, 116 U.S. 616, 625 (1886) (discussing the early history of the Fourth Amendment). The Supreme Court has determined that this arbitrary practice of using general warrants was an abuse that had "gradually crept into the administration of public affairs" in the American colonies, and it diverged from English law, which required intrusions to be justified by "some public law for the good of the whole." *Id.* at 627.

⁶ *Id.* at 625 (footnotes omitted).

⁷ *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1253 (2012) (J. Sotomayor, dissenting) (alteration in original) (citations omitted) (noting the Fourth Amendment's history and purpose).

⁸ See, e.g., *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967) (discussing the purpose of the Fourth Amendment).

⁹ *Bond v. United States*, 529 U.S. 334, 338 (2000) (alteration in original) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)) (considering privacy expectations for luggage traveling by bus).

For example, the courts generally note that individuals seek to secure privacy in their homes, but if an individual makes home activities visible to the public, he or she has not sought to preserve privacy and the Fourth Amendment does not provide protections.¹⁰ Thus, the courts have held that a government observation made from a public space, such as from a public thoroughfare or from an aircraft in public airspace, is not a search under the Fourth Amendment because what a person knowingly exposes to the public is not a subject of Fourth Amendment protection.¹¹

If an individual has made efforts to secure privacy, the Court then inquires whether the individual's expectation of privacy is "one that society is prepared to recognize as reasonable."¹² The Court typically begins this analysis by considering the property listed in the Fourth Amendment to be "encompassed by its protections: persons, houses, papers, and effects."¹³ This list of protected things "establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"¹⁴ Thus, many early Fourth Amendment cases focus extensively on property law concepts, such as trespass and licenses to use property.¹⁵ The Court has noted that an alignment between the laws of property and privacy is not surprising. "The law of property 'naturally enough influence[s]' our 'shared social expectations' of what places should be free from governmental incursions."¹⁶

For example, one baseline identified by the amendment is people's right to be secure in their "persons" against unreasonable government searches. The Court has determined that "[v]irtually any 'intrusio[n] into

the human body,' will work an invasion of 'cherished personal security' that is subject to constitutional scrutiny."¹⁷ In addition, a "careful exploration of the outer surfaces of a person's clothing all over his or her body"¹⁸ is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."¹⁹

Another Fourth Amendment baseline is the people's right to be secure in their "houses." The Court has noted that "the home is first among equals," because society accepts "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."²⁰ A home carries a presumption that searches are unreasonable without a warrant, although that presumption can be overcome.²¹ By contrast:

An owner or operator of a business...has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable...[but an] expectation of privacy in commercial premises...is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in "closely regulated" industries.²²

But the Fourth Amendment does not protect these baseline properties as a duplication of property laws. Instead its purpose is to protect legitimate privacy interests. The Supreme Court has determined that "property rights are not the sole measure of Fourth Amendment violations."²³ Rather:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.²⁴

¹⁷ *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) (alteration in original) (citations omitted) (first quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966); then quoting *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)) (determining that the Fourth Amendment permitted a state to require DNA testing for arrestees).

¹⁸ *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (upholding the need for "pat down" searches based on a reasonable suspicion in limited circumstances).

¹⁹ *Id.* at 17.

²⁰ *Jardines*, 133 S. Ct. at 1414 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

²¹ *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (considering exigencies that may overcome a presumption that searches and seizures inside a home require a warrant).

²² *New York v. Burger*, 482 U.S. 691, 699–700 (1987) (citations omitted) (upholding warrantless inspections of a regulated vehicle dismantling business under the "special needs" exception).

²³ *Soldal v. Cook County, Ill.*, 506 U.S. 56, 64 (1992) (interpreting past cases addressing the role of property rights in a Fourth Amendment analysis).

²⁴ *Katz v. United States*, 389 U.S. 347, 351 (1967) (citations omitted) (electronically listening to a phone conversation from outside a phone booth was a search).

¹⁰ *See, e.g., California v. Ciraolo*, 476 U.S. 207 (1986) (upholding the use of evidence seen in a backyard from an aircraft in public airspace) (citing *Katz v. United States*, 389 U.S. 347 (1967), which determined an electronic tap outside a phone booth was a search).

¹¹ *Ciraolo*, 476 U.S. at 213–214.

¹² *Bond*, 529 U.S. at 338 (citation omitted).

¹³ *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (internal quotation marks omitted) (citation omitted) (considering the Fourth Amendment's baseline list when determining that a dog and officer physically invaded a home's curtilage).

¹⁴ *Id.* at 1414 (citing *United States v. Jones*, 132 S. Ct. 945, 950–951, n.3 (2012)).

¹⁵ *See Jones*, 132 S. Ct. at 949 ("[t]he text of the Fourth Amendment reflects its close connection to property... Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century").

¹⁶ *Jardines*, 133 S. Ct. at 1419 (alteration in original) (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006)).

The amendment thus protects a right to secure personal privacy in a manner that society accepts as reasonable against unreasonable government intrusions, and it states baseline properties where such an expectation is accepted. Societal expectations of privacy “add to the baseline,” but they do “not subtract anything from the Amendment’s protections ‘when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.”²⁵ By recognizing that the Fourth Amendment protects legitimate expectations for securing privacy,²⁶ the Court has embodied a “preservation of past rights in our very definition of ‘reasonable expectation of privacy’” and preserved “that degree of privacy against government that existed when the Fourth Amendment was adopted.”²⁷

The Court has identified some contexts where society does not accept an expectation of securing privacy as being reasonable. For example, generally the Court does not recognize an open field to be a context that is subject to Fourth Amendment protections against intrusion. It has determined that an “open field is neither a ‘house’ nor an ‘effect,’ and, therefore, ‘the government’s intrusion upon the open fields is not one of those “unreasonable searches” proscribed by the text of the Fourth Amendment.”²⁸ In addition, there is simply “no basis for concluding that a police inspection of open fields accomplishes... an infringement” of “personal and societal values protected by the Fourth Amendment.”²⁹

The Court has also determined that official conduct that does not “compromise any legitimate interest in privacy” is not a search subject to the Fourth Amendment.³⁰ For example:

[A]ny interest in possessing contraband cannot be deemed “legitimate,” and thus, governmental conduct that only reveals the possession of contraband “compromises no legitimate privacy interest.” This is because the expectation “that certain facts will not come to the attention of the

²⁵ *Jardines*, 133 S. Ct. at 1414 (alteration in original) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983)).

²⁶ *United States v. Jones*, 132 S. Ct. 945, 951 (2012) (determining that a GPS tracker physically invaded a vehicle to obtain information and was a search).

²⁷ *Id.* at 950 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (determining that a GPS tracker physically invaded a vehicle to obtain information and was a search)).

²⁸ *United States v. Dunn*, 480 U.S. 294, 303–304 (1987) (quoting *Oliver v. United States*, 466 U.S. 170, 187 (1984)) (discussing factors affecting whether a place should be free from government intrusion) (observing the open area of a barn from an open field was not a search). *See also Jones*, 132 S. Ct. 945 (an information-gathering intrusion on an open field was not a Fourth Amendment search even though it was a property trespass under common law).

²⁹ *Oliver*, 466 U.S. at 182–183.

³⁰ *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (holding that the use of a canine to detect narcotics during a traffic stop did not violate the Fourth Amendment).

authorities” is not the same as an interest in “privacy that society is prepared to consider reasonable.”³¹

The Court has further determined that a Fourth Amendment intrusion must be made for the purpose of obtaining information. “A trespass on ‘houses’ or ‘effects,’ or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.”³²

The Fourth Amendment thus first requires showing that a given context is subject to the amendment’s protections against unreasonable government intrusions based on an individual’s actual efforts to secure privacy and society’s acceptance of those expectations. The “test of legitimacy is not whether the individual chooses to conceal assertedly ‘private activity,’ but instead ‘whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.’”³³ The Fourth Amendment secures “the individual’s legitimate expectations that in certain places and at certain times he has ‘the right to be let alone....’”³⁴ It “generally protects the ‘security’ of ‘persons, houses, papers, and effects’ against official intrusions up to the point where the community’s need for evidence surmounts a specified standard, ordinarily ‘probable cause.’”³⁵ At that point, “it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community’s vital interests in law enforcement.”³⁶

C. The Reasonableness Standard

If the Fourth Amendment’s protections apply to a given context, the amendment’s text imposes two standards on intrusive government action to implement its purpose of limiting that action to a justifiable scope. The first standard contained in the text is a general standard that requires a search and seizure action to be reasonable. The Supreme Court has determined that “the ultimate touchstone of the Fourth Amendment is reasonableness.”³⁷

³¹ *Id.* at 408–409 (quoting *United States v. Jacobsen*, 466 U.S. 109, 123, 122 (1984)).

³² *Jones*, 132 S. Ct. at 951 n.5.

³³ *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (quoting *Oliver v. United States*, 466 U.S. 170, 181–183 (1984)).

³⁴ *Winston v. Lee*, 470 U.S. 753, 758 (1985) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928)) (elaborating on the determination in *Katz v. United States* that the Fourth Amendment protects expectations of privacy).

³⁵ *Id.* at 759.

³⁶ *Id.*

³⁷ *See, e.g., Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014).

The Supreme Court uses several tests to evaluate what is reasonable. Initially, the Court will look “to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve” when assessing whether current practices provide those historic protections.³⁸ If this historical analysis does not give the Court “a conclusive answer” concerning what is reasonable, however, the Court then analyzes the government’s action “in light of traditional standards of reasonableness ‘by assessing, on the one hand, the degree to which it [the action] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”³⁹ That inquiry “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake,” and the Court conducts that analysis based on “the totality of the circumstances.”⁴⁰

Under a reasonableness analysis, the Court will consider the government’s reason for taking action and its manner of acting. The Court has determined that to be “reasonable,” a government action usually must be justified as a measure that could resolve “some quantum of individualized suspicion.”⁴¹ For example, “the mere fact that law enforcement may be made more efficient [by a practice] can never by itself justify disregard of the Fourth Amendment.”⁴² The Court acknowledges, however, that the Fourth Amendment does not always require an individualized suspicion of wrongdoing. For example, in some contexts government action is reasonable when it is taken based on an objective standard to advance an important government purpose (such as a regulatory inspection program to discover safety risks).⁴³ The Court’s reasonableness analysis also requires actions to be reasonable during all phases of the action—“whether the officer’s action was justified at its

inception, and whether it [the action taken] was reasonably related in scope to the circumstances which justified the interference in the first place.”⁴⁴

When conducting this analysis, the Court considers an officer’s actions objectively. That approach facilitates judicial review and provides “readily administrable rules” that officers can apply effectively in the field.⁴⁵ The Court considers the perspective “of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and it takes into account “the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving....”⁴⁶ Normally a reasonableness inquiry will not consider an officer’s own subjective beliefs. Reasonableness “is predominantly an objective inquiry.”⁴⁷ “We ask whether ‘the circumstances, viewed objectively, justify [the challenged] action.’ If so, that action was reasonable ‘whatever the subjective intent’ motivating the relevant officials.”⁴⁸

The Court’s reasonableness analysis also views government actions from the standpoint of practical decisions that experienced officers make in the field, not decisions made with the legal precision of a court. The Court has noted that “[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’”⁴⁹ The Court also does not consider whether an officer *should* have taken an action as long as the action taken was within the officer’s lawful range of discretion.⁵⁰

The Fourth Amendment’s first standard is general in nature and can consider diverse factors to determine whether an intrusion is a reasonable use of government power in all respects and under all circumstances. It thus serves as a general safeguard against an arbitrary or otherwise unjustified use of government power, whether the government is

³⁸ *Virginia v. Moore*, 553 U.S. 164, 168 (2008) (discussing the steps to determine whether a search or seizure is unreasonable).

³⁹ *Id.* at 171 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

⁴⁰ *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014) (citation omitted) (applying the balancing test to determine reasonableness).

⁴¹ *Skinner v. Railway Executives’ Ass’n*, 489 U.S. 602, 624 (1989) (citation omitted) (discussing the Fourth Amendment’s reasonableness standard).

⁴² *Bailey v. United States*, 133 S. Ct. 1031, 1041 (2013) (citation omitted) (discussing interests in a law enforcement action).

⁴³ See *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) (summarizing cases where warrantless searches were justified).

⁴⁴ *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

⁴⁵ See *Virginia v. Moore*, 553 U.S. 164, 175 (2008).

⁴⁶ *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (considering reasonableness).

⁴⁷ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (citations omitted) (discussing the role of intent when determining reasonableness).

⁴⁸ *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978) and *Whren v. United States*, 517 U.S. 806, 814 (1996)).

⁴⁹ See *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

⁵⁰ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (determining that officers may determine to take actions within their lawful discretion).

obtaining or executing a warrant, investigating wrongdoing in the field, or implementing a regulatory inspection program.

D. Specific Standards Based on Probable Cause

Under the Fourth Amendment's second requirement, the government must set a specific standard in advance that limits the scope of a particular search or seizure action. To set that standard, "whenever practicable, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure."⁵¹

The Fourth Amendment requires a warrant to be based on probable cause, and the elements of "probable cause" differ for a seizure and for a search. Probable cause to make an arrest (a seizure) exists where "the facts and circumstances" within the officers' knowledge and "of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."⁵² An officer "has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present."⁵³ In that analysis, evidence of a crime includes evidence that constitutes criminal "fruits, instrumentalities or contraband," as well as "mere evidence" that "will aid in a particular apprehension or conviction."⁵⁴

A probable cause evaluation is guided by practical considerations under the totality of the circumstances rather than by applying a standard that is a "precise definition or quantification."⁵⁵ "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence...have no place in the [probable-cause] decision.' All we have required is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act."⁵⁶ When deciding "whether the State has met this practical and common-sense

⁵¹ Terry v. Ohio, 392 U.S. 1, 20 (1968) (considering when action without a warrant is permissible).

⁵² Beck v. Ohio, 379 U.S. 89, 91 (1964) (discussing the probable cause standard).

⁵³ See Florida v. Harris, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61 (2013) (citations omitted) (considering the probable cause standard for a search based on a canine's alert during a traffic stop that established probable cause to search the car).

⁵⁴ Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307 (1967) (discussing the evidence subject to Fourth Amendment protections).

⁵⁵ See generally Maryland v. Pringle, 540 U.S. 366, 371 (2003) (discussing the nature of the probable cause standard).

⁵⁶ Harris, 133 S. Ct. at 1055 (alteration in original) (quoting Illinois v. Gates, 462 U.S. 213, 235, 238 (1983)).

standard, we have consistently looked to the totality of the circumstances.... We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."⁵⁷ "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."⁵⁸

The Supreme Court has identified some factors that are relevant to determining whether probable cause exists under the totality of the circumstances. For example:

The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.⁵⁹

The Court does not consider "what a search does or does not turn up."⁶⁰ It considers the "facts available to the officer" that informed the officer's belief, and it "does not demand any showing that such a belief be correct or more likely true than false."⁶¹ The analysis requires "more than a bare suspicion" and "less than evidence which would justify condemnation or conviction." "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt."⁶² In addition, "the belief of guilt must be particularized with respect to the person to be searched or seized."⁶³ A "person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."⁶⁴

The Fourth Amendment identifies the warrant procedure as the means to establish probable cause. The Court has determined that "whenever practicable, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure" and execute the warrant consistent with its stated standards.⁶⁵ The warrant

⁵⁷ *Id.*

⁵⁸ Maryland v. Pringle, 540 U.S. 366, 370–371 (2003) (alteration in original) (citation omitted) (discussing the probable cause standard).

⁵⁹ Ornelas v. United States, 517 U.S. 690, 696 (1996) (discussing the probable cause standard).

⁶⁰ Harris, 133 S. Ct. at 1059.

⁶¹ Texas v. Brown, 460 U.S. 730, 742 (1983) (discussing the probable cause standard).

⁶² Brinegar v. United States, 338 U.S. 160, 175 (1949) (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881)).

⁶³ Maryland v. Pringle, 540 U.S. 366, 371 (2003) (discussing the probable cause standard).

⁶⁴ Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (determining there was no basis to search a person for being present with a suspect).

⁶⁵ Terry v. Ohio, 392 U.S. 1, 20 (1968) (considering permissible searches without a warrant).

requirement is one of the “fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.”⁶⁶ The function served by setting standards in a warrant is so important that the Court considers a warrantless search “per se unreasonable,” unless the Fourth Amendment does not apply or the circumstances fall within a recognized exception (and thus the government’s actions are limited in some other manner).⁶⁷

The Supreme Court has determined “that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.”⁶⁸ In such circumstances, the “standards applicable to the factual basis supporting the officer’s probable-cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate’s assessment.”⁶⁹ The law favors a magistrate’s assessment. The fact that a neutral magistrate has issued a warrant is the “clearest indication” that officers are acting in objective good faith.⁷⁰

Any substantive discussion of warrant requirements is beyond the scope of this summary. Briefly, however, the warrant process requires an officer to submit a sworn statement of the probable cause to take an action that contains sufficient information to provide a magistrate with “a substantial basis for determining the existence of probable cause.”⁷¹ “There are so many variables in the probable cause equation that one determination will seldom be a useful ‘precedent’ for another,” but “wholly conclusory” statements of probable cause or mere claims of “reliable information” will not meet the requirement.⁷² The magistrate must have a substantial basis for concluding that probable cause existed, and the “usual inferences which reasonable men draw from evidence” must be “drawn by a neutral and detached magistrate instead of being judged by

⁶⁶ *Johnson v. United States*, 333 U.S. 10, 17 (1948) (determining that an officer must have some valid basis for an intrusion).

⁶⁷ *Groh v. Ramirez*, 540 U.S. 551, 573 (2004) (J. Thomas, dissenting) (noting the general rule requiring warrants and listing many of its exceptions).

⁶⁸ *Terry*, 392 U.S. at 20.

⁶⁹ *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 566 (1971) (discussing standards applicable to an officer’s determination of probable cause).

⁷⁰ *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) (discussing the magistrate’s function in issuing a warrant).

⁷¹ *See, e.g., Illinois v. Gates*, 462 U.S. 213, 239 (1983) (discussing information sufficient for a magistrate to determine probable cause).

⁷² *Id.* at 238 n.11.

the officer engaged in the often competitive enterprise of ferreting out crime.”⁷³

The warrant process also considers a variety of other factors. For example, the process must consider the time when a warrant should be issued to address the evidence or fugitive being sought.⁷⁴ The magistrate must also state with particularity the places to be searched or things to be seized for which there is probable cause.⁷⁵ All this information must be stated in the warrant, not in accompanying documents (although documents may be expressly incorporated by reference and attached to the warrant).⁷⁶ An executing officer is not required to present the property owner with a copy of the warrant before conducting the search or even after the search has ended.

The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the “deliberate, impartial judgment of a judicial officer...between the citizen and the police,”...and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.⁷⁷

In summary, under the Fourth Amendment’s second requirement, the government must set a specific standard in advance that justifies and governs the scope of a particular action. Whenever practicable, the amendment requires a neutral magistrate to determine that there is probable cause for taking the action so that officers are not in the position of exercising discretion and imposing restraints upon themselves. The Court also recognizes that in some limited circumstances, the government can use other procedures to satisfy the Fourth Amendment’s concern for justifying and governing the scope of an action, such as in exigent circumstances or under an administrative program.

E. Actions Seizing Persons and Property

The seizure of a person “within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances

⁷³ *Id.* at 240 (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)) (discussing probable cause). *See also Katz v. United States*, 389 U.S. 347, 359 (1967) (J. Douglas, concurring) (noting that under the Constitution’s separation of powers, the Executive Branch is “not supposed to be neutral and disinterested”).

⁷⁴ *See United States v. Grubbs*, 547 U.S. 90, 96–97 (2006) (discussing the timing of issuing warrants).

⁷⁵ *See id.*

⁷⁶ *See Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (discussing information included in a warrant).

⁷⁷ *Grubbs*, 547 U.S. at 99 (quoting *Wong Sun v. United States*, 371 U.S. 471, 481–482 (1963)) (considering warrant requirements).

surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”⁷⁸ This is an objective test. It does not rely on the motivation of the officers, but on “how their actions would reasonably be understood.”⁷⁹

The Supreme Court has noted examples of when police conduct may be understood as detaining (and thus seizing) a person, including “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”⁸⁰ But a seizure that is an “arrest requires *either* physical force...*or*, where that is absent, *submission* to the assertion of authority.”⁸¹ A show of authority that is ignored does not result in an arrest—“[t]here can be no arrest without either touching or submission.”⁸² An arrest also does not require taking the person into custody.

Arrests must comply with the two standards required by the Fourth Amendment. *All* arrests must be based on probable cause, and the constitutional validity of an arrest depends on whether, at the moment of arrest, “the officers had probable cause to make it—whether...the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner [suspect] had committed or was committing an offense.”⁸³ The arrest can be made pursuant to a warrant, and in addition, “[a] warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer’s presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.”⁸⁴ To “determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively

reasonable police officer, amount to’ probable cause” that is particular to the person arrested.⁸⁵ An arrest must also meet the Fourth Amendment’s reasonableness standard, under which the courts balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”⁸⁶ The courts have determined that the government may briefly detain persons based on less than probable cause under exigent circumstances, as further discussed in the next part of the digest.

The Supreme Court has determined that a variety of circumstances constitute an unconstitutional manner of seizing a person. These include a “lengthy detention of luggage,” a “surgery under general anesthesia to obtain evidence, or [a] detention for fingerprinting without probable cause.”⁸⁷ The Court has upheld other circumstances as constitutional, however, such as “the taking of fingernail scrapings from a suspect, an unannounced entry into a home to prevent the destruction of evidence, [and] administrative housing inspections without probable cause to believe that a code violation will be found.”⁸⁸

The Supreme Court also considers the degree of force used when seizing a person. It has determined that “notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him.”⁸⁹ The Court has acknowledged that historic common law allowed the use of whatever force was necessary to arrest a fleeing felon, but the Court has held that such a rule is no longer justified by conditions in society today.⁹⁰ The Court thus examines the use of force, including deadly force, by weighing the risk of bodily harm to the suspect in light of the threat to the public that the officer was trying to eliminate.⁹¹ It conducts that analysis from the perspective “of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁹² Its analysis also allows for “the fact that police officers are

⁷⁸ *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (internal quotation marks omitted) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)) (considering when a person is seized).

⁷⁹ *Id.* at 632.

⁸⁰ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (determining that a woman acted voluntarily when consenting to a search at an airport).

⁸¹ *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (determining that a defendant was not seized until the police tackled).

⁸² *Id.* at 626–627.

⁸³ *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (considering the constitutional validity of an arrest).

⁸⁴ *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (discussing warrantless arrests).

⁸⁵ *Id.* at 371 (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

⁸⁶ *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)) (balancing interests involved in the use of deadly force).

⁸⁷ *Id.* at 8 (citations omitted) (citing cases making these determinations).

⁸⁸ *Id.* (citations omitted) (citing cases making these determinations).

⁸⁹ *Id.* at 9.

⁹⁰ *Id.* at 14–15.

⁹¹ *Scott v. Harris*, 550 U.S. 372, 383–384 (2007) (discussing interest in the use of deadly force).

⁹² *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (considering reasonableness).

often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁹³

A “seizure” of property occurs when there is some meaningful interference with an individual’s possessory interests in that property,⁹⁴ such as when the government takes “dominion and control” over a package for the government’s own purposes.⁹⁵ The Supreme Court has noted that “[d]ifferent interests are implicated by a seizure than by a search. A seizure affects only the person’s possessory interests; a search affects a person’s privacy interests.”⁹⁶

The Court has noted a number of requirements that are relevant to constitutionally seizing property. For example, seizing property must be based on probable cause. Thus, there must “be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the items seized and criminal behavior.”⁹⁷ That nexus is automatic for contraband (items involved in the criminal conduct itself) because possessing them “cannot be deemed ‘legitimate.’”⁹⁸ In “the case of ‘mere evidence,’ probable cause must be examined in terms of cause to believe the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.”⁹⁹ For purposes of establishing probable cause, however, mere evidence “need not conclusively prove the ultimate fact in issue, but only have ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,’” consistent with evidentiary rules.¹⁰⁰

When officers are seizing property, not only must there be probable cause to seize the item, the officers must also have a constitutional right to access the item. Both issues can be addressed in a warrant. But “in the absence of consent or a warrant

permitting the seizure of the items in question, such seizures can be justified only if they meet the probable-cause standard and if they are unaccompanied by unlawful trespass.”¹⁰¹

Officers must have a right of lawful access to the item seized even when it is in plain view.¹⁰² If officers seize an item in plain view without a warrant, it is “an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”¹⁰³ In addition, two other conditions must be satisfied to justify a warrantless seizure. “First, not only must the item be in plain view, its incriminating character must also be ‘immediately apparent.’”¹⁰⁴ “Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the [location of the] object itself.”¹⁰⁵

If an officer has lawful access to view and seize an item, the officer’s discovery of that item need not be inadvertent.¹⁰⁶ Even if the officer has a specific object in mind prior to the search, the Fourth Amendment “requires only that the steps preceding the seizure be lawful.”¹⁰⁷ Thus, where access is lawful, any obviously incriminating evidence found may be seized whether or not that evidence was listed in a warrant.¹⁰⁸ If officers can only conclude that there is probable cause to seize an item by making an additional search, however, that particular search must first be constitutional.¹⁰⁹ A variety of other principles apply to property seizures.¹¹⁰

⁹³ *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (considering reasonableness).

⁹⁴ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (considering when a package was seized).

⁹⁵ *Id.* at 120.

⁹⁶ *Segura v. United States*, 468 U.S. 796, 860 (1984) (citations omitted) (discussing the nature of a seizure).

⁹⁷ *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) (rejecting a distinction between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband).

⁹⁸ *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (considering conduct that does not compromise privacy interests).

⁹⁹ *Hayden*, 387 U.S. at 307.

¹⁰⁰ *New Jersey v. T.L.O.*, 469 U.S. 325, 744–745 (1985) (quoting *FED. R. EVID.* 401) (discussing the meaning of mere evidence).

¹⁰¹ *Soldal v. Cook County, Ill.*, 506 U.S. 56, 66 (1992) (citations omitted) (discussing requirements for seizures).

¹⁰² *Horton v. California*, 496 U.S. 128, 135–136 (1990) (discussing the plain view doctrine).

¹⁰³ *Id.* at 136.

¹⁰⁴ *Id.* (quoting *Arizona v. Hicks*, 480 U.S. 321, 326–327 (1987) (the plain view doctrine cannot justify a seizure if the object’s incriminating character is not immediately apparent)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 141.

¹⁰⁷ *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011) (discussing requirements for warrantless seizures).

¹⁰⁸ *See Horton*, 496 U.S. at 142.

¹⁰⁹ *Arizona v. Hicks*, 480 U.S. 321, 326 (1987) (determining there must be probable cause to seize an item in plain view, and if a search is required to determine the item’s character, the search must be lawful).

¹¹⁰ For example, *see Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (an initially lawful seizure can become unconstitutional due to its manner of execution); *Segura v. United States*, 468 U.S. 796, 810 (1984) (considering seizures of premises).

F. Exigent Circumstances Generally

The Supreme Court recognizes that sometimes exigent circumstances call for limited but immediate action by the government, and when the exigency justifies the action taken, the Court recognizes these circumstances as an exception that complies with the Fourth Amendment's warrant requirement. The Court reached this conclusion in *Terry v. Ohio* when determining at what point the Fourth Amendment becomes relevant when an officer stops an individual.¹¹¹

The Supreme Court noted in *Terry* that the probable cause standard applies to most exigent circumstances—"specific and articulable facts...taken together with rational inferences from those facts, [must] reasonably warrant that intrusion."¹¹² Where an officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot" and that the relevant person "may be armed and presently dangerous," however, and the officer "investigating this behavior...identifies himself as a policeman and makes reasonable inquiries," and where "nothing in the[se] initial stages...dispel[s] his reasonable fear for his own or others' safety," the officer can conduct a protective, "carefully limited search of the outer clothing of such persons" to discover weapons and can use any weapons seized as evidence.¹¹³

The Court subsequently determined that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."¹¹⁴ It then more clearly articulated that "a requirement of reasonable suspicion for stops" protects the public interest and that "it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis."¹¹⁵ Such a stop must be "based on objective criteria, [or] the risk of arbitrary and abusive police practices exceeds tolerable limits."¹¹⁶

¹¹¹ *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (determining that the Constitution allowed an officer to stop and frisk suspects based on a reasonable suspicion of wrongdoing).

¹¹² *Id.* at 21.

¹¹³ *Id.* at 30–31.

¹¹⁴ *Adams v. Williams*, 407 U.S. 143, 146 (1972) (holding that an officer acted justifiably when he reached into a car and took a gun from a suspect because a credible informant had disclosed the gun to the officer).

¹¹⁵ *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (considering what the Fourth Amendment requires to justify a stop and concluding that roving border patrols were not justified).

¹¹⁶ *Brown v. Texas*, 443 U.S. 47, 52 (1979) (citation omitted) (no facts supported an officer's conclusion concerning suspicion).

In addition, "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose."¹¹⁷ When conducting such a search, officers also "may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry*."¹¹⁸ Limited seizures from persons detained in these circumstances are "justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as the police have an articulable basis for suspecting criminal activity."¹¹⁹

The Supreme Court has explained the basis for the constitutionality of a detention under *Terry* and subsequent cases:

The exception...rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.¹²⁰

The Court has cautioned that a detention based on reasonable suspicion must be brief and limited to the circumstances creating the need for the detention, and thus there is no "hard-and-fast" time limit for such a stop.¹²¹ A detention that is not limited to those circumstances will become a *de facto* arrest:

[I]f an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops...[while brevity] is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.¹²²

¹¹⁷ *Adams*, 407 U.S. at 146.

¹¹⁸ *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (analogizing discoveries made by touch during a lawful stop to the plain view doctrine).

¹¹⁹ *Michigan v. Summers*, 452 U.S. 692, 699 (1981) (discussing cases addressing a detention based on reasonable suspicion).

¹²⁰ *United States v. Place*, 462 U.S. 696, 703 (1983) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)) (determining that seizing a bag from a traveler at an airport was not a minimal intrusion and could not be justified based only on a reasonable suspicion).

¹²¹ *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (discussing precedent establishing these principles).

¹²² *Id.* at 685.

G. Administrative Actions Generally

The Supreme Court recognizes that searches and seizures conducted pursuant to an administrative program can constitute an exception if they satisfy the protective standards embodied in the Fourth Amendment. The Court has recognized this “administrative search doctrine” in several contexts. Among them, it has identified an administrative exception when the government conducts inspections in support of a “special need” beyond the normal needs of law enforcement, such as a regulatory drug testing program. It has also found an administrative exception when the government establishes a checkpoint to administer “special law enforcement” concerns, such as sobriety checkpoints to remove drunk drivers. This exception is important to airports because airport inspection and screening programs rely on it for Fourth Amendment compliance, as further discussed *infra* in Section III.

To satisfy the Fourth Amendment under the administrative search doctrine, an administrative program must be governed by regulatory procedures that are limited in scope to accomplishing an important government purpose. The important purpose thus justifies the government’s procedures, and the procedures set a standard in advance that creates a protective safeguard consistent with the Fourth Amendment’s warrant and probable cause standards.

An administrative program’s regulatory procedures serve the same function as a warrant. For example, obtaining a warrant serves to “advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’”¹²³ An administrative program achieves these same objectives when it gives the public adequate notice of its requirements (such as for inspections or testing) and does not place discretion in the hands of field officers regarding how to implement the program. In those circumstances, an officer “does not make a discretionary determination to search based on a judgment that certain conditions are present,” and as such “there are simply ‘no special facts for a neutral magistrate to evaluate.’”¹²⁴ Thus, “a warrant would provide little or nothing in the way of additional protection of personal privacy” since the program’s administrative

¹²³ Nat’l Treasury Emp.’s Union v. Von Raab, 489 U.S. 656, 667 (1989) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)) (considering the special needs of a regulatory drug testing program).

¹²⁴ *Id.* (quoting South Dakota v. Opperman, 428 U.S. 364, 383 (1976)).

requirements already contain objective standards, authorized in advance, that officers implement.¹²⁵

Similarly, standards set by regulatory procedures are more useful in an administrative search context than the probable-cause standard. “[T]he traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person.”¹²⁶ The probable-cause standard focuses on the likelihood of detecting individual violations suspected by an officer. No such cause exists, however, when the government conducts routine general screening to deter and reject hazardous conditions. Thus, an administrative program requires a different approach to effectively limit the scope of a different type of action. As the Supreme Court has noted, under the Fourth Amendment the government can act either “based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual...[or] pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”¹²⁷

The Supreme Court has also discussed the types of administrative procedures that can effectively limit government actions consistent with Fourth Amendment requirements. For example, when considering checkpoint programs for special law enforcement purposes, the Court has noted that some “forms of police activity, say, crowd control or public safety... [are] not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.”¹²⁸ Thus, “[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop.”¹²⁹ Such checkpoints will comply with constitutional standards when checkpoint locations are “selected pursuant to the guidelines [predetermined by administrators], and uniformed police officers stop every approaching vehicle.”¹³⁰ Objectively, the seizure involved in such a stop is minimal based on the duration and intensity of the investigation, and subjectively, this intrusion

¹²⁵ *Id.* at 667.

¹²⁶ *Id.* at 668 (citations omitted).

¹²⁷ Brown v. Texas, 443 U.S. 47, 51 (1979) (discussing seizure actions).

¹²⁸ Illinois v. Lidster, 540 U.S. 419, 424–425 (2004) (upholding a checkpoint stop that was implemented to ask motorists for information that might help solve a crime).

¹²⁹ United States v. Martinez-Fuerte, 428 U.S. 543, 566–567 (1976) (upholding the use of fixed border patrol checkpoints, including secondary inspection procedures).

¹³⁰ Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 453 (1990) (considering lawful checkpoint stops).

generates less concern because the checkpoint is visible and less likely to frighten those passing by.¹³¹ The Court has also noted that these standardized roadblock operations are “markedly different from roving patrols, where the unbridled discretion of officers in the field could result in unlimited interference with motorists’ use of the highways.”¹³²

Although regulatory procedures can act as a substitute for the Fourth Amendment’s warrant and probable cause requirements, administrative search programs must still meet the amendment’s standards for reasonableness. The Supreme Court examines their reasonableness at the programmatic level: Under the totality of the circumstances, it balances the government’s needs for the administrative action taken against the privacy concerns that the program intrudes upon. For example, when a government program addresses “special needs,” such as inspecting for dangerous conditions, the Court may consider whether “the Government’s need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.”¹³³ When considering checkpoints for special law enforcement concerns, the Court may consider “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”¹³⁴

To evaluate the government’s interests under this balancing test, the Supreme Court determines whether the government’s needs justify the actions being taken without individualized suspicion. For example, the Court may consider how a particular search action, such as an airport inspection or checkpoint, addresses important safety concerns, prevents threats, or provides particular information that the police seek for a specific purpose.¹³⁵ The

government’s need must describe “an interest that appears *important enough* to justify the particular search at hand.”¹³⁶ The Court may consider evidence of past problems that created a need for a program, but such a showing is not required. For example, a valid airport screening program does not turn on “whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program.”¹³⁷ Instead a lack of past incidents can be viewed as an indicator of the program’s success.¹³⁸ The Court considers whether the program’s methods are a reasonably effective means of addressing the legitimate government interests at stake rather than effectively transferring “from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.”¹³⁹

A reasonableness review also focuses on evidence that demonstrates the government’s *primary* purpose for its program.¹⁴⁰ For example, the Court has determined that a checkpoint program cannot be justified by a lawful *secondary* purpose because authorities could then establish checkpoints for virtually any purpose so long as they included a proper secondary purpose.¹⁴¹ The primary purpose of the checkpoint must be closely related to a specific problem that the checkpoint is designed to resolve, such as roadway safety or border patrol. The Supreme Court has “never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing,” and such a purpose requires “some measure of individualized suspicion.”¹⁴²

The Court has determined that when officers are acting “pursuant to a general scheme without individualized suspicion,” the administrative program’s “programmatic purpose” must be their reason for acting.¹⁴³ Usually the Court does not consider a government official’s subjective purpose for acting when determining whether the action taken was objectively reasonable. An official’s subjective motives are also irrelevant under the administrative search doctrine as long as the actions taken are actions that advance the purpose of the program rather than

¹³¹ *Id.* at 452–453.

¹³² *City of Indianapolis v. Edmond*, 531 U.S. 32, 50 (2000) (rejecting the use of a vehicle checkpoint to search for general crime). *See also* *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (discussing discretion in connection with checkpoint stops).

¹³³ *Nat’l Treasury Emp.’s Union v. Von Raab*, 489 U.S. 656, 668 (1989) (considering the special needs of a regulatory program). *See also id.* at 672 n.2 (citing cases discussing checkpoint searches).

¹³⁴ *Brown v. Texas*, 443 U.S. 47, 51 (1979) (determining that officers could not arbitrarily stop an individual to check for identification).

¹³⁵ *See generally* *Michigan*, 496 U.S. at 451–452 (considering a checkpoint stop addressing highway safety and threats); *Illinois v. Lidster*, 540 U.S. 419, 427–428 (2004) (considering a checkpoint stop seeking information to help solve a crime).

¹³⁶ *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (determining the importance of a school’s student athlete drug policy).

¹³⁷ *Von Raab*, 489 U.S. at 675 n.3.

¹³⁸ *Id.*

¹³⁹ *See Michigan*, 496 U.S. at 453.

¹⁴⁰ *See City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000) (requiring review of the primary programmatic purpose to justify a checkpoint program).

¹⁴¹ *Id.*

¹⁴² *Id.* at 41.

¹⁴³ *Id.* at 45–46.

advancing some other purpose.¹⁴⁴ The Fourth Amendment exception does “not apply where the officer’s purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified.”¹⁴⁵ When an administrative search is validly conducted, any information discovered (such as contraband or evidence of a crime) is lawfully known to the government, and thus law enforcement officers can investigate it using measures that the Fourth Amendment requires to justify law enforcement action.¹⁴⁶

The Supreme Court has ruled on the validity of administrative programs in a number of contexts. For example, it has upheld drug testing programs¹⁴⁷ and a government audit program,¹⁴⁸ and it determined that a health inspection program would meet constitutional standards when adequate protections were present.¹⁴⁹ The administrative search doctrine also justifies screening inspections at airports, as further discussed *infra* in Section III.

H. The Exclusionary Rule and Exceptions

As further discussed in this section, the exclusionary rule is a judicially created rule under which courts determine that the government may not use evidence that it obtained in violation of the Fourth Amendment. This concern exists both for evidence obtained directly from the impropriety and for evidence that is then obtained indirectly (sometimes

referred to as the “fruit of the poisonous tree”). The Supreme Court’s discussion of the exclusionary rule’s purpose and application has varied over time. Under modern cases, the Court excludes evidence if it was obtained in violation of the Fourth Amendment, but under limited exceptions, it may determine that using certain kinds of evidence at the prosecution stage is nonetheless reasonable even though the case involves a violation of Fourth Amendment standards.

The Court recently explained the exclusionary rule’s historic context.¹⁵⁰ It noted that the Court created the rule to compel respect for the constitutional guaranty of the Fourth Amendment, determining that this prudential doctrine was necessary to address a lack of Fourth Amendment language that expressly discusses suppressing evidence. The rule itself is “‘not a personal constitutional right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search. . . . The rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations [by law enforcement].”¹⁵¹ The Court also has “repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct.”¹⁵² The Court applies the rule “[w]hen the police exhibit ‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights, [because] the deterrent value of exclusion is strong and tends to outweigh the resulting costs.”¹⁵³

The Court has also developed exceptions to this rule, however, that essentially consider whether allowing the use of certain evidence at the prosecution stage would have the effect of perpetuating a Fourth Amendment violation from the investigation stage. At the investigation stage, standards establish whether a search or seizure action is reasonable, and “[t]o be reasonable is not to be perfect.”¹⁵⁴ The Fourth Amendment “allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’”¹⁵⁵ At the prosecution stage, however, securing Fourth Amendment rights requires considering broader circumstances—whether tainted evidence is being used to obtain a conviction. The Court’s

¹⁴⁴ *Id.* at 47–48.

¹⁴⁵ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011) (explaining the role of an officer’s intent in a Fourth Amendment analysis).

¹⁴⁶ *See Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (upholding an arrest made during a valid roadway checkpoint program).

¹⁴⁷ *See Nat’l Treasury Emp.’s Union v. Von Raab*, 489 U.S. 656, 668 (1989) (upholding regulatory drug testing program for Customs service employees); *Skinner v. Railway Labor Executives’ Assoc.*, 489 U.S. 602, 679 (1989) (upholding a regulatory drug testing program for railroad employees).

¹⁴⁸ *See City of Ontario, Cal. v. Quon*, 560 U.S. 746, 761 (2010) (considering a regulatory audit program).

¹⁴⁹ *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 532–533 (1967) (requiring the use of administrative warrants in conjunction with a program to inspect residences). In *Camera*, the court found that the practical effect of a residential health inspection program left residents subject to the discretion of officials in the field, and that such discretion was the very act for which the Fourth Amendment required limitations. It thus required officials to obtain “administrative warrants” supported by probable cause to search residences, but it noted that “the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.” *See id.* at 538.

¹⁵⁰ *See generally Davis v. United States*, 131 S. Ct. 2419, 2426–2428 (2011) (discussing the history and purpose of the exclusionary rule).

¹⁵¹ *Id.* at 2426 (citations omitted) (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)).

¹⁵² *Id.* at 2432.

¹⁵³ *Id.* at 2427 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)).

¹⁵⁴ *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (considering the reasonableness standard).

¹⁵⁵ *Id.* (quoting *Brinegar v. United States*, 388 U.S. 160, 176 (1949)).

exceptions essentially consider whether information that is material to the prosecution was obtained unreasonably and a conviction would rely on a Fourth Amendment violation.

Among the exceptions to the rule, the Court considers issues of police good faith (or bad faith) under a “good-faith exception.” Under this exception, the Court has determined that “when the police act with an objectively ‘reasonable good-faith belief’ that their conduct is lawful, or when their conduct involves only simple, ‘isolated’ negligence” without evidence of deliberate or reckless action, the “deterrence rationale loses much of its force” because the police conduct was reasonable.¹⁵⁶ This exception thus also recognizes that if the police act in bad faith, such as by acts that are pretextual or that recklessly disregard Fourth Amendment concerns, they have obtained information unreasonably, and the Court will not permit its use at the prosecution stage. To permit otherwise would honor a false appearance of police compliance when the actions are known to be unsound and would thus be arbitrary.¹⁵⁷ The exception recognizes that if the police act out of a good-faith belief that their actions comply with the Fourth Amendment, using those actions at the prosecution stage is not unreasonable or arbitrary.

The Supreme Court has applied this “good faith exception” to the exclusionary rule to determine in a variety of circumstances that evidence did not need to be excluded. For example, it determined that evidence should not be excluded when an officer’s search or seizure action reasonably relied on the following: a search warrant that was subsequently invalidated,¹⁵⁸ a statute that was subsequently invalidated,¹⁵⁹ erroneous information concerning an arrest warrant in a database maintained by judicial employees,¹⁶⁰ and binding appellate

precedent.¹⁶¹ It also found that the police were objectively reasonable when they relied on a database where *police* employees erred in maintaining warrant records and there was no reoccurring police negligence involved.¹⁶² These circumstances all involved an erroneous belief by the police that they had authority to act. Acts that later proved to be unauthorized could not proceed to prosecution (such as an arrest pursuant to a warrant that did not actually exist), but the Court allowed the prosecution to use evidence of other crimes that the police obtained during a search made in the good-faith belief that they had authority to act.¹⁶³

The Court has also identified an exception to the exclusionary rule when using evidence at the prosecution stage does not exploit, and thus have the effect of perpetuating, a Fourth Amendment violation from the investigation stage. In these cases, the police may have obtained evidence in violation of the Fourth Amendment, but the Court determined that the violation essentially is not material to the prosecution, such as when the police also properly discovered the evidence independent of the violation or its independent discovery would have been inevitable, or when the evidence is too attenuated from the violation to retain a taint.¹⁶⁴ Thus, the evidence used at the prosecution stage does

¹⁶¹ *Davis*, 131 S. Ct. 2419.

¹⁶² *Herring v. United States*, 555 U.S. 135 (2009) (determining that a reasonably well-trained officer would not have known a neighboring agency’s database was inaccurate and that there were only negligent mistakes rather than systemic error or a reckless disregard).

¹⁶³ *See also Heien v. North Carolina*, 135 S. Ct. 530 (2014) (an officer’s interpretation of a vague statute was objectively reasonable based on how the statute was written, not the officer’s lack of understanding, even though the person stopped may avoid criminal liability under the vague statute).

¹⁶⁴ *See generally Hudson v. Michigan*, 547 U.S. 586, 592–593 (2006) (the inevitable discovery or independent source exception refers to a discovery that did or would have occurred despite the unlawful behavior and independently of that unlawful behavior); *Nix v. Williams*, 467 U.S. 431, 444 (1984) (evidence should be received if the prosecution can establish by a preponderance that the evidence inevitably would have been discovered by lawful means); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (the question is, granting establishment of a primary illegality, whether evidence has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (a connection to illegally obtained evidence may become so attenuated as to dissipate the taint and it may be proved to have had an independent origin); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (the government could use knowledge of matters gained from an independent source but could not prosecute based on knowledge gained by the government’s own wrongdoing).

¹⁵⁶ *Davis v. United States*, 131 S. Ct. 2419, 2427–2428 (2011) (quoting *United States v. Leon*, 469 U.S. 897, 909, 919 (1984) and *Herring v. United States*, 555 U.S. 135, 137 (2009)).

¹⁵⁷ *See generally Boyd v. United States*, 116 U.S. 616, 625 (1886) (explaining that due to abuses of law in the American colonies, the Fourth Amendment was adopted to prevent arbitrary government search and seizure actions); *Davis*, 131 S. Ct. at 2428 (an absence of police culpability dooms a claim for use of the exclusionary rule).

¹⁵⁸ *United States v. Leon*, 468 U.S. 897 (1984) (in this case the officer’s reliance on the magistrate’s determination of probable cause was objectively reasonable).

¹⁵⁹ *Illinois v. Krull*, 480 U.S. 340 (1987) (an officer’s reliance on a statute was objectively reasonable even though the statute was later found to be unconstitutional).

¹⁶⁰ *Arizona v. Evans*, 514 U.S. 1 (1995) (finding no indication that an officer was not acting objectively reasonably when he relied on police computer records that were inaccurate).

not have the effect of perpetuating a Fourth Amendment violation. This exception does not focus on whether there is a causal relationship:

[E]vidence is [not] “fruit of the poisonous tree” simply because it would not have come to light *but for* the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”¹⁶⁵

To determine whether that “taint” has been purged, the Court essentially isolates the Fourth Amendment violation and determines whether pursuing the prosecution is reasonable absent those matters. For example, where the government agreed that police had misapplied “knock and announce” requirements and had entered a house in an illegal manner, the Court determined that this preliminary requirement for entry did not relate to obtaining the evidence found. “Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.”¹⁶⁶ In other words, the police obtained the evidence because they had a warrant based on probable cause, not because they entered without a sufficient announcement. Even where a police misstep is more directly connected to obtaining evidence, the Court has “never held that evidence is ‘fruit of the poisonous tree’ simply because ‘it would not have come to light but for the illegal actions of the police.’”¹⁶⁷ Causation can be “too attenuated to justify exclusion.”¹⁶⁸

The Supreme Court thus excludes evidence that is obtained by violating the Fourth Amendment, but in limited circumstances it will consider whether actions should constitute an exception to the exclusionary rule essentially because a violation is not material to the case and use of the evidence is reasonable. These limited exceptions help the Court determine the appropriate consequences of a Fourth Amendment violation in the criminal process by focusing on what effect that violation has in the prosecution’s case, and thus its effect on the interests of the defendant and society.

I. Liability for Fourth Amendment Violations

Actions involving alleged Fourth Amendment violations can take a variety of forms, but the Supreme Court recognizes two primary federal causes of

¹⁶⁵ *Hudson*, 547 U.S. at 592 (quoting *Wong Sun*, 371 U.S. at 487–488).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)).

¹⁶⁸ *Id.* (citation omitted).

action that allow individuals to pursue a civil lawsuit to recover damages for a violation of their Fourth Amendment rights. The Court hears actions against state and local government actors under 42 U.S.C. § 1983.¹⁶⁹ It also recognizes a cause of action against individual federal employees directly under the Fourth Amendment under a so-called *Bivens* action.¹⁷⁰

42 U.S.C. Section 1983 states that:

[e]very person who under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Under the U.S. Constitution’s Eleventh Amendment, this statute only allows a plaintiff to sue a state if the individual state has consented to such a lawsuit (including actions against state officials in their official capacity, which is considered a suit against the state).¹⁷¹

Local government entities, however, are not immune under the Eleventh Amendment. Those entities are subject to suit for “monetary, declaratory, or injunctive relief where...the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers,” or a local “governmental ‘custom’ even though such custom has not received formal approval through the body’s official decisionmaking channels.”¹⁷² The entity “cannot be held liable *solely* because it employs a tortfeasor...on a *respondeat superior* theory.”¹⁷³ “Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government

¹⁶⁹ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (considering Section 1983 principles, including qualified immunity). See also *Wilson v. Garcia*, 471 U.S. 261 (1985) (discussing the historic context of Section 1983 actions); *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (determining there was no clearly established law in a qualified immunity analysis).

¹⁷⁰ See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (determining that a complaint alleging damages against an individual federal employee under the Fourth Amendment stated a cause of action).

¹⁷¹ *Will v. Michigan Dep’t. of State Police*, 491 U.S. 58, 71 (1989) (holding that the State and State officials sued in their official capacities are immune from suit under the Eleventh Amendment).

¹⁷² *Monell v. Dep’t of Social Services of City of New York*, 436 U.S. 658, 690–691 (1978) (determining local government is subject to a Section 1983 action).

¹⁷³ *Id.* at 691.

as an entity is responsible under § 1983.¹⁷⁴ Section 1983 allows a plaintiff to obtain relief from the entity, including compensatory damages and injunctive and declaratory relief; attorneys' fees are also available under a related section (subject to certain requirements). It permits punitive damages claims, but the Supreme Court has determined that the government entity itself is not subject to punitive damages claims due to laws that protect public funds.¹⁷⁵

Section 1983 also allows a plaintiff to sue state or local government employees in their individual capacities for violating Fourth Amendment rights. The individual employee will be immune from the filing of this lawsuit (not just damages) if he or she is entitled to "qualified immunity," and as such, the courts must determine immunity issues at the beginning of a case.¹⁷⁶ Qualified immunity protects employees who are "performing discretionary functions.... insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁷⁷ The courts thus consider the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.¹⁷⁸

[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.¹⁷⁹

Private persons or entities can also be subject to suit and liable under Section 1983. The Court asks "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."¹⁸⁰ The Court has noted that a "state actor" analysis is "often

¹⁷⁴ *Id.* at 694.

¹⁷⁵ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (determining that local government is not subject to punitive damages but may be liable for compensatory damages); 42 U.S.C. § 1988.

¹⁷⁶ *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (determining that if discovery fails to uncover evidence sufficient to create a genuine issue as to whether a defendant in fact committed the acts, qualified immunity is an entitlement not to stand trial).

¹⁷⁷ *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotation marks removed) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

¹⁷⁸ *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

¹⁷⁹ *Id.* at 614–615 (quoting *Creighton*, 483 U.S. at 640).

¹⁸⁰ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991) (citations omitted) (determining that a private litigant was a state actor).

a factbound inquiry," and it may consider factors such as "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."¹⁸¹ A private person or entity that deprives a person of rights as a state actor is subject to all damages claims available under Section 1983, and the courts generally do not recognize any qualified immunity for state actor defendants.¹⁸²

Plaintiffs can pursue some constitutional violations against individual federal agents under a *Bivens* action. Under this action, a court must determine "whether the agent is amenable to suit, and whether a damages remedy is available for a particular constitutional violation absent authorization by Congress."¹⁸³ The courts first determine whether the agent has qualified immunity, with that analysis being identical to such an analysis under Section 1983.¹⁸⁴ The Supreme Court has already determined that there is an implied cause of action for damages against federal officers alleged to have violated Fourth Amendment rights, and thus a damages remedy is available.¹⁸⁵ To date, however, the Court has not recognized such a cause of action against a private entity that is alleged to violate Fourth Amendment rights when acting "under color of federal law."¹⁸⁶

In general, *Bivens* and Section 1983 actions are complex lawsuits. They provide financial remedies for a Fourth Amendment violation, however, address concerns for accountability, and promote compliance with the Fourth Amendment.

II. EXPECTATIONS OF PRIVACY AT AIRPORTS

The context of a government intrusion is generally the starting point for any type of Fourth Amendment

¹⁸¹ *Id.* at 621–622 (citations omitted).

¹⁸² *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (determining that a private firm providing prison guards was "systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government" and undertook that task "for profit and potentially in competition with other firms," and this context did not warrant any immunity from suit under Section 1983).

¹⁸³ *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (considering the nature of a *Bivens* claim in relation to the Federal Tort Claims Act).

¹⁸⁴ *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (considering qualified immunity under a *Bivens* claim).

¹⁸⁵ *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

¹⁸⁶ *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 71–72 (2001) (not extending *Bivens* to a federal contractor).

analysis because whether considering law enforcement actions, administrative inspection actions, or otherwise, the courts must first determine which privacy expectations society accepts as reasonable in a given context. As further discussed in the following section, the courts routinely identify airports as a context where individual privacy expectations are diminished and analyze Fourth Amendment issues in that light. The Supreme Court has confirmed that airports are such a context. For example, in *Florida v. Rodriguez*, the Court determined that an officer had lawfully approached passengers because they were “approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude.”¹⁸⁷

As discussed *supra* in Section I.B, the Supreme Court has established that courts must evaluate the context of a government action by taking several factors into account. First, the courts determine whether an individual made actual efforts to secure privacy. Then they examine whether society accepts the individual’s expectations of privacy in that context as reasonable, taking into account the “baseline” properties that the Fourth Amendment identifies as things that are subject to such expectations.

Under the first of these factors, the courts consider whether an individual has made actual efforts to secure privacy. At an airport, however, many factors indicate that individuals make actual efforts to permit observation of their persons and every object that they carry with them.¹⁸⁸ Travelers actively and voluntarily prepare for screening processes. They pack their bags by placing liquids in appropriate small containers, leaving bags unlocked, and educate themselves on which items are prohibited beyond the screening checkpoint. They prepare for technology scans of their persons by removing metallic objects such as belts with buckles, keys, and coins, as well as removing sweaters and shoes, and sometimes they submit to a physical pat-down. They present their identification for verification, and many submit identifying information in advance to a federal program that examines their identities before they arrive at the airport.

Short of bodily intrusions, travelers come to the airport prepared to permit a thorough inspection of their persons and property by government screening officials, not to maintain privacy. Employees and contractors work subject to similar requirements

¹⁸⁷ Driverless vehicles are classified as NHTSA Level 4—Full Self-Driving Automation

¹⁸⁸ Information concerning airport travel requirements, such as those noted in this section, may be found at the TSA’s Web site, at airport Web sites and locations, and as otherwise noted in this section.

when they are entering secure areas, and they participate in established screening measures while performing their jobs. Thus, people typically do not make efforts to secure most privacy interests at an airport and instead make actual efforts to facilitate government intrusions.

As discussed *supra* in Section I.B, if a person does attempt to secure something as private, under Supreme Court precedent the courts then consider whether society is prepared to accept the individual’s expectations of privacy in that context as reasonable. The courts first consider the “baseline” properties identified in the Fourth Amendment, and an airport itself is not one of those properties—a person, house, paper, or effect historically used to secure individual privacy. These baseline properties listed in the amendment do not support the notion that individuals should be able to use an airport facility itself to secure against a government intrusion.

Individuals voluntarily bring themselves and their property into an airport, however, subjecting them to its context, and thus the courts must determine to what extent society accepts as reasonable any individual privacy expectations for those matters. An array of factors overwhelmingly demonstrate that society is not prepared to accept most individual expectations of privacy as reasonable in the context of airport security screening programs and in many other airport contexts as well. At the outset, many laws give public notice that an airport is subject to extensive security requirements and that the public cannot use the facility without compliance.¹⁸⁹ Among them, the U.S. Congress passed the Aviation Transportation Security Act of 2001 (Public Law 107-71) (ATSA), which created the TSA and requires a variety of airport security measures.¹⁹⁰ The public is aware that individuals may be cited by TSA for violating these many laws and that the airport police are present to take law enforcement action if necessary.¹⁹¹

Travelers and others receive notice of airport security requirements not just from the law, but from the environment itself. For example, the government publishes an express list of items that are prohibited for travelers.¹⁹² Airport proprietors typically post signs reminding travelers and others of these prohibited items. Proprietors also play frequent messages over public address systems reminding all present at

¹⁸⁹ For example, see the court’s discussion of statutes and procedures authorizing some screening procedures contained in *Ruskai v. Pistole*, 775 F.3d 61 (1st Cir. 2014).

¹⁹⁰ For example, see 49 U.S.C. § 44901 (requiring a variety of airport screening measures).

¹⁹¹ See 49 U.S.C. § 114 (the TSA’s civil penalty authority).

¹⁹² TSA maintains a list of all prohibited items for travelers on its Web site and provides other information.

the airport to be alert to potentially suspicious conduct and to leave no bags unattended. Information on TSA's screening procedures for travelers is widely available on Web sites, from airlines, from TSA personnel at the airport, and from posted signage and even videos at the airport. The security screening process is also clearly visible before a traveler ever approaches the screening checkpoint, and it forms a barrier between public areas and areas of the airport that have access to aircraft. The airport police maintain a visible presence at the screening checkpoint and in all airport locations. People are also aware that government officials will scrutinize their identities prior to granting access to secure areas, whether through the federal watch list ("no-fly" list), by asking for identification at checkpoints or through federal programs, or by requiring criminal history background checks for employees and contractors.¹⁹³

In addition, each airport is subject to a federally mandated and approved security plan under which the proprietor implements additional security measures. Pursuant to that plan, the proprietor restricts access to aircraft areas and other secure areas using a variety of physical, technological, and human methods in a manner tailored to the airport.¹⁹⁴ Persons present at the airport are aware that these plans require extensive video surveillance in all airport locations. People are also aware that there are additional security measures at airports that are confidential, and federal laws make the public aware that many procedures may constitute "sensitive security information" that is only disclosed on a need-to-know basis.¹⁹⁵ Federal law makes clear that security procedures are comprehensive and can address all types of aircraft areas, security technologies, airport construction, tenant activities, cargo, and access by people and vehicles.¹⁹⁶ Employees and contractors receive training on the security requirements that apply to them and must comply with those procedures as a condition of working at the airport.

Not only are people aware of a broad spectrum of intrusive government actions at an airport, they are also present at the airport voluntarily. The courts recognize that people choose to place themselves in an airport environment by flying and can avoid air travel.¹⁹⁷ The courts also recognize that an individual's consent is not relevant to the administrative inspections conducted at airports. For example, the Ninth Circuit determined:

¹⁹³ 49 U.S.C. §§ 114(h)(3), 44903(j)(2), 44936.

¹⁹⁴ See 49 U.S.C. § 44903; 49 C.F.R. pt. 1542.

¹⁹⁵ See 49 U.S.C. § 114(r); 49 C.F.R. § 1520.5.

¹⁹⁶ See 49 U.S.C. § 44903, 49 U.S.C. ch. 449.

¹⁹⁷ See *Nat'l Treasury Emp.'s Union v. Von Raab*, 489 U.S. 656, 665 n.3 (1989).

[W]here an airport screening search is otherwise reasonable and conducted pursuant to statutory authority...all that is required is the passenger's election to attempt entry into the secured area of an airport. Under current TSA regulations and procedures, that election occurs when a prospective passenger walks through the magnetometer or places items on the conveyor belt of the x-ray machine.¹⁹⁸

The Supreme Court has noted some of the compelling safety concerns present in an airport context that justify the need for these intrusive government practices. The Court cited an airport context as one "where the risk to public safety is substantial and real."¹⁹⁹ It noted that the government conducts "searches in airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."²⁰⁰ It has also expressed approval for lower courts that uphold airport search measures, because "the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane."²⁰¹

The Supreme Court's conclusions also find support in analogous contexts where urgent needs for security and maintaining order have been found to dramatically reduce expectations of individual privacy in a government facility. For example, the Court has considered a prison environment, which like an airport is subject to extreme needs for safety and security, orderly operations, effective surveillance, and the prevention of prohibited items from entering the environment.²⁰² In that context, the Court found that privacy interests were incompatible in part because "administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors."²⁰³ In this case, the Court was satisfied that "society would insist that the prisoner's expectation

¹⁹⁸ *United States v. Aukai*, 497 F.3d 955, 961 (9th Cir. 2007) (citations omitted) (determining consent is not required for a proper airport administrative search).

¹⁹⁹ See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (commenting on the airport context in dicta).

²⁰⁰ *City of Indianapolis v. Edmond*, 531 U.S. 32, 33 (2000) (using airport searches as an example of a valid administrative search).

²⁰¹ *Nat'l Treasury Emp.'s Union v. Von Raab*, 489 U.S. 656, 665 n.3 (1989) (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (using airport searches as a lengthy example of a proper administrative search because the possible harm there is substantial and the need to prevent its occurrence justifies measures that advance the government's goals).

²⁰² See *Hudson v. Palmer*, 468 U.S. 517, 527–528 (1984) (determining that Fourth Amendment privacy rights are "fundamentally incompatible" with close and continual surveillance of inmates in their cells to ensure security and order).

²⁰³ *Id.* at 526.

of privacy always yield to what must be considered the paramount interest in institutional security.²⁰⁴ The Supreme Court has thus recognized that urgent institutional needs for safety and security at a government facility may substantially diminish the privacy interests of those at the facility.

The lower courts have repeatedly determined that there are diminished privacy expectations in an airport context and upheld government inspection programs undertaken to prevent terrorist acts and protect safety. For example, they have noted that “the State has an overwhelming interest in preserving air travel safety” and that passengers are on notice of the airport environment and choose to fly under those circumstances.²⁰⁵ There is “no doubt that preventing terrorist attacks on airplanes is of paramount importance.”²⁰⁶ It is “hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destruction from air terrorism is horrifically enormous.”²⁰⁷ The events of September 11, 2001 (9/11), “only emphasize the heightened need to conduct searches at this nation’s international airports.”²⁰⁸

Thus, courts have recognized the importance of public safety and security in an airport context and determined that many individual expectations of privacy must yield to those interests. In doing so, the courts have identified urgent needs that government programs must address and have discussed the diverse nature of threats against aviation, where an item as small as a box cutter can have potentially catastrophic consequences. They have pointed out that security needs vigorously, pervasively, and obviously diminish expectations of privacy at an airport with society’s full approval. Thus, the cases reviewed

²⁰⁴ *Id.* at 528. *See also* *United States v. Prevo*, 435 F.3d 1343 (11th Cir. 2006) (upholding a search of a prison visitor’s car after she drove past signs advising of searches and prohibited items); *Neumeyer v. Beard*, 421 F.3d 210 (3d Cir. 2005) (upholding random suspicionless searches of prison visitor vehicles as a relatively minor inconvenience when balanced against prison needs, even though law enforcement action may result).

²⁰⁵ *United States v. Hartwell*, 436 F.3d 174, 181 (3d Cir. 2006) (upholding an airport search as an administrative search).

²⁰⁶ *Corbett v. Transp. Sec. Admin.*, 767 F.3d 1171, 1180 (11th Cir. 2014) (quoting *Hartwell*, 436 F.3d at 179) (upholding airport searches using AIT screening technology).

²⁰⁷ *United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005) (upholding random section procedures during airport administrative searches).

²⁰⁸ *United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002) (upholding a search of luggage by Customs officers).

below in this digest evaluate government intrusions at an airport in light of that context.

III. AIRPORT ADMINISTRATIVE ACTIONS

Both the airport proprietor and TSA conduct administrative inspection actions at airports, and airport law enforcement actions also interact with administrative actions. When an administrative search is properly conducted, the information discovered by the search is lawfully known to the government. If administrative actions transform into law enforcement actions or are otherwise invalid, however, they lose their Fourth Amendment justification because they exceed the scope of the administrative program’s safeguards. This section discusses Fourth Amendment parameters for valid action under an airport administrative inspection program.

A. Common Administrative Actions at Airports

The public is familiar with many of the administrative inspection actions that occur at an airport. TSA has a statutory responsibility to provide for airport screening inspections for all passengers and property entering secure areas at the airport, including mail, cargo, carry-on and checked baggage, and other articles being transported by flight.²⁰⁹ A Federal Security Director generally manages the federal government’s security role at the airport.²¹⁰ Although TSA provides this screening function in most cases, airports also have the option of applying to TSA to engage a private security company to conduct this function.²¹¹ TSA’s screening procedures require a thorough screening inspection and implement regulations that respond to security needs. Some regulations may not be available to the public,²¹² and TSA’s screening technologies and procedures continue to evolve.²¹³

Administrative programs at airports can involve other actions as well. For example, a number of screening efforts scrutinize the identity of persons who seek to access secure areas. TSA has a statutory responsibility to screen all passenger names against a terrorist watch list maintained by the federal government, and passengers must bring acceptable identification to the airport.²¹⁴ TSA also allows passengers to enroll in a PreCheck program that performs a pre-travel identity check and then provides

²⁰⁹ *See* 49 U.S.C. § 44901.

²¹⁰ *See* 49 U.S.C. § 44933.

²¹¹ *See* 49 U.S.C. § 44920.

²¹² *See* 49 U.S.C. § 44903; 49 U.S.C. § 114(r); 49 C.F.R. § 1520.5.

²¹³ *See* 49 U.S.C. §§ 44912, 44913, 44925.

²¹⁴ *See* 49 U.S.C. §§ 114(h)(3), 44903(j)(2); 49 C.F.R. pt. 1560.

expedited screening at the airport, and it performs similar checks for persons who engage in charter and other types of aviation.²¹⁵ For employees and contractors, federal law requires each person who has unescorted access to aircraft areas to pass a fingerprint-based criminal history record check.²¹⁶ That check may be conducted by an air carrier, the airport proprietor, or another authorized government entity, and the applicant cannot have a conviction for specified crimes within a 10-year period prior to the check.²¹⁷

Airport proprietors typically have other administrative inspection responsibilities as well. For example, they must implement security plans approved by the federal government.²¹⁸ Under those plans, they are required to control access to aircraft areas, and only those with authorized access can enter. Airport proprietors may be responsible for checking identities and inspecting property being transported into those areas. Their security plans may require them to conduct other vehicle, employee, or contractor inspections as well.²¹⁹ They also may conduct or assist with ramp checks for suspect aircraft pursuant to regulatory requirements.²²⁰ Some airport tenants may have similar kinds of inspection responsibilities under security requirements.²²¹

As these examples illustrate, administrative inspection activities at an airport can take a number of forms and involve a variety of actors. The Fourth Amendment applies to intrusive actions seeking information as part of an administrative inspection, whether the government inspection is conducted by TSA, the airport proprietor, or private parties.²²²

B. Information Discovered During Airport Administrative Actions

The courts evaluate intrusive inspection actions under the administrative search doctrine (as more generally discussed *supra* at Section I.G), which allows the government to use inspections to address “special needs” or a “special law enforcement” concern. Under this Fourth Amendment doctrine,

²¹⁵ See 49 U.S.C. § 44903(j).

²¹⁶ See 49 U.S.C. § 44936.

²¹⁷ See *id.*

²¹⁸ See 49 U.S.C. § 44903(g), (h).

²¹⁹ See 49 U.S.C. § 44903(c).

²²⁰ See *United States v. Massi*, 761 F.3d 512 (5th Cir. 2014) (considering actions that began with an administrative ramp check performed by an airport’s police officers).

²²¹ See 49 U.S.C. § 44903(c)(2) (discussing tenant security programs).

²²² The courts recognize that a private party may be considered a “state actor” subject to governmental requirements when it assumes governmental responsibilities. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

administrative search programs (such as those at airports) are valid when they limit the actions that may be taken to those that are justified by an important programmatic need to obtain information, rather than searching due to an individualized suspicion of wrongdoing. Any information discovered during a valid administrative search is lawfully known to the government and may be used for law enforcement purposes. To determine whether an airport administrative search is valid, the courts consider two issues: whether the administrative program itself is valid and whether the scope of the search actually conducted remained within the program’s limitations.

Courts have upheld the validity of airport administrative programs for many years. For example, the Supreme Court upholds administrative programs when “the possible harm against which the Government seeks to guard is substantial, [and] the need to prevent its occurrence furnishes an ample justification for reasonable searches, calculated to advance the Government’s goal.”²²³ It has stated that this “point is well illustrated... by the Federal Government’s practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive.”²²⁴ The Court has also noted that “lower courts that have considered the question [of airport administrative searches] have consistently concluded that such searches are reasonable under the Fourth Amendment.”²²⁵

In particular, the Supreme Court has identified the important government interests that justify an airport administrative program. It has pointed out that aviation dangers to life and property alone justify routine inspection measures to deter such risks:

[T]hat danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.²²⁶

The Court has not required evidence of past problems to demonstrate these important government interests. It has observed that “[i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.”²²⁷ A lack

²²³ See *Nat’l Treasury Emp.’s Union v. Von Raab*, 489 U.S. 656, 674–675 (1989).

²²⁴ *Id.* at 675 n.3.

²²⁵ *Id.*

²²⁶ *Id.* (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)).

²²⁷ *Id.*

of dangerous incidents does not impugn the validity of the program and can be viewed as an indicator of its success.²²⁸ The Supreme Court recently reiterated, “where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’—for example, searches now routine at airports.”²²⁹

Lower court decisions have developed a more extensive analysis when upholding airport administrative programs. Early cases considered them using a balancing test under the totality of the circumstances that weighted the gravity of the public interest in an airport inspection program, the degree to which the intrusive action advances that public interest, and the severity of the program’s interference with Fourth Amendment rights.²³⁰ Under this test, early cases routinely identified the context of an airport as one presenting urgent public interests in safety based on dangers such as air piracy and kidnapping.²³¹

With that background, in *United States v. Hartwell*,²³² Judge Samuel Alito on the Third Circuit Court of Appeals then consolidated and established a number of principles for determining the constitutional validity of an airport administrative screening program. In *Hartwell*, a passenger triggered an alarm while walking through a magnetometer, triggered it again during a second attempt, and then was taken aside and scanned with a handheld magnetometer, which also resulted in an alarm.²³³ When the passenger refused to empty his pockets, he was taken to a private area.²³⁴ Eventually a TSA official reached into the passenger’s pocket and discovered drugs. The official called a police officer, who found more drugs and cash during a search of the passenger and arrested the passenger.²³⁵

Prior to that time, the courts had disagreed on whether an airport screening process consisted of

²²⁸ *Id.*

²²⁹ See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (citing airports as an example of a proper administrative search). See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000) (citing airports as an example of a proper administrative search); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (citation omitted) (citing airports as an example of a proper administrative search); *Von Raab*, 489 U.S. at 674–675 (citing airports as an example of a proper administrative search).

²³⁰ See *United States v. Hartwell*, 436 F.3d 174, 176–177 (3d Cir. 2006) (recognizing that past courts had not settled on a single framework for analyzing airport searches); *Ruskai v. Pistole*, 775 F.3d 61, 68 n.3 (1st Cir. 2014) (noting various formulations of the test used by the courts).

²³¹ See generally sources cited *supra* notes 205–208.

²³² 436 F.3d 174 (3d Cir. 2006).

²³³ *Id.* at 175.

²³⁴ *Id.* at 176.

²³⁵ *Id.*

several individual searches or one prolonged search. Judge Alito initially determined that although the screening process might include several procedures, a court should view the passenger’s “entire experience as a single search under the administrative search doctrine.”²³⁶ It did not require a series of separate justifications; rather, the same justification needed to support all of the steps taken. As search procedures escalated, they all needed to relate back to the programmatic reason for conducting the search in the first place.²³⁷

Next, Judge Alito determined that this “search at the airport checkpoint was justified by the administrative search doctrine.”²³⁸ He noted that ordinarily a search or seizure is not reasonable under the Fourth Amendment absent an individualized suspicion of wrongdoing, and that the Supreme Court has recognized only limited circumstances where this rule does not apply.²³⁹ The court noted that “[t]hese circumstances typically involve administrative searches of ‘closely regulated’ businesses, other so-called ‘special needs’ cases, and suspicionless ‘checkpoint’ searches.”²⁴⁰

Judge Alito then identified the Supreme Court’s analysis in *Brown v. Texas*²⁴¹ as providing the test for determining whether an airport administrative screening program was reasonable under the Fourth Amendment. He phrased the applicable test as finding “a favorable balance between ‘the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.’”²⁴² Under the first element of this test, the context of an airport, he quickly found “there can be no doubt that preventing terrorist attacks on airplanes is of paramount importance,” particularly in light of the events of 9/11.²⁴³ He noted that the lives and property at stake were “unquestionably... the most compelling reasons.”²⁴⁴

Judge Alito then focused on the second element of the test. He noted that airport checkpoints advance the public’s interest in protecting safety. He determined that “absent a search, there is no effective

²³⁶ *Id.* at 178.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ 443 U.S. 47 (1979).

²⁴² *Hartwell*, 436 F.3d at 178–179 (quoting *Illinois v. Lidster*, 540 U.S. 419, 427 (2004), which quoted *Brown v. Texas*, 443 U.S. 47 (1979)).

²⁴³ *Id.* at 179.

²⁴⁴ *Id.* (quoting *Singleton v. Comm’r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979)).

means of detecting which airline passengers are reasonably likely to hijack an airplane.”²⁴⁵ He also concluded “it is apparent that airport checkpoints have been effective.”²⁴⁶ The Supreme Court had previously noted that the lack of a history of such incidents can be viewed as evidence of a program’s success.²⁴⁷

Finally, Judge Alito addressed the test’s third element. He determined that these routine airport search procedures were “minimally intrusive” and “well-tailored to protect personal privacy, escalating in invasiveness only after a lower level of screening disclosed a reason to conduct a more probing search.”²⁴⁸ In this case, the search began when the passenger “passed through a magnetometer and had his bag x-rayed, two screenings that involved no physical touching.”²⁴⁹ Only after the passenger set off the “metal detector was he screened with a wand – yet another less intrusive substitute for a physical pat-down. And only after the wand detected something solid on his person, and after repeated requests that he produce the item, did the TSA agents... reach into his pocket.”²⁵⁰

Judge Alito also noted that “other factors make airport screening procedures minimally intrusive in comparison to other kinds of searches.”²⁵¹ Among them, “[s]ince every air passenger is subjected to a search, there is virtually no ‘stigma attached to being subjected to search at a known, designated airport search point.’”²⁵² Also, “the possibility for abuse is minimized by the public nature of the search. ‘Unlike searches conducted on dark and lonely streets at night where often the officer and the subject are the only witnesses, these searches are made under supervision and not far from the scrutiny of the traveling public.’”²⁵³ In addition, “the airlines themselves have a strong interest in protecting passengers from unnecessary annoyance and harassment.”²⁵⁴

Judge Alito also observed that notice plays an important role in minimizing public impacts. “[T]he entire procedure is rendered less offensive—if not less intrusive—because air passengers are on notice that they will be searched.”²⁵⁵ Passengers

have long had notice of routine screening procedures. “Air passengers choose to fly, and screening procedures of this kind have existed in every airport in the country since at least 1974. The events of 9/11 have only increased their prominence in the public’s consciousness.”²⁵⁶ It was “inconceivable” that the passenger in *Hartwell* “was unaware that he had to be searched before he could board a plane.”²⁵⁷

Judge Alito thus concluded that an airport administrative search program that included an escalating search procedure to resolve potential threats did “not offend the Fourth Amendment even though it was initiated without individualized suspicion and was conducted without a warrant.”²⁵⁸ This program “is permissible under the administrative search doctrine because the State has an overwhelming interest in preserving air travel safety, and the procedure is tailored to advance that interest while proving to be only minimally invasive, as that term is understood in *Brown*.”²⁵⁹

In *United States v. Aukai*,²⁶⁰ the Ninth Circuit followed the reasoning discussed in *Hartwell* to conclude that an airport administrative screening program was constitutionally valid, and it also considered two other aspects of these searches. The screening officials had conducted a secondary screening procedure because a passenger lacked proper identification, and they discovered drug paraphernalia in the passenger’s pocket.²⁶¹ The Ninth Circuit first noted that, consistent with *Hartwell*, airport screening programs are “constitutionally reasonable administrative searches because they are ‘conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.’”²⁶²

²⁵⁶ *Id.* at 181.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* (referring to *Brown v. Texas*, 443 U.S. 47 (1979)).

Judge Alito noted that “[e]ven assuming that the sole purpose of the checkpoint was to search only for weapons or explosives, the fruits of the search need not be suppressed so long as the search itself was permissible.” *Id.* n.13 (citing *Minnesota v. Dickerson*, 508 U.S. 366, 377 (1993) (seizure of an item whose identity is already known occasions no further invasion of privacy). Judge Alito also cited *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974), which noted that “traditional rule [is] that if the search is proper, it is of no moment that the object found was not what the officer was looking for.”

²⁶⁰ 497 F.3d 955 (9th Cir. 2007).

²⁶¹ *Id.* at 958.

²⁶² *Id.* at 960 (quoting *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973)).

²⁴⁵ *Id.* at 179–180 (quoting *Singleton*, 606 F.2d at 52).

²⁴⁶ *Id.* at 180.

²⁴⁷ See *Nat’l Treasury Emp.’s Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

²⁴⁸ *Hartwell*, 436 F.3d at 180.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* (quoting *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973)).

²⁵³ *Id.* (quoting *Skipwith*, 482 F.2d at 1276).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

The court then rejected previous Ninth Circuit precedent that had evaluated the scope of an airport screening search based on passenger consent. The court noted that “[s]ignificantly, the Supreme Court has held that the constitutionality of administrative searches is not dependent upon consent.”²⁶³ It further reasoned:

[R]equiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by “electing not to fly” on the cusp of detection until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks.²⁶⁴

The Ninth Circuit determined that rather than consent, “where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, 49 U.S.C. § 44901, all that is required is the passenger’s election to attempt entry into the secured area of an airport,” and “under current TSA regulations and procedures, that election occurs when a prospective passenger walks through the magnetometer or places items on the conveyor belt of the x-ray machine.”²⁶⁵ It expressly overruled previous cases to the extent that they “predicated the reasonableness of an airport screening search upon either ongoing consent or irrevocable implied consent.”²⁶⁶

Finally, the Ninth Circuit identified a test for determining whether the scope of the screening search that officials actually conducted was reasonable:

[T]he scope of such [airport] searches is not limitless. A particular airport screening search is constitutionally reasonable provided that it “is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [[and] that it is confined in good faith to that purpose.”²⁶⁷

The Ninth Circuit then considered the facts before it. In this case, a passenger had passed

through a magnetometer and was directed to secondary screening because his boarding pass was marked “No ID.”²⁶⁸ He underwent a standard “wandering procedure,” and when the machine sounded an alarm over his pants pocket, a TSA official asked if something was in the pocket. The passenger repeatedly claimed that the pocket was empty as the official conducted a second wandering procedure, felt something in the pocket, and then called a supervisor, who also felt the pocket using the back of his hand. The passenger finally removed some items from the pocket, but a bulge was still visible. After more requests and denials, the passenger then removed an object wrapped in tissue paper. The TSA supervisor unwrapped the item and discovered drug paraphernalia.²⁶⁹

Under these facts, the Ninth Circuit determined that the scope of the search actually conducted was properly limited. It focused its test on the extent to which the search procedures were intrusive. The court concluded, “[l]ike the Third Circuit, we find these search procedures to be minimally intrusive” because escalating invasiveness occurred “only after a lower level of screening disclosed a reason to conduct a more probing search.”²⁷⁰ The court also considered the time required to conduct the search. It noted that the “duration of the detention associated with this airport screening search [18 minutes] was also reasonable,” especially in light of the passenger’s conduct, “because it was not prolonged beyond the time reasonably required to rule out the presence of weapons or explosives.”²⁷¹ Thus, the search was no more intrusive than necessary to resolve concerns for weapons or explosives, and as such, the information discovered during the search was lawfully discovered.

Previous Ninth Circuit cases had addressed the rationale of *Aukai* without fully developing it. For example, in *United States v. Marquez*,²⁷² the Ninth Circuit upheld the constitutionality of an airport program and search that required a secondary screening procedure on a random basis. The passenger in *Marquez* walked through a magnetometer and his luggage was x-rayed without raising any concerns, but he was randomly asked to go to a selectee lane for screening with a more sensitive hand-held magnetometer, which produced an alarm that led to the discovery of cocaine.²⁷³ The court first

²⁶³ *Id.* at 959 (citing *United States v. Biswell*, 406 U.S. 311, 315 (1972) in which the Court determined “[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute”).

²⁶⁴ *Id.* at 960–961.

²⁶⁵ *Id.* at 961.

²⁶⁶ *Id.* at 962. *See also* *United States v. Herzbrun*, 723 F.2d 773 (11th Cir. 1984) (even under past consent cases, a passenger had no constitutional right to revoke consent to a search of his bag once it entered the x-ray machine and he walked through the magnetometer because that option would be a one-way street for the benefit of a party planning airport mischief).

²⁶⁷ *Aukai*, 497 F.3d at 962 (alternation in original) (quoting *Davis*, 482 F.2d at 913).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 962 (internal quotation marks omitted) (quoting *Hartwell*, 436 F.3d at 180).

²⁷¹ *Id.* at 962–963.

²⁷² 410 F.3d 612 (9th Cir. 2005).

²⁷³ *Id.* at 614–615.

noted precedent under the administrative search doctrine that upheld airport administrative programs that required passengers to walk through a magnetometer and submit carry-on luggage for x-ray screening, including supportive Supreme Court precedent.²⁷⁴ It then determined:

The added random screening procedure at issue in this case involving a handheld magnetometer scan of Marquez's person was no more extensive or intensive than necessary in order to detect weapons and explosives. It utilized the same technology and reported results based on the same type of information (*e.g.*, the presence or absence of metal) as the walkthrough magnetometer.²⁷⁵

The court's analysis in *Marquez* was consistent with the Ninth Circuit's later decision in *Aukai*. It reasoned that airport administrative screening programs were conducted "first, to prevent passengers from carrying weapons or explosives onto the aircraft; and second, to deter passengers from even attempting to do so."²⁷⁶ It determined that in this case, "the randomness of the selection for the additional screening procedure arguably increases the deterrent effects of airport screening procedures because potential passengers may be influenced by their knowledge that they may be subject to random, more thorough screening procedures."²⁷⁷ The court also found that these measures are justified by important purposes: It is "hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft."²⁷⁸ It also determined that the search conducted was "a limited search, confined in its intrusiveness (both in duration and scope) and in its attempt to discover weapons and explosives."²⁷⁹ As such, it held that "the random, more thorough screening involving scanning of Marquez's person with the handheld magnetometer was reasonable."²⁸⁰

A number of courts have now applied the rationale expressed by *Hartwell* and *Aukai* to other

²⁷⁴ *Id.* at 616 (citing *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (suggesting that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'")).

²⁷⁵ *Id.* at 617.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 618.

²⁷⁹ *Id.*

²⁸⁰ *Id.* See also *VanBrocklen v. United States*, 2009 WL 819382 (N.D.N.Y. 2009) (upholding the secondary screening of a wheelchair-bound plaintiff); *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006) (upholding secondary screening procedures for passengers without required identification); *United States v. Fofana*, 620 F. Supp. 2d 957, 860 (S.D. Ohio) (determining that in addition to prohibited items, other security issues such as forms of identification could be relevant to an administrative search, but this search was not properly conducted).

aspects of the screening process. In general, they look to *Hartwell's* reasoning to uphold the constitutionality of an airport administrative screening program under the Fourth Amendment, and they consider whether the scope of the search conducted was reasonable under the three-part test from *Aukai*: "An airport screening search is reasonable if: (1) it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the screening by electing not to fly."²⁸¹

Among those cases, in *George v. Rehiel*,²⁸² the Third Circuit determined what it considered to be the outer boundary of the proper scope of an airport screening search. In *Rehiel*, TSA officials checked a passenger's boarding pass and identification and then asked the passenger to remove two stereo speakers that he had stated were in his carry-on bag.²⁸³ Officials x-rayed the carry-on items, and the passenger walked through a screening device. Officials then asked the passenger to enter an additional screening area and empty his pockets, and they saw a set of handwritten flashcards containing Arabic words such as "bomb" and "terrorist." Officials took the passenger to another area, swabbed his phone for explosives and searched his carry-on items, and a supervisor aggressively questioned him. TSA's process took approximately 45 minutes, and then the airport police and FBI became involved.²⁸⁴

The Third Circuit noted that under *Hartwell*, an airport screening program "that involved an escalating level of scrutiny and intrusion [was valid] where 'a lower level of scrutiny disclosed a reason to conduct a more probing search.'"²⁸⁵ In this case, TSA officials had discovered handwritten flashcards containing words that could describe relevant threats in the course of their routine search.²⁸⁶ "[A]t that point, the Officials had a justifiable suspicion that permitted further investigation as long as the brief detention required to conduct that investigation was reasonable."²⁸⁷ The court

²⁸¹ See, *e.g.*, *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005) (citation omitted) (upholding random secondary screening procedures); *Fofana*, 620 F. Supp. 2d at 861–862 (upholding that airport administrative searches are reasonable and applying the three-part test from *Aukai* concerning their reasonable scope).

²⁸² 738 F.3d 562 (3d Cir. 2013).

²⁸³ *Id.* at 567.

²⁸⁴ *Id.* at 567–568.

²⁸⁵ *Id.* at 576 (quoting *United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir. 2006)).

²⁸⁶ *Id.* at 577.

²⁸⁷ *Id.*

cautioned, however, that “the detention at the hands of these TSA Officials is at the outer boundary of the Fourth Amendment. Once TSA Officials were satisfied that George was not armed or carrying explosives, much of the concern that justified his detention dissipated.”²⁸⁸

The court then noted that the context of the airport supported the TSA officials’ decision to conduct a further investigation by briefly questioning the passenger after the search. The officials’ concern “did not totally vanish or suggest that further inquiry was not warranted. Suspicion remained, and that suspicion was objectively reasonable given the realities and perils of air passenger safety.”²⁸⁹ The passenger was carrying references to terrorism, and “[i]n a world where air passenger safety must contend with such nuanced threats as attempts to convert underwear into bombs and shoes into incendiary devices, we think that the brief detention [for questioning] that followed the initial administrative search of George was reasonable.”²⁹⁰

The Third Circuit noted, however, that even at an airport, permissible intrusions had limits. The court noted that “harboring views that appear to be hostile to the United States government or its foreign policy is most assuredly not, by itself, grounds for detaining someone and investigating them pursuant to the administrative search doctrine or an investigative [law enforcement] seizure under *Terry [v. Ohio]*.”²⁹¹ Officials did not have to “turn a blind eye” to the flashcards though.²⁹² “Rather, basic common sense would allow those Officials to take reasonable and minimally intrusive steps to [briefly] inquire into the potential passenger’s motivations.”²⁹³ In this case, “the actions of the TSA Officials corresponded to the level of concern raised by the flashcards.”²⁹⁴ The court recognized that “[a]irport screening is obviously informed by unique concerns and risks.”²⁹⁵ Thus, “[i]tems other than weapons or explosives can give a TSA Screening Official reason to increase the level of scrutiny when circumstances suggest that it is reasonable to conduct a more probing investigation.”²⁹⁶

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 577–578.

²⁹⁰ *Id.* at 578.

²⁹¹ *Id.* at 578.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 579.

²⁹⁶ *Id.*

C. Administrative Searches Using Recent Technology

The Eleventh Circuit noted in *Corbett v. Transportation Security Administration*²⁹⁷ that in 2010, TSA issued new procedures that required it to use advanced imaging technology (AIT) body scanners, which detect nonmetallic threats, “as the primary screening method at airport checkpoints. If a passenger declines the scanner or...[there is an alarm] during the primary screening method, he receives a pat-down instead.”²⁹⁸ It also noted that legislation passed in 2012 required AIT scanners to generate only images of generic body contours, and that TSA adopted updated secondary pat-down procedures under which an official of the same gender must canvass most of a passenger’s body, using the back of the hand for sensitive areas.²⁹⁹ A passenger challenged the use of the scanner and procedure, claiming that other measures were less intrusive and more effective.³⁰⁰

The Eleventh Circuit first adopted the administrative search rationale of *Hartwell* and concluded that “the challenged [AIT] procedure is a reasonable administrative search under the Fourth Amendment.”³⁰¹ It found that the government’s interest in preventing terrorism was of “paramount importance”³⁰² and that AIT scanners advance that public interest and “effectively reduce the risk of air terrorism.”³⁰³ It observed that “the Fourth Amendment does not require that a suspicionless search be fool-proof or yield exacting results.”³⁰⁴ Instead:

Choosing which technique best serves the government interest at stake should be left to those with “a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.” “[W]e need only determine whether the [scanner] is a reasonably

²⁹⁷ 767 F.3d 1171 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2867 (2015).

²⁹⁸ *Id.* at 1174. The D.C. Circuit also considered AIT screening in *Electronic Privacy Information Center v. United States Department of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011). The D.C. Circuit looked to *Hartwell* and *Aukai* to evaluate the reasonableness of this program and actions taken under it. *Id.* at 10. When the facts of this case occurred, AIT scanners had produced a realistic image of the body. But by the time the case was considered, TSA had begun distorting AIT images and taking other measures to reduce the invasiveness of program procedures. The D.C. Circuit upheld the program on that basis. *See id.* at 3, 10–11. Current program practices are reflected in *Corbett v. Transp. Security Administration*.

²⁹⁹ *Corbett*, 767 F.3d at 1175.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1179.

³⁰² *Id.* at 1180.

³⁰³ *Id.* at 1181.

³⁰⁴ *Id.*

effective means of addressing the government interest in deterring and detecting a terrorist attack” at airports. Common sense tells us that it is.³⁰⁵

The Eleventh Circuit believed that “[t]he scanners pose only a slight intrusion on the individual’s privacy...[especially since] [t]he scanners now create only a generic outline of an individual, which greatly diminishes any invasion of privacy.”³⁰⁶

The court also considered TSA’s new alternate pat-down procedure and determined “that procedure as a secondary screening technique is a reasonable administrative search.”³⁰⁷ Although the new pat-down procedures are more intrusive than the scan:

[T]he security threat outweighs that invasion of privacy. And the Administration reduces the invasion of privacy through several measures: the pat-down is not a primary screening method; a member of the same sex ordinarily conducts it; a passenger may opt to have a witness present during the search...[if requesting that it be performed] in private; and the procedure requires...[an official to use] the back of his hand while searching sensitive areas of the body.³⁰⁸

The Eleventh Circuit thus concluded that “the Fourth Amendment does not compel the Administration to employ the least invasive procedure or one fancied by Corbett.”³⁰⁹ It relied on the rationale of *Hartwell* to determine that this program using AIT scanners complied with Fourth Amendment requirements.³¹⁰

The First Circuit determined that TSA did not need to accommodate a traveler’s own preferred screening method in *Ruskai v. Pistole*,³¹¹ where a passenger argued that as a TSA PreCheck program member, her metallic joint replacement should not subject her to more extensive pat-down searches when airports did not have an AIT scanner. The court first noted that the courts of appeals determine the validity of transit security screenings as an administrative search conducted without individualized suspicion, consistent with the rationale in *Harwell*.³¹²

The court then balanced the interests involved in cases where a passenger prefers alternate screening methods to accommodate a physical condition. It first determined that the government has a critical interest in keeping both metallic and nonmetallic weapons off commercial flights, noting that recent threats to aviation have involved nonmetallic explosives.³¹³ Although the plaintiff preferred more

limited procedures for joint-replacement passengers (using metal detectors rather than pat-downs in the absence of an AIT scanner), the court concluded that “the fact that a WTMD [metal detector] alerts TSA to Ruskai’s metallic implants does not mean that she is less likely to have a nonmetallic weapon.”³¹⁴

The First Circuit then determined that the government is not limited to using means that are the least intrusive. It noted that the “Supreme Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means to accomplish the government’s ends.”³¹⁵ The plaintiff argued that TSA’s procedure for passengers like her was not effective and underinclusive because only passengers who triggered an alarm for metal were searched for nonmetallic weapons. The court noted, however, that TSA was still in the process of implementing AIT scanners, and that “[t]he United States enjoys flexibility in selecting from among reasonable alternatives for an administrative search.”³¹⁶ It also noted that TSA had submitted some evidence that it had examined the effectiveness of its security measures, and “the Supreme Court has not required the degree of precision tailoring advocated by Ruskai.”³¹⁷

The First Circuit noted, however, that there still must be a fairly close fit between the nature of the government’s interest in searching and the intrusiveness of a search. It noted that although an airport search is more intrusive than some searches that government undertakes, “given the scale of the risk, the safety interests at stake are also dramatically more acute,” and “the Supreme Court ‘never has implied—much less...held—that a reduced privacy expectation is a sine qua non of special needs analysis.’”³¹⁸ In this case it determined that the government “may deal with one part of a problem without addressing all of it,” and that TSA was working on increasing its implementation of AIT scanners.³¹⁹ Thus, although airports without AIT scanners used intrusive procedures to search only some passengers for nonmetallic weapons, the court did not find that this practice rendered the searches unconstitutional.³²⁰

The court also considered and dismissed a number of other arguments. It found no basis to argue

³⁰⁵ *Id.* (alterations in original) (quoting Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 454 (1990) and MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006)).

³⁰⁶ *Id.* at 1181.

³⁰⁷ *Id.* at 1182.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ 775 F.3d 61 (1st Cir. 2014).

³¹² *Id.* at 68–69.

³¹³ *Id.* at 71.

³¹⁴ *Id.*

³¹⁵ *Id.* at 71–72 (quoting Cassidy v. Chertoff, 471 F.3d 67, 80 (2006)).

³¹⁶ *Id.* at 73 (quoting Corbett v. Transp. Sec. Admin., 767 F.3d 1171, 1181 (11th Cir. 2014)).

³¹⁷ *Id.* at 74.

³¹⁸ *Id.* at 75 (quoting MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006)).

³¹⁹ *Id.* (quoting Erznosnik v. City of Jacksonville, 422 U.S. 205, 215 (1975)).

³²⁰ *Id.*

that the program selected passengers in a discriminatory manner.³²¹ It also noted that “[w]ithin reason, choosing which technique best serves the government interest at stake should be left to those with a ‘unique understanding of, and responsibility for, limited public resources.’”³²² It thus concluded that the Fourth Amendment does not preclude a program searching for “both metallic and nonmetallic weapons on passengers who trigger WTMD [walk through metal detector] alarms just as it does on passengers who decline to pass through AIT scanners.”³²³

Under airport administrative search programs in effect both before and after 9/11, the courts have routinely upheld these programs as constitutional under the Fourth Amendment. When the facts of a case have raised concerns for the scope of a given search, the courts have also frequently found that screening officials remained within the limitations of the administrative program. In those instances, any information discovered during a valid search is lawfully known to the government and can be used by the police when enforcing criminal laws.

D. Administrative Actions Taken by Proprietors and Tenants

Although TSA conducts many of the administrative searches that occur at an airport, airport proprietors and airport tenants may also conduct these searches pursuant to an administrative program.³²⁴

³²¹ *Id.* at 76 (citing WAYNE LAFAYE, 5 SEARCH & SEIZURE § 10.6(b) (5th ed.) (noting that some degree of nonrandom selectivity is permissible under the Fourth Amendment only if the selection criteria tend to identify suspicious people, and noting that central considerations for assessing nonrandom criteria should include whether some selection criteria is necessary to avoid overwhelming the system and whether it reasonably appears that another basis for selection is not likely to at least work as well)).

³²² *Id.* at 77 (quoting *Corbett v. Transp. Sec. Admin.*, 767 F.3d 1171, 1181 (11th Cir. 2014)).

³²³ *Id.* This digest does not discuss all concerns that may relate to the use of technology in a search, and the Supreme Court has made a variety of statements on that subject. Among them, *see* *Kyllo v. United States*, 533 U.S. 27 (2001) (thermal imaging of a home’s interior did not physically intrude but was a search requiring a warrant where the technology was not in general public use); *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (officers could not use a trained narcotics dog (a technology) to explore the protected area of a home without a warrant); *United States v. Jones*, 132 S. Ct. 945 (2012) (a warrant was necessary to physically attach a GPS device to a car, and Justice Sotomayor’s concurrence noted at length concerns about the use of technology that gathers a comprehensive record of personal information about the individual being tracked); *Riley v. California*, 134 S. Ct. 2473 (2014) (searching a cell phone required a warrant and was not justified incident to an arrest due to the extensive personal information accessible from a cell phone).

³²⁴ *See* 49 U.S.C. § 44903(c).

When they do, the courts use the administrative search doctrine’s requirements (discussed *supra* in Section III.B) to determine the constitutionality of the program and to evaluate whether the scope of a search remained within the program’s lawful limitations. The case of *Cassidy v. Chertoff*³²⁵ illustrates how one court applied these principles to searches conducted under a transportation proprietor’s federally approved security plan.

In *Cassidy*, Judge Sonia Sotomayor on the Second Circuit Court of Appeals upheld a private ferry operator’s inspection program implemented under its approved transportation security plan.³²⁶ Judge Sotomayor first reviewed the law requiring the ferry operator to adopt the plan (pursuant to the Maritime Transportation Security Act of 2002, which was adopted in the wake of 9/11).³²⁷ The Act required the Department of Homeland Security to conduct a detailed vulnerability assessment of vessel types that posed a high risk of being involved in a security incident, and ferry operators were then required to conduct a security assessment, prepare a security plan for deterring incidents, and submit the plan to the Coast Guard for review and approval. Under a plan, a ferry operator was required to screen persons, baggage, and vehicles for dangerous items and check identification for persons seeking to board. The operator could also opt out of these screening requirements by implementing alternate security measures.³²⁸ A security plan was classified as sensitive security information under federal law, but for purposes of the motion to dismiss in this case, the court assumed that the procedures at issue were required or permitted by this private ferry operator’s security plan.³²⁹

Airport proprietors (and sometimes airport tenants) are subject to similar federal laws that require them to create a security plan that is subject to approval by TSA.³³⁰ An airport security plan must take into account potential vulnerabilities and risks at a given airport and must implement measures for deterring risks, which include acts of “criminal violence, aircraft piracy, and the introduction of an unauthorized weapon, explosive, or incendiary onto an aircraft.”³³¹ Federal law specifies contents that must be included in an airport security plan, and the proprietor also has the option of proposing an

³²⁵ 471 F.3d 67 (2d Cir. 2006).

³²⁶ *Id.* at 70.

³²⁷ *Id.*

³²⁸ *Id.* at 71.

³²⁹ *Id.* at 72.

³³⁰ *See* 49 U.S.C. § 44903(c); 49 C.F.R. § 1542.105.

³³¹ *See* 49 C.F.R. § 1542.101(a).

alternate means of compliance.³³² An airport security plan is classified as sensitive security information under federal law.³³³

When considering procedures under the private ferry operator's plan, Judge Sotomayor first noted that the private operator's actions were subject to the Fourth Amendment because although "a wholly private search falls outside the scope of the Fourth Amendment, a search conducted by private individuals at the instigation of a government officer or authority constitutes a governmental search for purposes of the Fourth Amendment."³³⁴ The operator had "implemented its security policy in order to satisfy the requirements imposed by MTSA [the Maritime Transportation Security Act of 2002]," and its adopted plan was "approved by the Coast Guard."³³⁵ The government's significant involvement in the policy brought these searches "within the ambit of the Fourth Amendment."³³⁶

Judge Sotomayor then reviewed the constitutionality of these security plan searches as a program that addressed special needs under the administrative search doctrine.³³⁷ Similar to *Hartwell*, she determined that the constitutionality of the search program depended on weighing the privacy interest affected, the nature of the government intrusion, and the manner in which the intrusion advanced the government's need.³³⁸

Under the first of these factors, Judge Sotomayor noted that the Fourth Amendment only protects expectations of privacy that society recognizes as legitimate, and "the Supreme Court has cautioned that privacy expectations necessarily depend on context."³³⁹ She considered a ferry patron's privacy interest in carry-on luggage and contrasted it with that of an airline passenger, where the courts have long upheld the intrusions involved in airport searches. "[A]irplanes are very different creatures from the more quotidian commuting methods at issue... [in] the instant case, and society has long accepted a heightened level of security and privacy intrusion with regard to air travel."³⁴⁰ In the context of commuting on

mass transportation, however, she found that "the privacy interests of LCT's ferry passengers in their carry-on luggage are undiminished."³⁴¹

When weighing the second factor, Judge Sotomayor determined that despite the presence of greater privacy interests when traveling by ferry, the administrative searches conducted under the private ferry operator's security plan were "minimally intrusive."³⁴² They were of "short duration"; the operator did not have "unbridled discretion" to search in a "discriminatory or arbitrary manner"; the search was "limited to visual inspections"; and the passengers had "[a]mple notice" that they were subject to search and could "avoid the search by exiting the premises."³⁴³ That notice helped to reduce "any unsettling show of authority"³⁴⁴ and to "eliminate any stigma associated with the search."³⁴⁵ She noted that search methods such as the use of a magnetometer may be less intrusive than visual inspections, but "reasonableness under the Fourth Amendment does not require employing the least intrusive means' to accomplish the government's ends."³⁴⁶ She also rejected a "slippery-slope" argument that the threat of terrorism could be used without limits to conduct suspicionless searches.³⁴⁷ She found that "the scope of the searches is rather limited," and under the circumstances, the balancing test weighed in favor of the private ferry proprietor implementing its mandated security plan.³⁴⁸

Under the third factor of her test, Judge Sotomayor considered whether the government's asserted special need was important enough to justify the particular search at hand (inspections under the proprietor's federally approved security plan).³⁴⁹ She first noted that special needs searches "must not be isomorphic with law enforcement needs, but rather go beyond them."³⁵⁰ She then noted that the government's special needs did not have to target a "well-defined target class," and that in this case the Coast Guard had identified a special need when it determined that certain vessels were at a

³³² See 49 C.F.R. §§ 1542.103, 1542.109.

³³³ See 49 C.F.R. § 1520.5.

³³⁴ *Cassidy*, 471 F.3d at 74 (citation omitted) (citing two cases: one determining that a seizure by a private company without government knowledge was unlawful but not a Fourth Amendment violation and the other determining that a private seizure pursuant to a regulatory program was subject to the Fourth Amendment).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 75.

³³⁸ *Id.*

³³⁹ *Id.* at 76.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 77. Judge Sotomayor also determined that there are "lesser expectations of privacy attendant to automobiles" brought onto a ferry, including "diminished privacy interests in their vehicles' trunks." *Id.* at 78.

³⁴² *Id.* at 79.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 80.

³⁴⁶ *Id.* (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 837 (2002)).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 81.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

heightened risk of attack.³⁵¹ Similar to airports, she observed that the ferry operator did not need to demonstrate this special need by showing that there were threats to its facility. She noted, “[i]f the government has determined that airports fall into a high-risk category and require special protection from terrorist attack, it does not matter whether a regional airport in a small city is perceived to be less susceptible to attack than an international airport in a major city.”³⁵² She believed that the Coast Guard’s determination of the risk was entitled to deference³⁵³ and noted that the ferry operator had a legal duty to implement the security plan,³⁵⁴ but her decision did not rely on deference to the Coast Guard.³⁵⁵ She also noted that the court’s role was not to decide what techniques government should use or whether a security plan “was optimally effective, but whether it was reasonably so.”³⁵⁶

Judge Sotomayor concluded that the private operator’s approved security plan appeared “reasonably calculated to serve its goal of deterring potential terrorists because [i]t provides a gauntlet, random as it is, that persons bent on mischief must traverse.”³⁵⁷ She observed that deterrence “need not be reduced to a quotient before a court may recognize a search program as effective.”³⁵⁸ Although the security plan “may not be maximally effective in preventing terrorist attacks...it is minimally intrusive, and we cannot say, particularly in light of the deference we owe to the Coast Guard, that it does not constitute a reasonable method of deterring the prohibited conduct.”³⁵⁹

Judge Sotomayor’s analysis in *Cassidy* provides insight into how a court might review the constitutionality of administrative search actions taken by an airport proprietor or an airport tenant when implementing a security plan. She applied the administrative search doctrine and made clear that airport search programs may have an even stronger justification.

IV. LAW ENFORCEMENT ACTIONS BY PROPRIETORS

Having the proper scope for an administrative action is important to establish lawfulness for both

administrative and law enforcement actions. Some airport law enforcement actions respond to information that is discovered as part of an administrative screening search, but that discovery is illegal if the search exceeds its administrative limitations. In other instances, airport law enforcement actions do not interact with administrative searches. Officers may address a disturbance at a screening checkpoint, where TSA officials or others act as witnesses. They also may need to stop passengers or baggage for investigative work. This section reviews these airport law enforcement concerns.

A. Law Enforcement Action on Administrative Discoveries

As discussed *supra* in Sections I.C, I.D, and III.B, intrusions that are subject to the Fourth Amendment must be governed by justifiable standards, and administrative and law enforcement actions rely on different Fourth Amendment justifications. Administrative actions use routine search procedures (pursued without individualized suspicion) that are justified by an important government purpose, such as screening all passengers for weapons, and all of the search actions taken must advance the important purpose. If a screening search is valid in all respects, “[t]he mere fact that a screening procedure ultimately reveals contraband other than weapons or explosives does not render it unreasonable, *post facto*... routine airport screening searches will lead to discovery of contraband and apprehension of law violators.”³⁶⁰ Law enforcement action, however, must be governed by standards that can safeguard an individual who is suspected of wrongdoing. An administrative program does not address that circumstance. Thus, a constitutional violation occurs if screening officials exceed their role or if law enforcement officers fail to establish a justification for their actions, and these violations can interfere with efforts to prosecute a criminal violation and create liability for a proprietor (as generally discussed *supra* at Section I.I).

For example, in *United States v. McCarty*,³⁶¹ a court considered a case where TSA officials in part exceeded the scope of a proper administrative search, frustrating law enforcement action. In *McCarty*, pursuant to administrative policies a CTX (computer tomography x-ray) machine would alarm and stop automatically when detecting a dense

³⁵¹ *Id.* at 82.

³⁵² *Id.* at 83.

³⁵³ *Id.* at 84.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 85.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 86 (alteration in original) (quoting *United States v. Green*, 293 F.3d 855, 862 (5th Cir. 2002)).

³⁵⁸ *Id.* (citation omitted).

³⁵⁹ *Id.* at 86–87 (internal quotation marks omitted) (citation omitted).

³⁶⁰ See *United States v. Marquez*, 410 F.3d 612, 617 (internal quotation marks omitted) (quoting *United States v. Davis*, 482 F.2d 893, 908 (1973)).

³⁶¹ 648 F.3d 820 (9th Cir. 2011).

object in a bag.³⁶² An official then had to examine the object to ensure that it was not an explosive device, including “sheet explosives” that may be disguised as a piece of paper. The protocol required an official to thumb through papers and confirm that sheet explosives were not present, and under the protocol, a search did not conclude until the official had cleared the bag of the safety concerns identified by the CTX machine.³⁶³ Under this mandatory policy, the official’s “sole job is to clear bags of safety concerns relating to air travel.”³⁶⁴ If an official believed contraband was present, the official was required to call a law enforcement officer. “It is not the screener’s job to continue investigation of possible contraband found in the course of an administrative safety inspection.”³⁶⁵

In this case, an envelope spilled some photographs on the table as an official searched for the dark mass in a CTX image, and the official saw pictures of nude children.³⁶⁶ She then looked through other photographs in the envelope to clear its contents. After she was no longer concerned about explosives, she felt the children were not in a good situation and read a few lines of letters and newspaper clippings in the envelope to make sure the photos were contraband before calling her lead officer to report them.³⁶⁷ Two other officials then saw some of the pictures, letters, and articles, and the officials called a private security contractor, who called a law enforcement officer.³⁶⁸ The officer made an arrest for promotion of child abuse, and federal agents then obtained a search warrant for a laptop computer and discovered child pornography.³⁶⁹

The Ninth Circuit first noted that “the circumstances under which a warrantless search not supported by probable cause may be considered reasonable under the Fourth Amendment are very limited,” and “airport screening searches... are constitutionally reasonable administrative searches because they are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.”³⁷⁰ Consistent

with *Aukai*, the court noted that because warrantless, suspicionless searches remain subject to the Fourth Amendment:

[A] *particular* search is “constitutionally reasonable [only where] it is no more extensive nor intensive than necessary, in light of current technology, to detect the presence of weapons or explosives [and where] it is confined in good faith to that purpose.”...In other words, an airport search remains a valid administrative search only so long as the scope of the administrative search exception is not exceeded; “once a search is conducted for a criminal investigatory purpose, it can no longer be justified under an administrative search rationale.”³⁷¹

The Ninth Circuit thus needed to determine whether this screening official’s actions had exceeded the proper scope of an administrative search, and it concluded that the official’s purpose for searching guided that determination. Under the Fourth Amendment, generally the “subjective motivations of the individual officer involved are irrelevant.”³⁷² Administrative searches are not constitutional, however, “where the officer’s purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified.”³⁷³ As such, a court must examine whether the *programmatic* purpose was motivating the official.³⁷⁴ Elaborating on *Aukai*, the court determined:

The search must still be “in furtherance” of the administrative goal, “no more extensive nor intensive than necessary, in the light of current technology...[and] confined in good faith to that purpose. So, as long as (1) the search was undertaken pursuant to a legitimate administrative search scheme; (2) the searcher’s actions are cabined to the scope of the permissible administrative search; and (3) there was no impermissible programmatic secondary motive for the search, the development of a second, subjective motive to verify the presence of contraband is irrelevant to the Fourth Amendment analysis.”³⁷⁵

When considering an official’s purpose, the court believed that the official could possess a secondary motive “at least as long as she actually engaged in a search for explosives and her actions were no more intrusive than necessary to clear the bag of any safety concerns.”³⁷⁶ Her subjective intent “becomes as relevant as objective conduct only at the point at

³⁶² *Id.* at 824.

³⁶³ *Id.* at 825.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 825–826.

³⁶⁷ *Id.* at 826.

³⁶⁸ *Id.* at 827.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 830–831 (internal quotation marks omitted) (citation omitted).

³⁷¹ *Id.* at 831 (second and third alterations in original) (quoting *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) and *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1246 n.5 (9th Cir. 1989)).

³⁷² *Id.* at 832.

³⁷³ *Id.* (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011)).

³⁷⁴ *Id.* at 833.

³⁷⁵ *Id.* at 834–835 (second alteration in original) (quoting *United States v. Davis*, 482 F.2d 893, 913 (1973) and *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–46 (2000)).

³⁷⁶ *Id.* at 835.

which the search ceases legitimately to be for the valid administrative purpose, as that is the point after which the administrative exception can no longer justify continuation of the warrantless search.”³⁷⁷

The court concluded that “where an action is taken that cannot serve the administrative purpose—either because the threat necessitating the administrative search has been dismissed, or because the action is simply unrelated to the administrative goal—the action clearly exceeds the scope of the permissible search.”³⁷⁸ In this case, “the scope of the permissible search—mandated by the TSA protocol—was defined by the point at which the screener was convinced the bag posed no threat to airline safety.”³⁷⁹ The court observed that objectively, “[o]nce Andrade was sufficiently certain that there were no explosives or other safety hazards hidden inside McCarty’s bag, the administrative search was over—nothing else was required to detect threats to aircraft safety.”³⁸⁰ At that point, the official’s legitimate search for the programmatic purpose ended and it became an independent search for evidence of a crime.

The court then considered the evidence in the record of the case concerning the screening official’s purpose for searching as her search progressed. The official had testified that “when she read the content of the letters and looked at the newspaper articles and advertisements, she was no longer searching for explosives...[but] was reviewing the items to confirm her feeling that the photographs were contraband.”³⁸¹ Based on this evidence, the court determined that her actions at that point “clearly fell outside the permissible scope of the lawful administrative search and violated McCarty’s Fourth Amendment rights because they were more extensive and intrusive than necessary to detect air travel safety concerns.”³⁸² Before reaching that point, however, the official saw some pictures of children in

the envelope while she was still conducting her search to investigate the “possible massive dark area” that had caused the CTX machine to alarm and “to determine if any sheet explosives were hidden therein.”³⁸³ This “search intent was consistent with the TSA protocol requiring Andrade to thumb through the photographs in order to clear the bag.”³⁸⁴

The court determined that to show probable cause to arrest McCarty, the government had to show that at the moment of the arrest, “the officers had an objectively reasonable belief that McCarty committed a crime, based on the totality of the relevant circumstances” (the facts and circumstances known to them and of which they had reasonably trustworthy information).³⁸⁵ The screening official’s testimony, however, had been unclear on some points.

The court thus remanded so the district court could determine two questions. First, “what materials may be considered in determining whether probable cause existed to arrest,” since “the fruits of an unlawful search cannot provide probable cause for an arrest, and it is clear some portion of this search was unlawful.”³⁸⁶ The court concluded, however, that “all of the photographs viewed by the screeners as part of the lawful search for explosives must be considered in reaching a probable cause determination.”³⁸⁷ The textual materials and “photographs *not* viewed by the screeners may be considered only if they do not constitute fruit of the poisonous tree.”³⁸⁸ Second, the district court had to determine whether the evidence that could be used in the case was “sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.”³⁸⁹ The government did not need to prove that the “arresting officers *knew* McCarty had committed a crime, but only that the officer’s belief that McCarty committed crimes related to child pornography was an objectively reasonable one.”³⁹⁰

In *United States v. Fofana*,³⁹¹ a federal district court considered another instance in which screening officials exceeded the proper scope of an administrative search and affected subsequent law enforcement action. In this case, a passenger was

³⁷⁷ *Id.* The Ninth Circuit has also noted that an administrative search cannot be undertaken with a programmatic “dual objective” that includes a law enforcement goal. In *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240 (9th Cir. 1989), a private company’s airport screening program offered screeners a financial bonus to report violations of law. The court found that “the decision to open a particular briefcase may be motivated by the desire to comply with the...[screening company’s] cooperation policy” and screeners “may choose to open packages more often, hoping to improve their chances of earning a reward.” *Id.* at 1245. This would “very likely influence FTS officers to conduct more searches, and more intrusive searches, than if they focus on air safety alone.” *Id.* at 1246.

³⁷⁸ *McCarty*, 648 F.3d at 835.

³⁷⁹ *Id.* at 836.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 836.

³⁸² *Id.*

³⁸³ *Id.* at 837.

³⁸⁴ *Id.* at 838.

³⁸⁵ *Id.* at 839. The court did not require the government to prove that any or all of the photographs actually exhibited child pornography. *Id.*

³⁸⁶ *Id.* (citation omitted).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 840 (internal quotation marks omitted) (citation omitted).

³⁹⁰ *Id.*

³⁹¹ 620 F. Supp. 2d 857 (S.D. Ohio 2009).

selected for secondary screening, and a screening official found a large amount of cash on the passenger.³⁹² Testimony established that screeners were required to look for anything that might compromise air safety, including information suggesting a false identity, and to report any unlawful possessions to law enforcement.³⁹³ The screening official discovered numerous envelopes while searching the passenger's bag, and when she opened some of them she saw large amounts of cash. She also looked in other envelopes and discovered passports with the passenger's picture under different names. She testified that "when she opened the envelopes she did not believe that they contained weapons or explosives, but instead was looking for contraband."³⁹⁴ Another official learned that she had found the passports and contacted law enforcement officers.³⁹⁵

The court considered the permissible scope of this search and noted that "a checkpoint search tainted by 'general law enforcement objectives' such as uncovering contraband evidencing general criminal activity is improper."³⁹⁶ It found that conclusion "is further supported by the Supreme Court's repeated instruction that administrative searches may not be justified by a desire to detect 'evidence of ordinary criminal wrongdoing.'"³⁹⁷ Therefore, "to the extent that airport administrative searches are used for purposes other than screening luggage and passengers for weapons or explosives, they fall outside the rationale by which they have been approved as an exception to the warrant requirement, and the evidence obtained during such a search should be excluded."³⁹⁸

The court then determined that "the evidence in this case shows that the extent of the search went beyond the permissible purpose of detecting weapons and explosives and was instead motivated by a desire to uncover contraband evidencing ordinary criminal wrongdoing."³⁹⁹ It based that conclusion on the screening officials' testimony that she was concerned about illegal activity, not a security risk.⁴⁰⁰ The official had not opened all of the envelopes because she could feel that some of them contained cash, and she had already x-rayed and thoroughly searched the bags, so opening the

envelopes "did not serve safety-related ends."⁴⁰¹ The court also determined that:

[T]he Government failed to establish through evidence that opening the envelopes containing the passports was necessary to serve the programmatic purpose of an airport screening search, i.e., to unearth weapons or explosives. ... For example, the TSA did not present, or submit for in camera review, SOPs or other regulations stating that all items, including non-bulky business-sized envelopes, must be opened as part of a secondary screening to ensure that there are no prohibited items are [sic] contained within.⁴⁰²

The court recognized "that contraband discovered in the course of an otherwise constitutionally reasonable airport search may be reported to law enforcement officials."⁴⁰³ In this case, however, it held that "the evidence demonstrates that the intrusiveness of a passenger's search was ramped-up based on a desire to detect evidence of ordinary criminal wrongdoing, after the presence of weapons and explosives had been ruled out," and as such the search could "no longer be justified under the administrative search doctrine and suppression [of the evidence unlawfully discovered] is appropriate."⁴⁰⁴ When the proper scope of an administrative search is exceeded, information is not discovered lawfully and constitutional violations will affect a prosecution and a proprietor's potential liability.

In *United States v. Massi*,⁴⁰⁵ the Fifth Circuit determined that although an administrative search was proper, officers could not justify a lengthy detention after the search and had unconstitutionally seized a pilot. In this case, the law enforcement officers took both the administrative and the law enforcement actions. Two airport police officers responded to a request to conduct a regulatory ramp check of a suspicious aircraft.⁴⁰⁶ In the course of the ramp check, Homeland Security agents arrived and observed a suspicious box on the plane, but the pilot would not grant access to the aircraft.⁴⁰⁷ After 90

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 865.

⁴⁰³ *Id.* at 866.

⁴⁰⁴ *Id.*

⁴⁰⁵ 761 F.3d 512 (5th Cir. 2014).

⁴⁰⁶ *Id.* at 518. The request came from the Air Marine Operations Center (AMOC), which monitors all air traffic in the United States. Under FAA regulations, a ramp check requires the officers to ask for consent to search a plane, ask for identification for all on board, and check FAA records with AMOC's guidance. AMOC's suspicions were based on the plane's unusual stops, the pilot's past conviction for drug trafficking, and the passenger's recent entry into the United States. The airport police officers conducted the ramp check, which included examining the airplane's exterior, a canine sniff of the plane and luggage removed from the plane, and observing a cardboard box inside the plane.

⁴⁰⁷ *Id.* at 519.

³⁹² *Id.* at 859.

³⁹³ *Id.* at 859–860.

³⁹⁴ *Id.* at 860–861.

³⁹⁵ *Id.* at 861.

³⁹⁶ *Id.* at 863.

³⁹⁷ *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 37–42 (2000)).

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 864.

minutes, another Homeland Security agent arrived and gathered information so that he could corroborate what the officers knew, prepare an affidavit, obtain approval from the U.S. Attorney's Office, and properly obtain a search warrant for the aircraft. This took an additional 4.5 hours, and the officers and agents did not allow the plane's occupants to leave during that time.⁴⁰⁸

The parties to the case all agreed that the initial, regulatory ramp check (an administrative search) was not a detention and was properly conducted, but "no specific occurrence demark[ed] when the activities relating to the ramp check ended and a broader investigation commenced."⁴⁰⁹ The court noted that "both the scope and length of the officer's [law enforcement] investigation [needed] to be reasonable in light of the facts articulated as having created the reasonable suspicion of criminal activity."⁴¹⁰ The regulatory "obligation to submit to a ramp check allowed the airplane and Massi to be held at the airport initially"; then the "suspicion of a drug crime, either having been committed or still ongoing, was not dispelled and permitted the encounter to continue beyond the temporal confines of the ramp check."⁴¹¹ The court was concerned, however, that detaining the plane's occupants during the prolonged process had "morphed into a *de facto* arrest."⁴¹²

The court then considered at what point an arrest may have occurred. A person is arrested if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,"⁴¹³ and in this case the plane's occupants "were told by law enforcement officers that they were not free to leave" throughout the process.⁴¹⁴ The court determined that all administrative and investigative search actions had been completed by the time the final officer arrived, and at that time "no violation of Massi's Fourth Amendment rights had occurred."⁴¹⁵ The detention had continued, however, while the officers and agents sought a search warrant.⁴¹⁶ A "*Terry*

detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop, unless further reasonable suspicion, supported by articulable facts, emerges.'"⁴¹⁷ The court determined that in this case, the delay that accompanied the process caused an initial investigatory stop to morph "from a *Terry* detention into a *de facto* arrest" that required probable cause, since the "men were detained well beyond the time for the ramp check and *Terry* investigation."⁴¹⁸

The Fifth Circuit observed that a *de facto* arrest must be supported by probable cause.⁴¹⁹ It noted that "probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the laminated total."⁴²⁰ In this case, the *de facto* arrest was based entirely on matters that the two agencies discovered before seeking a search warrant.⁴²¹ The court thus considered "whether such evidence constituted probable cause to arrest Massi and keep him at the airport in excess of four more hours" and concluded that it was insufficient.⁴²²

While we do not require new facts be developed in order to transform reasonable suspicion into probable cause, we do require that "the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed, or was in the process of committing, an offense. There needed to be probable cause to believe that Massi was guilty of a drug-related offense, but we conclude

⁴¹⁷ *Massi*, 761 F.3d at 523 (quoting *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004)).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 524.

⁴²⁰ *Id.* (citation omitted). The Supreme Court has determined that "where law enforcement authorities are cooperating in an investigation...the knowledge of one is presumed shared by all." *Illinois v. Andreas*, 463 U.S. 765, 772 n.5 (1983) (officers did not need a warrant to open a package where a Customs agent had already lawfully opened a package under the Fourth Amendment's border search exception and discovered drugs concealed in it). Some courts have questioned whether there must be communication between the officers to support this presumption. *See Bailey v. Newland*, 263 F.3d 1022 (9th Cir. 2001) (discussing circuit positions). The Supreme Court also noted that "once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost." *Andreas*, 463 U.S. at 771. For more information concerning the border search exception, *see United States v. Ramsey*, 431 U.S. 606, 616 (1977) (considering a search of international mail made at the border); *Almeida-Sanchez v. United States*, 413 U.S. 266, 274–275 (1973) (observing that airports where aircraft arrive after a non-stop flight from a foreign destination are "functional equivalents" of a border).

⁴²¹ *Massi*, 761 F.3d at 524.

⁴²² *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 521.

⁴¹⁰ *Id.* at 521–522 (citation omitted).

⁴¹¹ *Id.* at 522.

⁴¹² *Id.*

⁴¹³ *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 523.

⁴¹⁶ *Id.* *See also United States v. Foreste*, 780 F.3d 518 (2d Cir. 2015) (determining that if two agencies conduct an investigative stop successively based on the same reasonable suspicion, and the second investigation is aware of the first, the duration and scope of these investigations must be both individually and collectively reasonable under the Fourth Amendment).

that until the midnight search, all the officers had were suspicions. We conclude that Massi was subject to an unconstitutional seizure at the airport.⁴²³

The court then considered whether to suppress the evidence obtained pursuant to the search warrant or, under the good faith exception to the exclusionary rule, “permit the admissibility of evidence over a possible taint caused by an earlier-in-time detention in violation of the Fourth Amendment that would otherwise warrant exclusion as fruit of the poisonous tree.”⁴²⁴ The Fifth Circuit noted precedent from other circuits determining that the good faith exception could overcome a taint from prior unconstitutional conduct that was not the basis for issuing the warrant.⁴²⁵ It also noted that the issue important to this analysis was the officer’s “awareness at the time of presenting the affidavit that the conduct violated constitutional rights that would affect the application of the good faith exception.”⁴²⁶ In this particular case, the court determined that an objectively reasonable officer would have believed in the validity of the agents’ investigative conduct as he prepared the affidavit to obtain a warrant and that there was no basis for determining a lack of good faith.⁴²⁷ This particular unlawful detention essentially was not material to obtaining the search warrant that produced the evidence of unlawful activity, and thus it had no effect in a prosecution setting.

B. Disturbances at Screening Checkpoints

Some calls requesting law enforcement assistance at a screening checkpoint do not involve information discovered during an administrative search. When law enforcement officers are called to respond to a disturbance at the screening checkpoint, they are addressing conduct witnessed by TSA officials rather than evidence uncovered during an administrative search action.

In general, when officers rely on a witness’s information they must consider the “informant’s ‘veracity,’ ‘reliability’ and ‘basis of knowledge’” when determining “whether there is ‘probable cause’” to believe that “contraband or evidence is located in a particular place” under a “totality-of-the-circumstances approach.”⁴²⁸ This assessment recognizes

⁴²³ *Id.*

⁴²⁴ *Id.* at 525.

⁴²⁵ *Id.* at 527.

⁴²⁶ *Id.* at 528.

⁴²⁷ *Id.* at 529–532.

⁴²⁸ *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (determining that the reliability or unreliability of an informant’s information must be assessed under the totality of the circumstances). In *Gates*, an officer received an anonymous letter claiming that a man would fly to Florida after his wife drove there on a specific date, and that the two would

that “[i]nformant’s tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability.”⁴²⁹ As officers assess informant information, the Supreme Court has “consistently recognized the value of corroboration of details of an informant’s tip by independent police work.”⁴³⁰ It noted that there must be a “substantial basis for crediting the hearsay presented” in an affidavit that relies on hearsay to obtain a warrant, and “even in making a warrantless arrest an officer ‘may rely upon information received through an informant, rather than upon his direct observations, so long as the informant’s statement is reasonably corroborated by other matters within the officer’s knowledge.’”⁴³¹ For a law enforcement action to be valid, an officer’s assessment of probable cause involving informant information must rely on “corroboration through other sources of information [that] reduced the chances of a reckless or prevaricating tale,’ thus providing a substantial basis for crediting the hearsay.”⁴³²

then load the car with drugs and drive back. The Court believed that the officer had sufficiently corroborated the information in the letter when the officer confirmed that the man had a driver’s license; found a recent address for the man; determined that the man had made travel plans to fly to a city in Florida near that date; another agency surveilled the flight and observed the man boarding; the man was observed going to a hotel room where his wife was staying; the man and his wife left the hotel in a car registered to the man; and the man and his wife arrived back in their home city after an appropriate driving time. *Id.* at 225–226.

⁴²⁹ *Id.* at 232.

⁴³⁰ *Id.* at 241. *See also* *Draper v. United States*, 358 U.S. 307, 313 (1959) (police officers must corroborate informant information when forming a basis for probable cause). In *Draper*, an informant claimed a man would arrive by train on one of 2 days with heroin, and the informant described the man, his clothing, and his manner of walking. On one of the stated dates, an officer observed a man fully matching that description exiting the train, and the Court found that the arresting officer “had personally verified every facet of information given him” by the informant “except whether petitioner...had the three ounces of heroin on his person or in his bag.” *See Gates*, 462 U.S. at 242–243 (describing *Draper*). The Court believed that “with every other bit of Hereford’s [the informant’s] information being thus personally verified, [the officer] had ‘reasonable ground’ to believe that the remaining unverified bit of Hereford’s information—that Draper would have the heroin with him—was likewise true.” *Id.* at 243.

⁴³¹ *Gates*, 462 U.S. at 242 (quoting *Jones v. United States*, 362 U.S. 257, 269 (1960)).

⁴³² *Id.* at 244–245 (quoting *Jones*, 362 U.S. at 269). *See also* *Florida v. Harris*, 133 S. Ct. 1050, 1056 (2013) (quoting with approval from *Gates* that when assessing the trustworthiness of an informant’s tip, deficiencies “may be compensated for, in determining the overall reliability of a tip, by a strong showing as to...other indicia of reliability”); *Alabama v. White*, 496 U.S. 325 (1990) (considering corroboration of informant information consistent with *Gates*).

If a proprietor's officers do not corroborate information that they receive from another agency, a court may find that the officers did not have a sufficient basis to establish probable cause for their actions. For example, in *Tobey v. Jones*,⁴³³ the Fourth Circuit concluded that a passenger's behavior (removing his shirt to display the text of the Fourth Amendment on his chest) was "bizarre," but "bizarre behavior alone cannot be enough to effectuate an arrest. If...[officers] caused Mr. Tobey's arrest solely due to his 'bizarre' behavior...[they] cannot be said to have acted reasonably."⁴³⁴ The court also determined that "bizarre does not equal disruptive....Appellants seem to think that removing clothing is per se disruptive. We beg to differ."⁴³⁵ The court did not discuss any actions that the officers took to corroborate claims of disruptive behavior. Under these facts, the court determined that the passenger had stated a claim for First Amendment retaliation that would survive a motion to dismiss. In addition, because the TSA and airport police acted "in close concert," the court allowed this claim to move forward against both of the agencies and their employees.⁴³⁶

C. The Basis for an Airport Stop

Police investigative work at an airport relies on the same core concepts for interacting with the public that police agencies rely on elsewhere. In general, the

⁴³³ 706 F.3d 379 (4th Cir. 2013).

⁴³⁴ *Id.* at 388 (determining for purposes of a motion to dismiss that Mr. Tobey's complaint asserted a plausible First Amendment retaliation claim for an arrest motivated by his speech). See also *Hebshi v. United States*, 12 F. Supp. 3d 1036, 1050 (E.D. Mich. 2014) (determining for purposes of a motion to dismiss that a prolonged detention and searches by officers were unjustified once it was clear that there were no emergency conditions); *Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002 (D. N.M. 2014) (considering whether a passenger's actions had disrupted screening and created a reasonable suspicion of criminal activity; the court also noted that TSA officials are charged with assessing threats, making their information more weighty than that of a 911 caller, but did not discuss corroborating actions by officers and noted that video evidence contradicted some statements in the case).

⁴³⁵ *Tobey*, 706 F.3d at 388.

⁴³⁶ *Id.* at 386. The court found that the passenger's First Amendment rights were clearly established in the law at the time of the incident—"it is crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it." *Id.* at 391. It also found that the passenger had alleged he was arrested without probable cause, impacting another clearly established right, and that his "rights at the time of his arrest were clearly established by decades-old precedent." *Id.* at 393. It thus affirmed the district court's denial of a qualified immunity-based motion to dismiss the passenger's First Amendment claim. *Id.* at 394.

Supreme Court has determined that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions."⁴³⁷ Nor would "the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification."⁴³⁸ The person approached "need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way."⁴³⁹ A person, however, "may not be detained even momentarily without reasonable, objective grounds for doing so, and his refusal to listen or answer does not, without more, furnish those grounds."⁴⁴⁰

The courts build on these general principles when considering how law enforcement officers may stop passengers at airports. The Supreme Court considered some basic principles concerning voluntary airport stops and detentions in *United States v. Mendenhall*.⁴⁴¹ In *Mendenhall*, federal agents approached a woman in an airport concourse who was in civilian clothing and not displaying weapons. They then identified themselves and asked to see her identification and ticket.⁴⁴² She produced the information and answered questions about why she was traveling under a false name.⁴⁴³ The agents returned her ticket and driver's license and asked her to accompany them to an office, which she did. At the office, the agent asked if she would allow a search of her person and bag and informed her that she could decline. She agreed and confirmed her consent to another agent.⁴⁴⁴ She then handed packages of heroin to an agent and was arrested.⁴⁴⁵

The Court first noted that "not every encounter between a police officer and a citizen is an intrusion requiring an objective justification."⁴⁴⁶ It noted:

[A] person is "seized" only when, by means of physical force or show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary

⁴³⁷ See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (reviewing general investigative principles while determining that a police encounter was not voluntary).

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 498. See also *Kentucky v. King*, 563 U.S. 452 (2011) (quoting *Royer*, 460 U.S. at 497–498).

⁴⁴⁰ *Royer*, 460 U.S. at 498.

⁴⁴¹ 446 U.S. 544 (1980).

⁴⁴² *Id.* at 547–548.

⁴⁴³ *Id.* at 548.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 549.

⁴⁴⁶ *Id.* at 553.

and oppressive interference by enforcement officials with the privacy and personal security of individuals.”⁴⁴⁷

The Court then explained factors to consider when determining whether a seizure has occurred:

A person has been “seized” within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.⁴⁴⁸

On the facts of this case, the Court determined that no seizure occurred, and the woman acted voluntarily.⁴⁴⁹ The agents approached her initially in a public concourse, wore no uniforms, displayed no weapons, and did not summon the woman but approached and identified themselves. “Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest.”⁴⁵⁰ Nothing suggested that the passenger “had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way,” even though she was not expressly told that she could decline to cooperate.⁴⁵¹ In general, the Supreme Court does not require the government to “prove that a defendant consenting to a search knew that he had the right to withhold his consent.”⁴⁵² The Court does, however, take that factor into account when “determining whether or not a consent was ‘voluntary.’”⁴⁵³

The Court in *Mendenhall* then considered whether the woman had voluntarily accompanied the agents to the office. The Court noted that whether her consent to accompany them “was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances.”⁴⁵⁴ It observed that the evidence showed she had simply been asked to accompany the agents, and they had returned her ticket and identification. On these facts, the Court believed that “the totality of the evidence in this case was plainly adequate to support the District Court’s finding that the respondent voluntarily consented to accompany the officers.”⁴⁵⁵ Thus, “[b]ecause

the search of the respondent’s person was not preceded by an impermissible seizure of her person, it cannot be contended that her apparent consent to the subsequent search was infected by an unlawful detention.”⁴⁵⁶ The Court also did not find the consent to be invalid for any other reason.⁴⁵⁷ The evidence sustained the trial court’s view that the consent was given “freely and voluntarily.”⁴⁵⁸

Some cases focus on whether an officer has reasonable suspicion that justifies detaining a passenger at an airport. For example, in *Reid v. Georgia*,⁴⁵⁹ the Supreme Court considered whether an officer had reasonable suspicion to justify stopping two men carrying identical shoulder bags whom he observed deplaning from an early morning flight. One man occasionally looked back in the direction of the other as they walked through the concourse, and then the two met in the lobby, spoke briefly, and left together.⁴⁶⁰ The officer caught up with them and asked to see their ticket stubs and identification, which revealed that the tickets were purchased together and that the men had stayed in Fort Lauderdale only 1 day. The men appeared nervous, and the officer then asked if they would agree to return to the terminal and consent to a search of their persons and bags. The officer testified that they gave consent, but as they reentered the terminal, one man began to run. When the officer recovered the man’s bag, it was found to contain cocaine.⁴⁶¹ The officer based his suspicions justifying this stop on the observation of characteristics from a Drug Enforcement Administration “drug courier profile.”⁴⁶²

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 559–560. See also *Ohio v. Robinette*, 519 U.S. 33 (1996) (“[t]he Fourth Amendment test for a valid consent to search is that the consent be voluntary, and ‘[v]oluntariness is a question of fact to be determined from all the circumstances,’” *id.* at 40 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–249 (1973))). Courts have also considered whether a passenger voluntarily abandoned a bag. The First Circuit noted it is “well established that one who abandons or disclaims ownership of an item forfeits any claim of privacy in its contents, and that as to that person the police may search the item without a warrant.” See *United States v. De Los Santos Ferrer*, 999 F.2d 7, 9 (1st Cir. 1993) (upholding a search where there was no evidence of coercively oppressive police conduct at the outset of an airport stop). The Fifth Circuit determined that by abandoning a bag a passenger lacked standing to challenge it, but the abandonment “must be truly voluntary and not merely the product of police misconduct.” See *United States v. Roman*, 849 F.2d 920, 923 (5th Cir. 1988) (determining that assumed police misconduct was too tenuous to be the cause of abandoning a bag).

⁴⁵⁹ 448 U.S. 438 (1980).

⁴⁶⁰ *Id.* at 439.

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 440.

⁴⁴⁷ *Id.* at 553–554 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

⁴⁴⁸ *Id.* at 554.

⁴⁴⁹ *Id.* at 555.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² See *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984).

⁴⁵³ *Id.* at 7.

⁴⁵⁴ *Mendenhall*, 446 U.S. at 557.

⁴⁵⁵ *Id.* at 558.

The Court concluded “that the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances.”⁴⁶³ Only the fact that one man looked back at the other related to their particular conduct, and the “other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.”⁴⁶⁴ Nor could the Court agree that the men’s manner of walking “reasonably could have led the agent to suspect them of wrongdoing.”⁴⁶⁵ The agent’s belief that the men were trying to conceal the fact that they were traveling together “was more an ‘inchoate and unparticularized suspicion or ‘hunch,’” than a fair inference in light of his experience.”⁴⁶⁶ The Court thus determined that the agent had not “lawfully seized the petitioner when he approached him outside the airline terminal.”⁴⁶⁷

The Supreme Court has noted that the context of an airport is one element to be considered when determining whether officers have a reasonable suspicion to stop a passenger. In *Florida v. Rodriguez*,⁴⁶⁸ officers saw men behaving in an unusual manner at a ticket counter. Shortly afterwards, when the men spotted the officers, they quickly turned and conversed, made comments such as “Let’s get out of here,” and one made running motions and uttered a vulgar exclamation.⁴⁶⁹ An officer showed his badge and asked to talk with one of the men, who agreed, and the officers then asked for identification and an airline ticket. The men produced cash tickets and misidentified themselves, and when officers asked for consent to search their bags, the men provided a key, and the officers found cocaine.⁴⁷⁰

The Court determined that “[t]he initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest.”⁴⁷¹ It then determined, however, that even assuming a Fourth Amendment seizure subsequently occurred, “we hold that any such seizure was justified by ‘articulable suspicion.’”⁴⁷² The Court believed that the men’s actions

and statements after spotting the officers aroused justifiable suspicion, and it noted that one officer had specialized training in narcotics surveillance and apprehension.⁴⁷³ It also considered the fact that the “[r]espondent ‘was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of slightly lesser magnitude.’”⁴⁷⁴

When determining which facts will support reasonable suspicion, the Supreme Court looks at the collective facts known to the officers. In *United States v. Sokolow*,⁴⁷⁵ agents considered a number of facts when deciding that they had reasonable suspicion to stop a passenger, including purchasing a ticket with cash, carrying a large amount of cash, traveling under an alias, briefly staying in Miami, appearing nervous, and not checking any luggage.⁴⁷⁶ The Court determined that “[a]ny one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”⁴⁷⁷ The Court noted that “innocent behavior will frequently provide the basis for a showing of probable cause,” and that “[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.”⁴⁷⁸ It believed “[t]hat principle applies equally well to the reasonable suspicion inquiry.”⁴⁷⁹

The Court did not believe that its analysis should change because the agent in this case considered the passenger’s behavior to be consistent with a drug courier profile. It determined that “[a] court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a ‘profile’ does not somehow detract from their evidentiary significance as seen by a trained agent.”⁴⁸⁰ The Court also determined

⁴⁶³ *Id.* at 441.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

⁴⁶⁷ *Id.*

⁴⁶⁸ 469 U.S. 1 (1984).

⁴⁶⁹ *Id.* at 3–4.

⁴⁷⁰ *Id.* at 4.

⁴⁷¹ *Id.* at 5–6.

⁴⁷² *Id.* at 6.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 515 (1983)).

⁴⁷⁵ 490 U.S. 1 (1989).

⁴⁷⁶ *Id.* at 3.

⁴⁷⁷ *Id.* at 9.

⁴⁷⁸ *Id.* at 10 (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 243–244 n.13 (1983)).

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* See also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (refusing to adopt the concept that race was relevant to investigating drug trafficking at an airport); *Shqairat v. United States Airways Group, Inc.*, 645 F. Supp. 2d 765 (D. Minn. 2009) (considering claims that race was a factor in an airport arrest under the Equal Protection clause); *Hebshi v. United States*, 12 F. Supp. 3d 1036 (E.D. Mich. 2014) (considering claims that race was a factor in an airport detention under the Equal Protection clause).

that “[t]he reasonableness of the officer’s decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.”⁴⁸¹ It then held that on these facts the agents had a reasonable basis to suspect that the passenger was transporting illegal drugs.⁴⁸²

In *Florida v. Royer*,⁴⁸³ the Supreme Court discussed actions that exceeded the limits of reasonable suspicion for an investigatory stop at an airport. The officers in *Royer* asked to talk with a man and to see his ticket and driver’s license. The man agreed and produced them.⁴⁸⁴ His ticket showed that he was traveling under a false identity, and he was nervous. The officers then did not return the man’s ticket and license and asked him to accompany them to an office. The man said nothing but went with them. Once there, the officers retrieved the man’s checked luggage without the man’s consent or agreement, and they asked if he would consent to a search of his bags. The man produced a key without comment, which unlocked one bag, and he told the officers to go ahead and pry open the other.⁴⁸⁵ The officers found marijuana in both bags and arrested the man.⁴⁸⁶

The Court noted that “in the absence of probable cause and exigent circumstances, the validity of the search depended on Royer’s purported consent... [and] the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given.”⁴⁸⁷ The Court reviewed past cases determining that the Fourth Amendment does not prevent officers from approaching and asking people if they will answer questions, and that it also allows some seizures of a person “if there is articulable suspicion that a person has committed or is about to commit a crime.”⁴⁸⁸ It noted, however, that this authority for seizures is limited. The police may not “seek to verify their suspicions by means that approach the conditions of arrest,” and a “reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative.”⁴⁸⁹ The Court noted that the

“scope of the detention must be carefully tailored to its underlying justification,” and that the stop may “last no longer than is necessary to effectuate th[at] purpose.”⁴⁹⁰ In addition, the statements “given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will,” but if a police encounter was permissible, the passenger’s voluntary consent would legalize a search of his bags.⁴⁹¹

The Court then considered whether “confinement” in the office in this case “went beyond the limited restraint of a Terry investigative stop, and Royer’s consent was thus tainted by the illegality, a conclusion that required reversal in the absence of probable cause to arrest.”⁴⁹² The Court believed that the officers could ask the man for his ticket and driver’s license:

[B]ut when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver’s license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. These circumstance surely amount to a show of official authority such that “a reasonable person would have believed he was not free to leave.”⁴⁹³

The Court believed that the man’s behavior initially provided officers with “adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention.”⁴⁹⁴ If the man had voluntarily consented to a search of his bags while he was justifiably detained on reasonable suspicion, “the products of the search would be admissible against him,” but at the time of his consent, “the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.”⁴⁹⁵ At that time, “[a]s a practical matter, Royer was under arrest.”⁴⁹⁶

In this case, “the officers’ conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases.”⁴⁹⁷ The Court noted that the officers could have returned the man’s ticket and driver’s license

⁴⁸¹ *Rodriguez* at 11.

⁴⁸² *Id.*

⁴⁸³ 460 U.S. 491 (1983).

⁴⁸⁴ *Id.* at 494.

⁴⁸⁵ *Id.* at 494.

⁴⁸⁶ *Id.* at 495.

⁴⁸⁷ *Id.* at 497.

⁴⁸⁸ *Id.* at 498.

⁴⁸⁹ *Id.* at 499. See also *Kaupp v. Texas*, 538 U.S. 626 (2003) (the police may not seek to verify mere suspicions by means that approach the conditions of arrest); *Tobey v. Jones*, 706 F.3d 379, 388 (4th Cir. 2013) (for purposes of a motion to dismiss, the complaint asserted a plausible First Amendment retaliation claim for an arrest at an airport screening checkpoint motivated by speech and without probable cause).

⁴⁹⁰ *Royer*, 460 U.S. at 500. See also *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (quoting *Royer*, 460 U.S. at 500).

⁴⁹¹ *Royer*, 460 U.S. at 501.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 501–502 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

⁴⁹⁴ *Id.* at 502.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.* at 503.

⁴⁹⁷ *Id.* at 504.

and informed him that he was free to go, and no facts indicated that the officers needed to move the encounter to an interrogation room.⁴⁹⁸ The Court also questioned whether searching the bags could have been handled “in a more expeditious way,” such as through “the use of trained dogs.”⁴⁹⁹ Such a process would have “freed Royer in short order...[or] resulted in his justifiable arrest on probable cause.”⁵⁰⁰ The Court emphasized that there is not “a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bound of an investigative stop” during airport encounters because circumstances can vary, but in this case it believed “the limits of a *Terry*-stop had been exceeded.”⁵⁰¹

A year prior to the Supreme Court’s decision in *Royer*, the Sixth Circuit in *United States v. Berry*⁵⁰² determined that additional interests are involved when officers ask a person to accompany them to an airport office. It determined that “airport stops of individuals by police, if of extremely restricted scope and conducted in a completely non-coercive manner, do not invoke the Fourth Amendment.”⁵⁰³ It observed, however, that courts must be especially protective of Fourth Amendment rights in the context of an airport stop.⁵⁰⁴ It noted that “the very nature of such stops may render them intimidating” because of the “nervousness that air flight often engenders,” the “need quickly to make connections,” the “mere surprise from being accosted in a crowded airport concourse,” and the “pressure to cooperate” to avoid an “untoward scene before crowds of people.”⁵⁰⁵ These factors make it “easy for implicit threats or subtle coercion to exert tremendous pressure on an individual to acquiesce in the officer’s wishes,” and “acquiescence cannot, of course, substitute for free consent.”⁵⁰⁶ The court also believed that airport stops make judicial fact-finding more difficult, since they require “distinguishing nuances of tone and language...that are subject to easy distortion or poor recall by parties and that hence might allow covert coercion easily to escape a casual review by a court.”⁵⁰⁷ “Minor gradations in the degree of coercion” might “tip the balance against the government’s interests and hence be a seizure.”⁵⁰⁸

⁴⁹⁸ *Id.* at 504–505.

⁴⁹⁹ *Id.* at 505.

⁵⁰⁰ *Id.* at 506.

⁵⁰¹ *Id.* at 506–507.

⁵⁰² 670 F.2d 583 (5th Cir. 1982).

⁵⁰³ *Id.* at 594.

⁵⁰⁴ *Id.* at 596.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 596–597.

The court concluded that a court should closely scrutinize the totality of the circumstances of an airport stop and if they reveal that coercion was present, a “court must hold that a reasonable person would believe that his freedom had been limited.”⁵⁰⁹ It noted some “specific factors that have arisen in the past on which a court should place great weight... in a[n airport] stop.”⁵¹⁰ It noted concerns for coercive factors such as “blocking an individual’s path” or otherwise “preventing his progress”; “implicit constraints” on freedom such as “retaining an individual’s ticket for more than a minimal amount of time or by taking a ticket over to a ticket counter”; statements implying that an “investigation has focused on a specific individual,” which could induce a reasonable person to believe failure to cooperate would lead to detention; or stating that “an innocent person would cooperate with police” or implying “failure to respond is an indication of guilt.”⁵¹¹ The Sixth Circuit believed:

The more intrusive on an individual’s freedom complying with a request would be, the greater should be the skepticism with which a court treats assertions that an individual consented to a request. A court, therefore, should analyze with care evidence of consent to a search or to a request to accompany an agent to an office.⁵¹²

The court also noted that airport cases often lacked evidence of informing individuals that they were free to refuse consent, free to contact a lawyer, or free not to go to the airport office, practices that “in many instances assuage the fear of a court that an individual was intimidated into consent to a search.”⁵¹³ It stated:

We do not wish to shackle police absolutely to a rigid and awkward rule requiring them to inform individuals that they are free not to [sic] accompany police to an office, but we do believe that only exceptionally clear evidence of consent should overcome a presumption that a person requested to accompany an agent to an office no longer would feel free to leave. Such a request combines a substantial intrusion on an individual’s freedom, a marked increase in the coercive nature of the environment in which the individual will be responding to police, and substantial psychological coercion from the intimation that there is strong suspicion that an individual is involved in a criminal act. Silently following an officer would rarely constitute sufficient evidence of consent under almost any circumstances.⁵¹⁴

The Sixth Circuit determined that being required to walk to a nearby airport office is an intrusion

⁵⁰⁹ *Id.* at 597.

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Id.* at 598.

⁵¹⁴ *Id.*

“sufficiently great that it is tantamount to an arrest.”⁵¹⁵ The court noted:

Requiring an individual to accompany police to an office indicates a detention for a time period longer than that permitted in a seizure; cuts the individual off from the outside world, without indication of when he might be allowed to leave; places him in unfamiliar surroundings; may subject him to increased implicit police pressure; and leaves him without third parties to confirm his story of events that may have occurred, should his story differ from that of police. Such a detention, if not by consent—and, as we noted earlier, courts should scrutinize exceptionally closely whether consent in fact was voluntary in such situations—we believe is only constitutional if accompanied by probable cause.⁵¹⁶

The Sixth Circuit also noted that not only must the initial intrusion be based on a reasonable suspicion, “[t]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.”⁵¹⁷ It determined:

In the context of airport stops, we can discern no justification tying the rationale for initiating the stop to the expanded scope of forced detention in a private office. The limited interrogation permissible during a seizure can be conducted as well in an airport concourse as in an office, as can a request for consent to search. In order to expand the scope of an intrusion to include bringing an individual involuntarily from an airport concourse to an office, an officer must therefore have probable cause.⁵¹⁸

Despite voicing these concerns for asking a passenger to go to an airport office, in this case the Sixth Circuit determined that a passenger had voluntarily consented to a search of his bags in an office.⁵¹⁹ The court believed that “there were substantial intervening circumstances” between the request to go to the office and a consent to search baggage.⁵²⁰ In this case, two passengers were told they were “free to refuse consent to a search and that they could consult with an attorney,” although the court did not find this factor determinative.⁵²¹ The court found it critical that the passengers “were allowed to consult with each other,” and that the officer “invited them to use a telephone” when one “indicated that she might want to contact an attorney.”⁵²² In addition, the court believed probable cause at least arguably did exist that would justify the detention.⁵²³

⁵¹⁵ *Id.* at 602.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

⁵¹⁸ *Id.* at 602–603.

⁵¹⁹ *Id.* at 605.

⁵²⁰ *Id.* at 605.

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *See id.* The Sixth Circuit also determined that where a passenger misrepresented identity, it was a “critical consideration” in determining whether an officer had reasonable suspicion because the passenger “was deliberately and clearly attempting to mislead a law enforcement officer.” *Id.* at 603–604.

A variety of airport-specific factors thus affect whether an airport law enforcement officer has a basis to detain a passenger.

D. Stopping Baggage and Effects

The Supreme Court focused on the proper scope of an investigatory stop involving baggage at an airport in *United States v. Place*.⁵²⁴ In *Place*, officers approached a man as he proceeded to the gate for his flight in Miami and asked for his ticket and identification.⁵²⁵ The man complied and consented to a search of his bags, but the flight was about to depart so the officers decided not to search. As he left, the man commented that he had recognized the officers were police, and the officers looked at the address tags on his bags and noted discrepancies in the addresses. The officers then investigated and found that neither address existed and that the man’s phone number belonged to a different address. They contacted agents in New York with this information, and the agents met the man at the gate and noted suspicious behavior. They approached the man, and he stated that he knew they were cops.⁵²⁶

The agents then told the man that they believed he was carrying narcotics and asked to search his bags, but the man refused.⁵²⁷ So the agents told the man they were going to take his bags to a judge to try to obtain a search warrant and that the man could accompany them. The man declined, but he obtained a phone number for the agents. The agents then took the bags from one New York airport to another, where they subjected the bags to a sniff test by a trained drug detection dog, and the dog reacted to one bag. This process took 90 minutes from the time the agents seized the bags. Because it was late on a Friday, they retained the bags until Monday morning and then obtained a search warrant and discovered cocaine.⁵²⁸

The Court first noted that a seizure of personal property is “*per se* unreasonable” without a warrant based on probable cause, but where officers believe a container holds contraband or evidence of a crime, officers may seize it pending issuance of the warrant “if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.”⁵²⁹ It then noted that seizing property based on reasonable suspicion rests on a balancing of interests—such seizures are valid if the “nature and extent of the detention are minimally

⁵²⁴ 462 U.S. 696 (1983).

⁵²⁵ *Id.* at 698.

⁵²⁶ *Id.*

⁵²⁷ *Id.* at 699.

⁵²⁸ *Id.*

⁵²⁹ *Id.* at 701.

intrusive of the individual's Fourth Amendment interests," and the "opposing law enforcement interests can support a seizure based on less than probable cause."⁵³⁰

The Court determined that "[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels."⁵³¹ Balancing that strong government interest against the intrusion's impact on a traveler, the Court concluded that:

[W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.⁵³²

The Court further noted it had "affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment."⁵³³ It determined, however, that a canine sniff by a well-trained narcotics detection dog is not a search because it does not require opening the luggage and it exposes only contraband, not noncontraband items that would otherwise remain hidden from public view. As such, it provides limited information in a limited manner without subjecting the bag owner to embarrassment or inconvenience.⁵³⁴

The Court then observed that the "manner in which the seizure...[was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all."⁵³⁵ The Court concluded that when detaining luggage "within the traveler's immediate

possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary."⁵³⁶ Such a seizure disrupts the person's travel plans, and thus "when the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause."⁵³⁷

The Court then found that in this case, the "length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause."⁵³⁸ The Court considered both the length of the detention and "whether the police diligently pursued their investigation."⁵³⁹ The officers had known when the man was scheduled to arrive and they had "ample time to arrange for their additional investigation" at the destination airport to minimize the intrusion, but they did not.⁵⁴⁰ Thus, the Court determined that "although we decline to adopt any outside time limit for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case."⁵⁴¹ It stated:

Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.⁵⁴²

⁵³⁰ *Id.* at 703.

⁵³¹ *Id.* at 704.

⁵³² *Id.* at 706.

⁵³³ *Id.* at 707.

⁵³⁴ *Id.* See also *Illinois v. Caballes*, 543 U.S. 405 (2005) (use of a trained narcotics dog does not implicate legitimate privacy interests because it can only detect contraband); *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (a dog sniff that extends the time required for a traffic stop must be independently supported by individualized suspicion); *Florida v. Harris*, 133 S. Ct. 1050 (2013) (probable cause for a dog sniff requires showing facts that would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997) (an airport passenger was not seized when officers arranged for a dog to sniff his bag within 25 minutes, and when the sniff did not resolve suspicions, the passenger could stay or leave and have the bag returned); *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984) (a dog sniff that required 120 minutes unreasonably delayed an airport passenger and separated him from his bag when less intrusive means could have been used, such as allowing the bag to proceed to another airport for a dog sniff there).

⁵³⁵ *Place*, 462 U.S. at 707–708 (alternations in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 28 (1968)).

⁵³⁶ *Id.* at 708.

⁵³⁷ *Id.* at 708–709.

⁵³⁸ *Id.* at 709.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* at 709–710.

⁵⁴² *Id.* at 710. See also *United States v. Respress*, 9 F.3d 483 (6th Cir. 1993) (seizing a bag at an airport after the passenger refused consent to search and then departed was justified under the facts of the case to prevent the disappearance of evidence so officers could obtain a search warrant). The courts also may consider seizing currency to be different than seizing luggage, especially when it is carried on the person. The Sixth Circuit observed: "privacy interests in luggage are of a different order than the privacy interests in personal effects carried on the person. ... [t]hus, a greater expectation of privacy exists in items carried on one's person. Probable cause is required to justify the seizure of such items." *United States v. Fifty-Three Thousand Eighty-Two Dollars in U.S. Currency*, \$53,082.00, 985 F.2d 245, 249 (6th Cir. 1993) (officers seized currency without reasonable suspicion or probable cause when passengers disclosed they were carrying \$45,000 in their socks, and the officers told the passengers that they would subject the currency to a dog sniff).

In *United States v. Jacobsen*,⁵⁴³ the Supreme Court considered the effect of law enforcement detaining a package after a private party had intruded into the package. In *Jacobson*, a private freight carrier's employees damaged a package and then observed a white powdery substance within eight layers of wrappings.⁵⁴⁴ They opened the package to examine its contents in accordance with a written company policy regarding insurance claims. Then they put the bag of powder back in the box and called a federal agent. When the agent arrived, he removed the contents of the box, saw the powder, removed a trace of the powder for testing, and determined that the powder was cocaine.⁵⁴⁵ Other agents arrived and retested the powder, and they then obtained a warrant for the address on the package and made arrests.⁵⁴⁶

The Court noted that it has “consistently construed this [the Fourth Amendment’s] protection as proscribing only governmental action; it is wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.’”⁵⁴⁷ It determined that this parcel “was unquestionably an ‘effect’ within the meaning of the Fourth Amendment.”⁵⁴⁸ However, “the fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent cannot render otherwise reasonable official conduct unreasonable.”⁵⁴⁹ The Court thus determined that the “initial invasions of respondents’ package were occasioned by private action” and “did not violate the Fourth Amendment because of their private character.”⁵⁵⁰

The Court then determined that the “additional invasions of respondents’ privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search.”⁵⁵¹ First, it noted that the government may use information that is revealed by a private party: “Once frustration of the original expectation of privacy occurs, the

Fourth Amendment does not prohibit governmental use of the now-nonprivate information.”⁵⁵² Then the Court determined that even if the powder had not been in “plain view” when the agent arrived, “there was a virtual certainty that nothing else of significance was in the package.”⁵⁵³ As such, the scope of the agent’s search would not exceed the scope of the search by the private employees. The agent also could “utilize the Federal Express employees’ testimony concerning the contents of the package.”⁵⁵⁴ The agent thus did not infringe on the package owner’s privacy to “reexamine the contents of the open package.”⁵⁵⁵ The package owner:

[C]ould have no privacy interest in the contents of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents. The agent’s viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.⁵⁵⁶

The Court also determined that “[w]hile the agents’ assertion of dominion and control over the package and its contents did constitute a ‘seizure,’ that seizure was not unreasonable.”⁵⁵⁷ Where there is probable cause to believe a container contains contraband, “[s]uch containers may be seized, at least temporarily, without a warrant.”⁵⁵⁸

Finally, the Court determined that although the agents’ chemical field test exceeded the scope of the private search and was an additional intrusion, “[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”⁵⁵⁹ Like a sniff by a trained narcotics dog, it can only reveal contraband.⁵⁶⁰ The Court also determined that destroying some of the powder for testing was reasonable because of substantial law enforcement interests that justified the procedure compared to a *de minimis* loss of property that was contraband.⁵⁶¹ Under these circumstances, “the safeguards of a

⁵⁵² *Id.* at 117.

⁵⁵³ *Id.* at 119.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* at 120–121.

⁵⁵⁸ *Id.* at 121–122.

⁵⁵⁹ *Id.* at 123.

⁵⁶⁰ *Id.* at 123–124. *See also* *Illinois v. Caballes*, 543 U.S. 405 (2005) (use of a trained narcotics dog during a lawful traffic stop does not implicate legitimate privacy interests because it can only detect contraband).

⁵⁶¹ *Jacobson*, 466 U.S. at 125.

⁵⁴³ 466 U.S. 109 (1984).

⁵⁴⁴ *Id.* at 111.

⁵⁴⁵ *Id.* at 111–112.

⁵⁴⁶ *Id.* at 112.

⁵⁴⁷ *Id.* at 113 (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)).

⁵⁴⁸ *Id.* at 114.

⁵⁴⁹ *Id.* at 114–115.

⁵⁵⁰ *Id.* at 115.

⁵⁵¹ *Id.*

warrant would only minimally advance Fourth Amendment interest. This warrantless ‘seizure’ was reasonable.”⁵⁶²

CONCLUSION

The Fourth Amendment involves many issues in addition to those presented in this digest. This digest, however, provides an overview of airport-specific concerns to assist with a general understanding of those issues and provide a starting point for additional research. As these airport cases illustrate, an airport’s context is an important factor affecting how Fourth Amendment issues at an airport are evaluated by the courts, whether the government is taking administrative action to inspect for safety hazards or taking law enforcement action to enforce criminal laws at an airport.

⁵⁶² *Id.* The courts have also considered stops involving cars and ground transportation. In general, the Supreme Court recognizes an “automobile exception” to the Fourth Amendment’s warrant requirement: see *Maryland v. Dyson*, 527 U.S. 465 (1999) (officers may search a car without a warrant if it is readily mobile and probable cause exists to believe it contains contraband); *United States v. Ross*, 456 U.S. 798 (1982) (officers may search a car without a warrant if the search is confined to places where there is probable cause to find contraband); *Arizona v. Gant*, 556 U.S. 332 (2009) (officers may search a vehicle pursuant to arrest if the arrestee can reach areas at the time of the search or officers reasonably believe the car contains evidence of the offense of arrest); *Illinois v. Caballes*, 543 U.S. 405 (2005) (a dog sniff was not a search and lawful when it did not extend a lawful traffic stop). For some discussion of ground transportation, see *United States v. Pina-Lopez*, 2013 WL 867430, at 6 (D. Oregon, 2013) (citing First and Fifth Circuit opinions upholding searches of ground transportation passengers based on third-party consent, but noting a lack of Ninth Circuit precedent and noting that such consent should not apply in the context of the seizure of a passenger).

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