FROM STATE TORT TO FEDERAL LIABILITY:

An FTCA Field Guide for Minnesota Practitioners

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THIS PRACTITIONERS' GUIDE offers a practical roadmap for Minnesota attorneys seeking to bring claims under the Federal Tort Claims Act for actions arising from immigration-enforcement activity. Because the FTCA permits suit against the United States only where a private person would be liable under applicable state tort law, the Guide translates federal officer misconduct into potential Minnesota tort analogues, including assault, battery, false imprisonment, negligent supervision, conversion, trespass, and nuisance. It also identifies the principal obstacles likely to arise, including scope-of-employment requirements, the intentional-tort exception, the discretionary-function exception, the detention-of-goods exception, and Minnesota official-immunity doctrine. Finally, the Guide walks through the mechanics of FTCA litigation—from administrative presentment and pleading through discovery, trial, and damages—and applies those principles to recurring fact patterns involving immigration officers. The result is a resource designed to help practitioners assess claim viability, anticipate defenses, and craft litigation strategies in a complex and highly fact-dependent area of federal liability.

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> "It is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals."
>
> —ABRAHAM LINCOLN[1]

INTRODUCTION

This Practitioners' Guide provides a practical resource to assist Minnesota attorneys who seek to bring claims against immigration officers under the Federal Tort Claims Act (FTCA). It is written for counsel who may be unfamiliar with the FTCA, Minnesota tort law, or both. Its purpose is to help lawyers identify viable Minnesota tort analogues, anticipate the government's principal sovereign-immunity and merits defenses, and understand the mechanics of litigating an FTCA claim from pleading through trial.

This Guide proceeds in seven parts. Part I explains the basic structure of FTCA liability. Part II sketches the Minnesota tort theories most likely to arise from immigration-enforcement operations. Part III addresses scope of employment, because an FTCA plaintiff must show that the tort was committed by a federal employee acting within the scope of employment as defined by applicable state law. Part IV analyzes the FTCA defenses most likely to arise in these cases. Part V addresses how Minnesota's official-immunity doctrine may affect FTCA claims against federal immigration officers. Part VI lays out the mechanics of litigating an FTCA claim, from administrative presentment through pleading, motion practice, discovery, and trial. Finally, Part VII applies those principles to recurring fact patterns involving immigration officers, with an emphasis on claim selection, likely defenses, and issues requiring further factual development.

This Guide is intended to be a practical resource, not a substitute for counsel's independent legal judgment. FTCA cases are often highly fact dependent, and claim viability may turn on evolving federal precedent, disputed jurisdictional facts, and case-specific questions about state-law analogues, privilege, and immunity. Counsel should therefore independently consult current authorities, verify all cited propositions, and tailor any pleading or litigation strategy to the facts and procedural posture of the particular matter. In compiling this information, we are neither providing legal advice nor supplanting careful consideration by counsel.

[1] CONG. GLOBE, 37th Cong., 2d Sess. app. at 2 (1862).

I. THE FEDERAL TORT CLAIMS ACT: A Primer

This introductory Part offers an overview of the FTCA.

Enacted in 1946, the FTCA supplies a limited waiver of sovereign immunity. It authorizes damages suits against the United States "for injury or loss of property, or personal injury or death" caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).

In so doing, the FTCA does not create new substantive tort law. Instead, it asks whether a private person would be liable under the relevant state's tort rules for the challenged conduct and it borrows that law for the plaintiff's claim. *Id.* § 1346(b)(1); *see Richards v. United States*, 369 U.S. 1, 7 (1962) (explaining that, in enacting the FTCA, Congress did not mint new substantive law but, rather, chose "to build upon the legal relationships formulated and characterized by the States"); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.2 (2016) ("As a basic proposition, the United States is liable under the FTCA on the same basis and to the same extent as recovery would be allowed for a tort committed under like circumstances by a private person in that state."); Eric Wang, Note, *Tortious Constructions: Holding Federal Law Enforcement Accountable by Applying the FTCA's Law Enforcement Proviso over the Discretionary Function Exception*, 95 N.Y.U. L. REV. 1943, 1950 (2020) (explaining that "the FTCA piggybacks off of state tort law in that the federal government's consent to suit is only for claims that would exist against a private individual in the state of the claim's occurrence").

To bring an FTCA claim, therefore, a plaintiff must show that:

- She was the victim of a tort recognized by state law (i.e., that a private person who did what the federal employee did would be liable under the relevant state-law rule);
- The tort was committed by a federal employee acting within the scope of his or her employment (as defined under the applicable state law);
- In inflicting injury, the federal employee behaved negligently or intentionally. (Per *Laird v. Nelms*, 406 U.S. 797 (1972), by authorizing the recovery of damages for the "negligent or wrongful act or omission of any employee of the Government," the FTCA does not authorize suit against the government on claims based on strict liability for ultrahazardous activities.); and
- No FTCA exception immunizes the federal government for the particular tortious conduct.

II. MINNESOTA STATE LAW CLAIMS

Because the FTCA looks to "the law of the place where the act or omission occurred," the plaintiff must show that she was the victim of a tort recognized by state law. 28 U.S.C. § 1346(b); *accord Washington v. Drug Enf't Admin.*, 183 F.3d 868, 874 (8th Cir. 1999) (explaining that "constitutional tort claims are not cognizable under the FTCA").

In suits arising from the actions of immigration officials, the most promising Minnesota tort theories are likely to be (1) assault, (2) battery, (3) false imprisonment, (4) intentional infliction of emotional distress, (5) negligent hiring, retention, or supervision, (6) conversion, (7) trespass to land, (8) trespass to chattels, and (9) nuisance. For each tort, this Part identifies the elements and the principal state-law privileges or defenses. This Part also discusses the Minnesota Human Rights Act but concludes that the Act likely cannot serve as the basis for an FTCA claim. All tort claims remain subject to the FTCA's other requirements and exceptions, discussed below in Parts III and IV.

A ASSAULT

To state a claim for assault, the plaintiff must show that (1) the defendant made an "unlawful threat to do bodily harm," (2) the threat caused the plaintiff "reasonable apprehension" of bodily harm, and (3) the threat was "inten[ded]" to cause such apprehension. *Dahlin v. Fraser*, 288 N.W. 851, 852 (Minn. 1939). Intent can be inferred from circumstances such as "exhibitions of anger, threats, [and] gestures." *Id.* at 853. And, transferred intent appears to suffice. *See* RESTATEMENT (SECOND) OF TORTS § 21(1) (AM. L. INST. 1965) (stating that a defendant "is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other *or a third person*, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension") (emphasis added); 4A MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES—CIVIL 60.20 (6th ed. 2025) (authorizing a claim for assault, even if the intent was directed at "another").

The threat must be paired "with present ability to carry the threat into effect." *Dahlin,* 288 N.W. at 852; *see Longtin v. Pollard*, 2020 WL 5507808, at *3 (Minn. Ct. App. 2020) (the "plaintiff must show both immediacy of the threatened harm and the defendant's contemporaneous or present display of force or ability to carry out the threat"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, LAW OF TORTS § 39 (2d ed. 2025) ("Many opinions have asserted . . . that the defendant must have the apparent present ability to complete the [threatened] battery . . . . [The plaintiff] must in fact conclude that the threatened battery is imminent, meaning that it will occur without delay unless an intervening force prevents it or the plaintiff is able to flee."). "It is an assault to shake a fist under another's nose, to aim or strike another with a weapon, or to hold it in a threatening position, to rise or advance to strike another, to surround another

with a display of force, [or] to chase another in a hostile manner." W. Page Keeton et al., Prosser and Keeton on Torts § 10 (5th ed. 1984).

When words are uttered "under conditions indicating present ability to carry out the threat," they may be sufficient to cause reasonable apprehension of bodily harm. *Id.* However, mere words in isolation will not suffice. *E.g.*, *Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988) (affirming dismissal of assault claim where officers did not point a shotgun at the plaintiff or threaten the plaintiff with it); *Scheffler v. Costco Wholesale Corp.*, 2024 WL 5244999, at *4 (Minn. Ct. App. 2024), *rev. denied* (Minn. 2025) (finding that the plaintiff's claimed apprehension of bodily harm was not reasonable when an employee pursued him to demand to see his receipt before he exited the store).

Synthesizing these elements, Minnesota's civil jury instruction for "cases involving civil assault" states that an assault occurs when:

> 1. *(Defendant)* acted with the intent to cause apprehension or fear of imminent *(harm to) (offensive contact with) (plaintiff) (or another) [or intended to cause an imminent harmful or offensive contact with (plaintiff) (or another)]*, and
>
> 2. *(Defendant)* had the apparent ability to cause the *(harm) (offensive contact)*, and
>
> 3. *(Plaintiff)* had a reasonable apprehension or fear that the imminent *(harm) (offensive contact)* would occur.
>
> A contact is "imminent" if it will happen without significant delay.

Minnesota Practice, *supra*, at 60.20.

B BATTERY

"The essential elements of battery are intent and contact." *Schumann v. McGinn*, 240 N.W.2d 525, 529 (Minn. 1976); *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980); *see also* Keeton et al., *supra*, § 9 ("A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third party to suffer such a contact, or apprehension that such a contact is imminent, is a battery."). Without contact, there is no battery. *See Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988).

> Distilling these elements, the relevant jury instruction provides:
>
> A battery occurred if it is proved that *(defendant)* intentionally caused harmful or offensive contact with *(plaintiff) (or anything worn or held by or closely connected to (plaintiff))*.

[It was still a battery, if (defendant) did not intend to make contact with (plaintiff), but did intend to make contact with someone or something else.]

[The contact may be caused directly or indirectly.]

MINNESOTA PRACTICE, *supra*, at 60.25.

Regarding intent, the plaintiff need not show that the defendant intended to harm the plaintiff. Instead, a defendant is subject to liability for battery when he intentionally caused offensive bodily contact, DOBBS ET AL., *supra*, § 35, or knew "with substantial certainty" that bodily contact would result from his actions, RESTATEMENT (SECOND) OF TORTS § 18 cmt. e (AM. L. INST. 1965). *See Miller v. Lewis ex rel. Est. of Pavelich*, 2024 WL 4195602, at *4 (Minn. Ct. App. 2024) (reaffirming that intent exists where the actor desires the consequences of the act or believes they are substantially certain to result). Intent may be inferred from the surrounding circumstances. *See, e.g.*, *id.* at *8 (finding that intent could be inferred from the fact that the tortfeasor struck the plaintiff with a heavy metal pipe eight times); *Plath v. Plath*, 428 N.W.2d 392, 393 (Minn. 1988) (reversing dismissal of battery claim where the court of appeals had found that defendant "may have intended to keep his wife away, but he did not intend to create an offensive contact" (citation omitted)).

As the jury instruction makes plain, the defendant need not intend to make contact with the plaintiff *in particular*. Thus, Minnesota courts have recognized battery where the defendant initially intended to make unlawful contact with someone other than the injured plaintiff. *E.g.*, *Corn v. Sheppard*, 229 N.W. 869, 870–71 (Minn. 1930) (affirming a finding of battery where the defendant intended to shoot a dog but accidentally shot the plaintiff).

In addition to being intended, the contact must also be "unpermitted [and] offensive." *Johnson v. Morris*, 453 N.W.2d 31, 40–41 (Minn. 1990); *Paradise*, 297 N.W.2d at 155. Contact is offensive when it "offend[s] a reasonable sense of personal dignity." *MacNeil Env't, Inc. v. Allmon*, 2002 WL 767754, at *2 (Minn. Ct. App. 2002) (quoting RESTATEMENT (SECOND) OF TORTS § 19 (AM. L. INST. 1965)) (finding that a colleague rubbing the plaintiff's head, though unpermitted, would not have offended a reasonable person). Thus, inoffensive contact is insufficient, even if the unwelcome contact nevertheless caused harm. *See, e.g.*, *Cent. Sur. Co. v. Sutherland*, 2007 WL 1378386, at *1–2 (D. Minn. 2007) (finding that the question of whether the defendant intended *offensive* contact should go to the jury even though defendant's unpermitted contact with the plaintiff's buttocks caused her bladder pacemaker to fail); DOBBS ET AL., *supra*, § 34.

The unpermitted and offensive contact, however, need not cause *significant* harm. Even minimal offensive contact is sufficient to maintain a battery claim. *See, e.g.*, *Plath*, 428 N.W.2d at 393 (affirming the trial court's finding of battery where a husband "swung his arm back to ward off" his wife); *Smith v. Hubbard*,

91 N.W.2d 756, 760, 764 (Minn. 1958) (finding battery where defendant "grabbed [the plaintiff] by the shirt and pushed him against a building," resulting in a torn shirt and broken badge); *see also* DOBBS ET AL., *supra*, § 36 (noting that contact that is not harmful but is "simply against the plaintiff's will" may be sufficient); *State v. Dorn*, 887 N.W.2d 826 (Minn. 2016) (finding that criminal battery may be satisfied by "even the slightest offensive touching" (citation omitted)); KEETON ET AL., *supra*, § 9 ("Spitting in the face is a battery, as is forcibly removing the plaintiff's hat, or any other contact brought about in a rude or insolent matter.").

No published Minnesota case has directly addressed whether battery extends to contact with objects attached to or identified with the plaintiff's person, such as a cane, purse, or phone. However, because in *Schumann v. McGinn*, 240 N.W.2d 525, 529 (Minn. 1976), the Minnesota Supreme Court expressly adopted Restatement (Second) § 18, and because a comment to § 18 unambiguously includes contact with clothing and related objects, it is highly probable that a Minnesota court would endorse such a claim. *See* RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (AM. L. INST. 1965) (explaining that, for a battery, "it is not necessary that the plaintiff's actual body be disturbed" but instead includes "anything so connected with the body as to be customarily regarded as part of the other's person . . . such as clothing or a cane or, indeed, anything directly grasped by the hand"); KEETON ET AL., *supra*, § 9 (instructing that a battery can also be shown if the "unpermitted contact" is with an object "attached" to the body and "practically identified with it," such as the plaintiff's clothing or "any other object held in the plaintiff's hand" and emphasizing that "the interest in the integrity of [a] person includes all those things which are in contact or connected with the person").

Minnesota courts also have not directly addressed whether usage of chemical agents can constitute a battery claim, but the Second Restatement § 18 (which, again, Minnesota has expressly adopted) recognizes battery by indirect contact. A comment to § 18 provides: "All that is necessary [for battery] is that the actor intended to cause the other, directly or indirectly, to come in contact with a foreign substance in a manner which the other will reasonably regard as offensive" which includes "throw[ing] a substance, such as water, upon the other." RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (AM. L. INST. 1965). Likewise, Minnesota's jury instruction advises that "[t]he contact [at the root of a battery claim] may be caused directly or indirectly." MINNESOTA PRACTICE, *supra*, at 60.25. The rationale underlying the doctrine is also consistent with Minnesota's general approach, which asks whether the contact "offends a reasonable sense of personal dignity." *MacNeil*, 2002 WL 767754, at *2. Taken together, these theories suggest that use of a chemical agent would be sufficient to demonstrate contact; Minnesota courts faithfully applying the law should so find.

Then, in battery cases against law enforcement officers, the law enforcement privilege looms large. Minnesota law allows officers to use reasonable force to arrest or detain an individual, but excessive force

is "unpermitted and thus constitute[s] a battery." *Paradise*, 297 N.W.2d at 155–56. To define the scope of the law enforcement privilege for state and local officers, Minnesota courts look to the state's criminal statutes defining an officer's reasonable use of force. *See Schumann*, 240 N.W.2d at 537; *Paradise*, 297 N.W.2d at 155 (citing MINN. STAT. ANN. § 629.32 (West 2026)). The plaintiff bears the burden of showing that a law enforcement officer's use of force was unreasonable. *Johnson v. Peterson*, 358 N.W.2d 484, 485 (Minn. Ct. App. 1984).

Under Minnesota Statutes § 629.32, law enforcement officers "may not subject the person arrested to any more restraint than is necessary for the arrest and detention." Therefore, any force beyond what is necessary to effectuate the arrest may be considered excessive and therefore beyond the scope of the privilege. *Compare Paradise*, 297 N.W.2d at 155–56 (reversing the trial court's grant of a directed verdict to the defendant on the plaintiff's battery claim because a reasonable jury could determine there was "no need to apply the handcuffs and lift plaintiff from the ground in the manner described"), *and Rozycki v. City of Champlin*, 2016 WL 7493619, at *15, *17 (D. Minn. 2016) (finding that a jury could find excessive force based on testimony that officers "placed [the plaintiff] in a chokehold, forcibly took him to the ground at any point after he was handcuffed, or slammed him against a car," even if the officers had probable cause to arrest), *with Johnson*, 453 N.W.2d at 40–41 (finding the force used during handcuffing insufficient to constitute battery where handcuffing was clearly "permitted by law" and the plaintiff did not complain that the cuffs were too tight at the time), *and Hageman v. Morrison County,* 2022 WL 1110164, at *6 (D. Minn. 2022) (recommending summary judgment based on finding that the jail official's use of force was no more "than the minimum necessary" to stop the plaintiff from moving further into a restricted area), *report and recommendation adopted*, 2022 WL 897721 (D. Minn. 2022). Though courts often point to the "necessary" language from Minnesota statutes as the governing standard for excessive force, they sometimes ultimately employ an analysis similar to Fourth Amendment excessive force claims. *See, e.g.*, *Ross v. Reiter*, 2016 WL 11031223, at *7 (D. Minn. 2016) (noting that the principal question to determine a battery claim is whether the officer "used more force than was necessary" but concluding that this ultimately requires "the same legal analysis as [a Fourth Amendment claim]—whether [the officer] acted as an 'objectively reasonable' officer"); *Rozycki*, 2016 WL 7493619, at *17 (relying on the court's earlier Fourth Amendment excessive-force analysis and concluding that, if the officers used excessive force, their conduct would support a Minnesota battery claim). *But see Olson v. City of Austin*, 386 N.W.2d 815, 817 (Minn. Ct. App. 1986) (finding that "the standard for a [constitutional] violation" regarding excessive force is "higher" than the standard under Minnesota tort law).

Negligent or reckless conduct by the victim is not a defense to battery, even if it contributed causally to the injury. *Florenzano v. Olson*, 387 N.W.2d 168, 175 (Minn. 1986) ("Without question, principles of comparative negligence would not apply to an intentional tort; we have never so applied them."); *Schumann*, 240 N.W.2d at 530 (finding that jury instructions framed solely in terms of negligence constituted reversible error in an

excessive force case where plaintiff alleged both negligence and battery in part because negligent conduct of the victim is irrelevant to a battery claim).

C FALSE IMPRISONMENT OR ARREST

False imprisonment in Minnesota requires: "(1) words or acts intended to confine, (2) actual confinement, and (3) awareness by the plaintiff that he is confined." *Blaz v. Molin Concrete Prods. Co.*, 244 N.W.2d 277, 279 (Minn. 1976) (citing RESTATEMENT (SECOND) OF TORTS § 35 (AM. L. INST. 1965)); *Jones v. Walgreens Co.*, 2012 WL 1658895, at *2 (Minn. Ct. App. 2012) (quoting *Blaz*, 244 N.W.2d at 279). "Any confinement that is not legally justified constitutes false imprisonment." *Jones*, 2012 WL 1658895, at *2 (citing *Kleidon v. Glascock*, 10 N.W.2d 394 (Minn. 1943)). But there is no claim if the plaintiff "is aware of a reasonable means of escape" that would not risk material harm. *Id.* (quoting *Peterson v. Sorlien*, 299 N.W.2d 123, 128 (Minn. 1980)).

Synthesizing these elements, the relevant jury instruction provides that a defendant is liable for false imprisonment if:

> 1. *(Defendant)* intentionally restricted the physical liberty of *(plaintiff)* by words or acts, and
> 2. *(Plaintiff)* was aware of the words or acts *[or was harmed by them].*
>
> [This restriction may be caused by words or by acts, including:
>
> 1. The use of physical barriers, or
> 2. The use of physical force, or
> 3. The threat of the immediate use of physical force.
>
> It must be proved that *(plaintiff)* believed *(defendant)* had the ability to carry out the threat.]

MINNESOTA PRACTICE, *supra*, at 60.70.

As the jury instruction indicates, in order to show that she was confined, the plaintiff need not show that she was actually held in a closed space. Instead, confinement can be shown in a variety of other ways. *Scheffler*, 2024 WL 5244999, at *4 (noting that confinement may include the use of physical force, physical barriers, or threats of physical force).

For starters, a "defendant's *threat* of force" may be sufficient to show confinement if the threat would produce a "reasonable apprehension that force would be used if [the plaintiff] did not submit." *Scheffler*, 2024

WL 5244999, at *4–5 (quoting *Durgin v. Cohen*, 209 N.W. 532, 533 (Minn. 1926)) (emphasis in original); RESTATEMENT (SECOND) OF TORTS § 40A cmt. a (AM. L. INST. 1965) ("[T]here may be confinement by submission to a threat to inflict harm upon a member of the other's immediate family, or his property."); KEETON ET AL., *supra*, § 11 ("The restraint may be by . . . threats of force which intimidate the plaintiff into compliance with orders. It is sufficient that the plaintiff submits to an apprehension of force reasonably to be understood from the conduct of the defendant, although no force is used or even expressly threatened."). Given this flexibility, a plaintiff may be considered "confined" for purposes of a false-imprisonment claim "when [she is] restrained in the open street, or in a traveling automobile, or when confined to an entire city." KEETON ET AL., *supra*, § 11.

Compelled movement can constitute a false imprisonment. *Blaz*, 244 N.W.2d at 279 (explaining that confinement may also be established by a threat that compels the plaintiff "to go where he does not wish to go"); *see also* RESTATEMENT (SECOND) OF TORTS § 36 cmt. c (AM. L. INST. 1965) ("If the actor by force or threats of force, or by exerting legal authority, compels another to accompany him from place to place, he has as effectively confined the other as though he had locked him in a room."); KEETON ET AL., *supra*, § 11 (explaining that a plaintiff can state a false-imprisonment claim if she was "compelled to go along with the defendant"). This principle—which continues to be clearly articulated in Minnesota's pattern jury instructions—has a long lineage. Exactly 100 years ago, the Minnesota Supreme Court declared in *Durgin v. Cohen*, 209 N.W. 532, 533 (Minn. 1926), that "any unlawful exercise or show of force, by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go, is actionable."

Nor does Minnesota impose a fixed minimum duration for false imprisonment. Rather, the restraint's duration plus its circumstances determines whether the restraint constituted actual confinement. *See* DOBBS ET AL., *supra*, § 41 ("Nor need the plaintiff show confinement for a substantial length of time. Unless the defendant is privileged, a confinement for 'any appreciable time, however short' is actionable."). *Compare Anderson v. Averbeck*, 248 N.W. 719, 719–20 (Minn. 1933) (affirming a judgment for false imprisonment based on "unreasonable" delay where the plaintiff was detained without being brought before a magistrate from Friday to the following Tuesday), *and Kor*, 2000 WL 558067, at *3 (disagreeing with the trial court that seventeen minutes is by definition "too brief to constitute false imprisonment" where the plaintiff "was taken to a room where she was not allowed to leave until the police arrived"), *with Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988) (affirming dismissal of false-imprisonment claim because "the record shows not confinement but 'a very brief restraint of the right of the Plaintiffs to go to their son'"), *Warner v. Jordan*, 1998 WL 157363, at *5 (Minn. Ct. App. 1998) (finding that appellant's detention for thirty minutes was not "unreasonable" where officers had to search for her VIN number and, given this finding, concluding that the appellant was not falsely imprisoned), *and State v. Dokken*, 312 N.W.2d 106, 107 (Minn. 1981) (holding, in a criminal case, that less than ten total minutes of binding was insufficient for false imprisonment).

1. False Arrest Is a Species of False Imprisonment

Minnesota law recognizes false arrest as a specific form of false imprisonment; it occurs when the confinement is imposed through asserted—but, in fact, invalid—legal authority. *Lundeen v. Renteria*, 224 N.W.2d 132, 135 (Minn. 1974) ("The restraint may be imposed by the assertion of legal authority, and if an arrest is made without proper legal authority, it is a false arrest, and so false imprisonment."). Thus, a plaintiff states a claim for false arrest by showing "(1) an arrest performed by defendant, and (2) the unlawfulness of such arrest." *Id.*

To determine the unlawfulness of an arrest, Minnesota courts look to whether the arresting officer acted within—or exceeded—his statutory or common-law authority. *Id.* at 136. *See, e.g.*, *Altman v. Knox Lumber Co.*, 381 N.W.2d 858, 861 (Minn. Ct. App. 1986) (considering whether a store security officer had legal justification to detain a potential shoplifter based on Minnesota Statutes § 629.366, which establishes that a merchant may detain suspected shoplifters if the detention is supported by probable cause); *Johnson v. Morris*, 453 N.W.2d 31, 36 (Minn. 1990) (holding that false-arrest and false-imprisonment claims failed because the officer's arrest was authorized by Minnesota Statutes § 629.34, which permits warrantless arrests under specified conditions); *Lundeen*, 224 N.W.2d at 136 (affirming directed verdict against false-arrest and false-imprisonment plaintiff who was arrested after entering television station with a stick of dynamite, because the officer had probable cause for a warrantless arrest under Minnesota Statutes § 629.34); *see also, e.g.*, *Celestine v. United States*, 841 F.2d 851, 853 (8th Cir. 1988) (finding legal justification that defeated the plaintiff's false-imprisonment claim where the plaintiff was mentally ill and Missouri recognized a common-law principle allowing the detention of mentally ill patients under certain circumstances).

In an FTCA claim, federal officers may be able to claim that their actions are "legally justifiable," and therefore do not constitute false imprisonment / false arrest under Minnesota law, based on federal authorization. Though the Eighth Circuit has not addressed the question, other circuits have found that where state law requires the plaintiff to show that the defendant acted in excess of his statutory or common-law authority in order to state a claim of false imprisonment, federal law can provide the authority (and thus doom the plaintiff's claim). In *Rhoden v. United States*, 55 F.3d 428, 430 (9th Cir. 1995), for instance, the Ninth Circuit noted that California law defines false imprisonment as confinement "without lawful privilege." The court decided that, to assess whether the arrest was or was not privileged, the court could look to federal law. *Id.* at 431. Therefore, the liability of Immigration and Naturalization Service agents depended on whether they "complied with applicable federal standards when they detained [plaintiff]." *Id.*

Similarly, in *Liranzo v. United States*, the Second Circuit found that New York law required a plaintiff claiming false imprisonment to prove that they had been confined and "*the confinement was not otherwise*

privileged." 690 F.3d 78, 95 (2d Cir. 2012) (emphasis in original) (citation omitted). When applying this New York standard to Immigration and Customs Enforcement (ICE) officers under the FTCA, "whether the ICE agents' actions here were 'otherwise privileged' [wa]s determined by consulting federal privileges applicable to federal immigration officers." *Id.*[2]

2. The Regulatory Architecture: When ICE Officers Can (and Can't) Detain U.S. Citizens and Others Entitled to be in the United States

Given that federal authority may supply the legal justification that defeats a Minnesota false-arrest or false-imprisonment claim, we must grapple with the precise limits of ICE officers' statutory, regulatory, and constitutional authority.

So long as a stop is supported by reasonable suspicion, immigration officers may, without a warrant, "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1); *see also* 8 C.F.R. § 287.8(b)(2) ("If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in any offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning."). For the reasonable suspicion requirement, see *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975) (holding that roving immigration officers may briefly stop a vehicle for immigration questioning only on reasonable suspicion); and *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 1 (2025) (Kavanaugh, J., concurring) (summarizing this standard). Reasonable suspicion depends on the totality of the circumstances, and "apparent ethnicity alone cannot furnish reasonable suspicion." *Vasquez Perdomo*, 146 S. Ct. at 3; *see, e.g.*, *Hussen v. Noem*, 2026 WL 657936, at *33, *43 (D. Minn. 2026) (finding that plaintiffs were likely detained in violation of the Fourth Amendment where immigration officials encountered plaintiffs while they were "going about their daily business" and did not know plaintiffs' "identities before stopping them" and were therefore likely "based solely on their race"). But ethnicity "can be a 'relevant factor' when considered along with other salient factors." *Vasquez Perdomo*, 146 S. Ct. at 3 (quoting *Brignoni-Ponce*, 422 U.S. at 887).

Yet, these stops have to be brief. "[I]f the person is a U.S. citizen or otherwise lawfully in the United States,

[2] Courts, both in the Eighth Circuit and elsewhere, have sometimes relied on state law standards in order to determine whether confinement by federal officials was justifiable. However, these cases primarily concerned actions by federal officials that more closely mirror traditional state law enforcement activities, rather than immigration enforcement. See, e.g., Abreu-Guzman v. Ford, 241 F.3d 69, 75 (1st Cir. 2001) (looking to Puerto Rico law to determine whether DEA agents had acted with reasonable cause to detain plaintiffs); Scott v. United States, 952 F. Supp. 2d 13, 18–19 (D.D.C. 2013) (looking to D.C. standards to determine whether the Supreme Court Police had probable cause to arrest plaintiff); Cole v. United States, 874 F. Supp. 1011, 1034 (D. Neb. 1995) (looking to Nebraska law when determining whether FBI agents unlawfully confined plaintiffs during the execution of a search warrant). But where federal officers detain an individual for a suspected violation of federal law, courts may rely on federal standards of probable cause. See Gasho v. United States, 39 F.3d 1420, 1427–29 (9th Cir. 1994) (relying on federal standards of probable cause to determine whether Customs and Border Protection officers had lawful authority to detain the plaintiff for a potential violation of federal statute).

that individual will be free to go after the brief encounter." *Id.* So, once a person establishes citizenship or lawful presence, any continued restraint likely exceeds the officers' federal authority. This is key because, again, intentional confinement + no adequate justification = false arrest / false imprisonment. The key consideration in determining whether a stop, supported by reasonable suspicion, has (improperly) ripened into an arrest, is whether the detention has exceeded "the time reasonably needed to effectuate" the "law enforcement purposes to be served by the stop." *United States v. Sharpe*, 470 U.S. 675, 685 (1985); *see also United States v. Lopez-Tubac*, 943 F.3d 1156 (8th Cir. 2019) (applying *Sharpe*'s principles to ICE officers); *United States v. Quintana*, 623 F.3d 1237 (8th Cir. 2010) (same). This is a totality-of-the-circumstances inquiry. Accordingly, an extended detention—without more—does not necessarily transform the encounter into an arrest unless its duration was excessive, i.e., longer than reasonably necessary to effectuate legitimate law enforcement purposes. In *Sharpe*, 470 U.S. at 685, for example, a twenty-minute detention was upheld since the officer had "diligently" pursued his investigation throughout that period.[3]

Then, if the ICE officer has probable cause to believe that a noncitizen "is in the United States in violation of any such law or regulation," he may initiate an arrest. 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.8(c)(1)(i); *Quintana*, 623 F.3d at 1239. Again, this means that if officers lacked probable cause to believe the plaintiff was unlawfully present in the United States, the arrest falls outside their statutory authority—and, with it, the protections that authority affords.

Even where there is probable cause to believe an individual has committed a violation of immigration law, immigration officials may only arrest the individual without an administrative arrest warrant if he is "likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2); *Quintana*, 623 F.3d at 1241 (determining that, because he lacked a warrant, the Border Patrol agent was only entitled to arrest the individual if the agent had both probable cause to believe that the individual was illegally present in the country and that he was likely to escape if he wasn't arrested); *Hussen*, 2026 WL 657936, at *39 (finding, in a suit seeking injunctive relief against allegedly unlawful Department of Homeland Security policies in Minnesota, no evidence "that officers made an individualized inquiry into the arrestees' likeliness of disappearing or evading detention, as required by statute," and concluding that the plaintiffs were likely to succeed on their challenge to the defendants' warrantless-arrest policy, though ultimately denying preliminary injunctive relief on standing and irreparable-harm grounds). A warrantless arrest, then, may also give rise to a false-imprisonment claim, if (per 8 U.S.C. § 1357(a)(2)) a warrant should have been obtained.

But what if an ICE officer detains a U.S. citizen for his or her activity (for example) documenting the

[3] In determining whether a detention has escalated to an arrest, whether or not booking has occurred is not relevant. There is no statutory or regulatory booking requirement with which immigration officials must comply. *See* 8 U.S.C. § 1357 (discussing arrest authority but not prescribing any post-arrest processing mandates); *see also* 8 C.F.R. § 287.3 (regulating post-arrest procedures but not mentioning booking).

officer's activities? Here, an ICE officer has some limited authority to make arrests "for any offense against the United States" committed in their presence, "if the officer . . . is performing duties relating to the enforcement of the immigration laws at the time of the arrest." 8 U.S.C. § 1357(a)(5). One possible predicate offense is 18 U.S.C. § 111(a)(1), which prohibits "forcibly assault[ing], resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing]" with any federal officer "engaged in or on account of the performance of official duties." Yet, § 111 is narrow. The Eighth Circuit has made clear that its use of the word "forcibly" applies to every operative verb in the provision, so "[f]orce is a necessary element of any § 111 violation." *United States v. Schrader*, 10 F.3d 1345, 1348–49 (8th Cir. 1993) (finding the evidence sufficient to convict defendants under 18 U.S.C. § 111 but reversing because the jury instruction stated, "you do not have to forcibly resist, or forcibly oppose, or impede, intimidate or interfere in order to violate the statute"). Force may be satisfied by "proof of actual physical contact, or by proof of 'such a threat or display of physical aggression toward the officer as to inspire fear of pain, bodily harm, or death.'" *Id.* at 1348 (quoting *United States v. Walker*, 835 F.2d 983, 987 (2d Cir. 1987)). That modifier sharply limits any claim that peaceful observation, recording, or verbal criticism alone amounts to a § 111 offense. *Accord Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005) (reaffirming that observation alone is insufficient cause to arrest an individual for obstruction of justice—while observing "[i]n a democracy, public officials have no general privilege to avoid publicity and embarrassment by preventing public scrutiny of their actions"); *Chestnut v. Wallace*, 947 F.3d 1085, 1087 (8th Cir. 2020) (similar); Use of Potatoes to Block the Me.-Can. Border, 5 U.S. Op. O.L.C. 422, 426 (1981) (noting that "Immigration and Naturalization Service (INS) agents may only arrest for violations of the immigration laws, 8 U.S.C. §§ 1324(b), 1357 . . . .").

Department of Homeland Security (DHS) officers also have additional arrest authority on or near protected federal property. Under 40 U.S.C. § 1315, designated DHS officers and agents may protect federal property and persons on that property, including by making arrests without a warrant if the officer has "reasonable grounds to believe that the person to be arrested has committed or is committing a felony" under federal law. *Id.* § 1315(b)(2)(C). This includes authority to make arrests outside the federal property to the extent necessary to protect the property and persons on the property. *Id.* § 1315(a). The implementing regulations require compliance with the lawful directions of security personnel, prohibit obstruction of the usual use of or access to federal property, and forbid photographing or recording federal facilities in contravention of "any security regulation, rule, order, or directive." 6 C.F.R. §§ 139.30, 139.35, 139.65. That said, DHS's federal-property regulations also expressly permit recording in many places—including on public streets, sidewalks, parks, plazas, and publicly accessible interior areas—so long as it is not impeding or disrupting access to or operations on the federal property. *Id.* § 139.65.

The upshot is this: for each alleged confinement, counsel should break the encounter into stages—initial questioning, continued detention, arrest, transport—and identify the specific source of federal authority, if any, for that stage. Where officers lacked such authority, that defect helps show that the confinement

lacked legal justification under Minnesota law. As explored in Part IV.B below, it also helps establish that the challenged conduct was not the kind of discretionary policy judgment the FTCA shields.

3. The Agent's Justification: Part of Prima Facie Case or Affirmative Defense?

The last key question is whether the defendant's inadequate justification to confine the plaintiff is part of the plaintiff's prima facie case (such that the plaintiff bears the burden of production or persuasion) or an affirmative defense (such that the defendant bears the burden of production or persuasion). On this point, Minnesota law is a bit of a muddle. The answer to this question appears to depend on the context of the confinement: while justification is often an affirmative defense in the general false-imprisonment setting, false-arrest doctrine—where imprisonment occurs through asserted legal authority—treats unlawfulness as the plaintiff's burden.

According to the Minnesota *Jury Instruction Guides* for false imprisonment, the plaintiff is not required to demonstrate "a lack of consent" at the outset. Minnesota Practice, *supra*, at 60.70. Instead, "[p]rivilege, including proof of a valid arrest and actual or implied consent, is an affirmative defense." *Id.* This approach aligns with the three elements as set out in *Blaz*, where the court required only that a plaintiff show "(1) words or acts intended to confine, (2) actual confinement, and (3) awareness by the plaintiff that he is confined." 244 N.W.2d at 279.

However, in cases involving arrest or other detention *imposed through asserted legal authority*, Minnesota courts have stated that *the plaintiff* must allege the confinement was unlawful. In *Lundeen*, for instance, where the plaintiff's claim was framed as a false arrest, the court found that "the essential elements of the plaintiff's claim for relief are (1) an arrest performed by defendant, and (2) the *unlawfulness of such arrest*." 224 N.W.2d at 135 (emphasis added); *see also Kleidon v. Glascock*, 10 N.W.2d 394, 397 (Minn. 1943) (defining false imprisonment "as any imprisonment which is not legally justifiable" (citation omitted)); *Durgin v. Cohen*, 209 N.W. 532, 533 (Minn. 1926) ("Any *unlawful* exercise or show of force . . . is actionable.") (emphasis added). *See also Strei v. Blaine*, 996 F. Supp. 2d 763, 789–90 (D. Minn. 2014) (explaining that, "to prevail on a claim for false . . . arrest a plaintiff must prove that . . . the arrest was unlawful or without legal justification" and ultimately granting summary judgment based on the existence of probable cause); *Baker v. Holtz*, 2025 WL 2879200, at *3 (D. Minn. 2025) ("Under Minnesota law, the tort of false arrest requires a showing that the defendant made an arrest without proper legal authority." (citation modified)).

For pleading purposes, because the detentions at issue here were carried out by immigration officers acting under asserted legal authority, the wiser course is to plead explicitly that the arrest or detention constituted a confinement, was unlawful, and lacked legal justification.

D INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To state a claim for intentional infliction of emotional distress (IIED), the plaintiff must show:

1. The conduct of *(defendant)* was so extreme and outrageous that it passed the boundaries of decency and is utterly intolerable to the civilized community, and
2. The conduct was intentional or reckless, and
3. The conduct caused emotional distress to *(plaintiff)*, and
4. The distress was so severe that no reasonable person could be expected to endure it.

MINNESOTA PRACTICE, *supra*, at 60.75; *see Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438–39 (Minn. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. L. INST. 1965)).

The first element set forth above—the requirement that the defendant's conduct needs to be both "extreme and outrageous"—is demanding. To satisfy this standard, the conduct must be "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 865 (Minn. 2003) (citation omitted). And indeed, in operationalizing this standard, sometimes even very problematic conduct doesn't pass muster. *See, e.g.*, *id.* (finding that the district court erred in submitting an IIED claim to the jury because the defendant's alleged conduct—filing false police reports, making threats of legal action, and engaging in loud workplace arguments—did not amount to extreme and outrageous conduct); *Peterson v. HealthEast Woodwinds Hosp.*, 2015 WL 4523558, at *5 (Minn. Ct. App. 2015) (determining that neither asking an employee to engage in unethical or unlawful conduct nor verbally criticizing an employee was sufficient to support an IIED claim); *cf. Wenigar v. Johnson*, 712 N.W.2d 190, 207–08 (Minn. Ct. App. 2006) (affirming an IIED verdict for a plaintiff with cognitive disabilities who was belittled every day and forced to live in uninhabitable conditions).

The fourth element—the requirement that the plaintiff sustain "severe emotional distress"—also has bite. The plaintiff must show distress "no reasonable man could be expected to endure." *Hubbard*, 330 N.W.2d at 439 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. L. INST. 1965)). To satisfy this fourth element, proof of physical injury is not per se required, *Dornfeld v. Oberg*, 503 N.W.2d 115, 118 (Minn. 1993), but it is often "important," *Hempel v. Fairview Hosps. & Healthcare Servs., Inc.*, 504 N.W.2d 487, 492–93 (Minn. Ct. App. 1993). *See, e.g.*, *Wenigar*, 712 N.W.2d at 208 (finding that medical records showing the plaintiff experienced PTSD and medical testimony linking the condition to the defendant's conduct supported a finding of severe emotional distress). Indeed, courts tend to be skeptical of claims of severe emotional distress that are not accompanied by meaningful physical manifestations. *See Boykin v. Perkins Fam. Rest.*, 2002 WL 4548, at *2 (Minn. Ct. App. 2002) (explaining that "[m]edical testimony may

be required to substantiate physical manifestations of physical distress" where the plaintiff alleged only that her relationships suffered and that she was afraid to go to work but sought no medical treatment); *see, e.g.*, *Hubbard*, 330 N.W.2d at 439 (finding insufficient evidence of emotional distress where the plaintiff testified that he had been depressed and had stomach disorders as a result of the incident but never missed work or saw a doctor); *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn. Ct. App. 1995) (finding that "insomnia, crying spells, a fear of answering her door and telephone, and depression, which caused [the plaintiff] to seek treatment" were insufficient to show severe emotional distress, and that the plaintiff therefore failed to state a claim for IIED).

E NEGLIGENT HIRING, RETENTION, OR SUPERVISION

Next, a plaintiff may be able to claim that the particular officer's supervisor engaged in negligent hiring, retention, or supervision—and that this negligent hiring, retention, or supervision proximately caused the plaintiff's injury.

"An employer is negligent in hiring an employee if the employer knew or should have known that the employee posed a threat of physical injury to others." MINNESOTA PRACTICE, *supra*, at 55.20. Liability is based on the employer's negligence "in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat or injury to others." *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993), *rev. denied* (Minn.) (quoting *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983)).

Negligent retention is related but distinct. An employer is negligent in *retaining* an employee if: "1. The employer knew or should have known that the employee posed a threat of physical injury to others, and 2. The employer failed to take reasonable action. Reasonable action may include investigation, discharge, or reassignment of the employee." MINNESOTA PRACTICE, *supra*, at 55.30. The difference between negligent hiring and negligent retention hinges "on whether the employer was on notice that an employee posed a threat and failed to take steps to insure the safety of third parties." *Yunker*, 496 N.W.2d at 422.

Finally, an employer can be liable for negligent supervision. A negligent supervision claim may lie if "1. The employer failed to use reasonable care to supervise the activity of the employee, and 2. The activity posed a threat of physical injury to the employee or others," where "'[r]easonable care' is the care a reasonable person would use in the same or similar circumstances." MINNESOTA PRACTICE, *supra*, at 55.25; *see also Doe 121 v. Diocese of Winona*, 2018 WL 4558318, at *4 (Minn. Ct. App. 2018) ("To make out a successful claim for negligent supervision, the plaintiff must prove (1) the employee's conduct was foreseeable; and (2) the employer failed to exercise ordinary care when supervising the employee." (citation

omitted)). As the jury instruction makes plain, a negligent supervision claim is only available when the plaintiff is physically injured; economic injuries will not suffice. *See Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007) (explaining that "it is well established that a viable negligent-supervision claim must allege physical injury"); *Piper Jaffray Cos., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 967 F. Supp. 1148, 1157 (D. Minn. 1997) ("Minnesota courts have made clear that this tort may not be predicated upon economic loss. Rather, the doctrine . . . is unambiguously limited to situations involving the threat of personal injury.").

Negligent hiring, retention, and supervision claims are limited to claims that allege a physical injury or that the employee posed a threat of physical injury. *See Johnson*, 734 N.W.2d at 278 (holding that "a negligent hiring claim, like a negligent supervision claim, requires that the employer knew or should have known that the employee was violent or aggressive and might engage in injurious conduct," and concluding that the plaintiff's claim failed because he alleged only "emotional distress that may have caused heart problems and anxiety disorders," which "is not a physical injury"); *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992) (holding that economic harm alone is not sufficient to support a negligent supervision claim); *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440, 443 (Minn. Ct. App. 1996) (holding that physical injury, or apprehension of physical injury, is a required element of a claim for negligent supervision); *Yunker*, 496 N.W.2d at 422 (holding that liability for negligent hiring is imposed only when the employer knows or should have known that the employee was "violent or aggressive and might engage in injurious conduct"); *see also Ludwig v. Nw. Airlines, Inc.*, 98 F. Supp. 2d 1057, 1072 (D. Minn. 2000) (holding that the plaintiff's "negligent hiring and supervision claims likewise fail because she has not alleged the type of injury necessary to maintain such claims, namely, bodily injury or the threat of bodily injury").

"[C]urrent Minnesota law does not recognize a cause of action for negligent training." *Johnson*, 734 N.W.2d at 277.

F CONVERSION

"Conversion occurs where one willfully interferes with the personal property of another 'without lawful justification,' depriving the lawful possessor of 'use and possession.'" *Williamson v. Prasciunas*, 661 N.W.2d 645, 649 (Minn. Ct. App. 2003) (quoting *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997)); *see Hildegarde, Inc. v. Wright*, 70 N.W.2d 257, 259 (Minn. 1955). "The elements of common law conversion are: (1) plaintiff holds a property interest; and (2) defendant deprives plaintiff of that interest." *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 125 (Minn. Ct. App. 2017), *aff'd*, 913 N.W.2d 687 (Minn. 2018) (citation omitted).

Synthesizing Minnesota law, the "conversion" jury instruction provides that personal property has been

"converted" when a person:

> 1. Intentionally exercises control over an owner's personal property in a way that is contrary to the owner's right to the personal property, or
>
> 2. Intentionally destroys or changes the personal property, or
>
> 3. Intentionally deprives the owner of possession of the property permanently, or for an indefinite period of time.

MINNESOTA PRACTICE, *supra*, at 60.65.

Additionally, in order to state a claim for conversion, two other property-specific requirements must be satisfied. First, the plaintiff must actually own the property in question; he or she must have an "enforceable interest in the subject property." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 920 (Minn. Ct. App. 2008) (citation omitted); *Buzzell v. Citizens Auto. Fin., Inc.*, 802 F. Supp. 2d 1014, 1024 (D. Minn. 2011) ("The tort of conversion under Minnesota law requires proof that . . . the plaintiff has a property interest . . . .") (citation omitted). Second, the property must itself (usually) be "tangible" —something that can be "seen and touched." *TCI Bus. Cap., Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 429 (Minn. Ct. App. 2017).[4]

As is clear from the above jury instruction's repeated invocation of the word "[i]ntentionally," conversion requires intent. "There is no such thing as conversion by accident." DOBBS ET AL., *supra*, § 62. But the "intent required is the defendant's intent to exercise control of or dominion over the goods, no more." *Id.* "It is not necessary that the actor intend to commit what he knows to be a trespass or conversion." *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 586 (Minn. 2003) (quoting RESTATEMENT (SECOND) OF TORTS § 222 cmt. c (AM. L. INST. 1965)). Nor must the plaintiff show that the defendant acted with ill will or bad faith. *Hoyt v. Duluth & I. R. R. Co.*, 115 N.W. 263, 264 (Minn. 1908) ("Good faith, in an action of this nature, is not a defense."); DOBBS ET AL., *supra*, § 62 ("The defendant might believe the goods are his and that he has every right to deal with them, but, even so, he harbors the requisite intent if he intends to act upon the goods."). Instead:

> [I]ntent is shown either by the defendant's purpose to affect the goods in question or by his substantial certainty that they will be affected. For example, the defendant who intentionally seizes the plaintiff's automobile must be substantially certain that in taking the car he

[4] On occasion, Minnesota has recognized conversion claims for intangible property. *E.g.*, Dain Bosworth Inc. v. Goetze, 374 N.W.2d 467 (Minn. Ct. App. 1985) (recognizing conversion claim based on dividend shares); *see also* DOBBS ET AL., *supra*, § 63 (noting that conversion has traditionally been limited to tangible personal property, but some jurisdictions have expanded it to include documents that are an embodiment of an intangible right, such as paper money, promissory notes, or bonds).

> will also take the contents. Such a defendant thus intends to seize its contents, even if his only purpose is to repossess the car.

DOBBS ET AL., *supra*, § 62.

Still, not every intentional interference with the plaintiff's tangible personal property amounts to conversion. Conversion occurs through "exercise of dominion over the goods which is inconsistent with and in repudiation of the owner's right to the goods," or through conduct which "destroys or changes [the property's] character or deprives the owner of possession permanently or for an indefinite length of time." *Hildegarde, Inc.*, 70 N.W.2d at 259; *Bates v. Armstrong*, 603 N.W.2d 679, 682 (Minn. Ct. App. 2000) (finding that conversion is limited to "serious, major, and important interferences" (citation omitted)). In other words, "if the defendant behaved toward the chattel in a way that would suggest to an objective viewer that the defendant was the owner, he is a converter. If his behavior fell short of that, he may be no more than a mere trespasser to the chattel." DOBBS ET AL., *supra*, § 64.

Accordingly, Minnesota courts may be unlikely to find conversion where the deprivation is very brief, and the property is returned in one piece. *See Rudnitski v. Seely*, 452 N.W.2d 664, 668 (Minn. 1990) (defining conversion as "[a]n action which destroys the character of goods or deprives the owner of possession for an *extended period of time*") (emphasis added); *see, e.g.*, *TCI Bus. Cap., Inc.*, 890 N.W.2d at 430 (affirming summary judgment where the plaintiff's conversion claim failed to show that the defendant intended to deprive the property interest "permanently or for an indefinite length of time") (citation omitted).[5]

Similarly, if the defendant clearly intended to return the property, he may not have substantially interfered with the plaintiff's property interest. *See, e.g.*, *TCI Bus. Cap., Inc.*, 890 N.W.2d at 430 (affirming summary judgment where the defendant "intended that [plaintiff]'s funds would be returned" and therefore "did not intend to interfere with" the plaintiff's property interest).

Minnesota does not require a pre-suit demand for return of the property to establish conversion, *Torgerson v. Quinn-Shepherdson Co.*, 201 N.W. 615, 616 (Minn. 1925), although refusal to return the property may be additional evidence of interference. *Bates*, 603 N.W.2d at 682.

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[5] The Restatement points to several possible factors:

> (1) the extent and duration of the defendant's dominion or control;
> (2) the defendant's intent to assert a right in the goods that is inconsistent with the plaintiff's ownership;
> (3) the defendant's good faith;
> (4) the amount of actual interference with the plaintiff's right to use the chattel;
> (5) any harm done; and
> (6) the inconvenience or expense caused.

RESTATEMENT (SECOND) OF TORTS § 222A(2) (AM. L. INST. 1965).

Like a plaintiff asserting a claim for false imprisonment, a plaintiff bringing a conversion claim must show that the defendant's action was taken "without lawful justification." *DLH, Inc.*, 566 N.W.2d at 71 (citation omitted). This, in turn, means that, when a law enforcement officer seized the plaintiff's property in connection with a law enforcement investigation, a plaintiff likely must show that the seizure exceeded the scope of the officer's authority. *See, e.g.*, *Rachuy v. Pauly*, 2014 WL 103388, at *3 (Minn. Ct. App. 2014) (affirming summary judgment for the defendant on a conversion claim where the plaintiff presented only "bare accusations" that the officer "acted without lawful justification," which the court found plainly "insufficient").

Obviously, an officer can lawfully seize property with a warrant—and, sometimes, officers can lawfully seize property even without one. For instance, officers may seize items to assure their own safety during an arrest that is supported by probable cause. *See Strei*, 996 F. Supp. 2d at 79 (affirming summary judgment for the defendant on a conversion claim based on the seizure of guns during an arrest because the officer could "in the interest of his own safety . . . search for and seize weapons incident to that arrest"). Similarly, a police officer with a search warrant may appropriately seize items that were not specifically included in the warrant "if there is 'a nexus . . . between the items seized and the criminal behavior' which prompted the issuance of the search warrant." *Hassan v. City of Minneapolis*, 2000 WL 1051910, at *4 (Minn. Ct. App. 2000) (alteration in original) (quoting *State v. Severtson,* 232 N.W.2d 95, 97 (Minn. 1975)) (finding that the plaintiff could not overcome official immunity where law enforcement officers seized cigarettes and infant formula that was not included in the warrant because the purpose of the raid was related to the unlawful sale of these items).

But lawful authority to seize some property does not give officers carte blanche to seize other property willy nilly. Even if an arrest or investigatory stop was lawful, seizure of personal property that has no relation—or, perhaps, even a tenuous relation—to the incident may give rise to a conversion claim. *See, e.g.*, *Mhanna v. Metro. Council*, 2023 WL 3179347, at *1, *13 (D. Minn. 2023) (allowing the plaintiff's conversion claim to proceed where the plaintiff plausibly alleged that a police officer took $100 from her purse during the course of a lawful investigatory stop).

Likewise, if the initial arrest or stop was not lawful, officers likely also lack justification for taking or damaging any property during that arrest. *See, e.g.*, *Hoel v. Alexander Prouse*, 2025 WL 3033945, at *2–3, *5 (D. Minn. 2025) (declining to dismiss the plaintiff's conversion claim where a police officer briefly detained the plaintiff without probable cause and left the scene with the plaintiff's two phones, later returning only one with a shattered screen); *Ash v. City of Duluth*, 331 F. Supp. 3d 935, 942–43 (D. Minn. 2018) (declining to dismiss a conversion claim where the plaintiff alleged that "the City towed [her] vehicle without a warrant, consent, or 'any other lawful reason for seizing the vehicle'" (citation omitted)).

G TRESPASS TO LAND

"Trespass [to land] encompasses any unlawful interference with one's . . . property . . . and requires only two essential elements: a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant." *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 550 (Minn. Ct. App. 2003) (quoting *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792–93 (Minn. Ct. App. 1998)). Further, the unlawful entry must be intentional, meaning only that "the actor desires to cause the consequences of his act or that he believes that the consequences are substantially certain to result from it." *Victor v. Sell*, 222 N.W.2d 337, 339 (Minn. 1974); DOBBS ET AL., *supra*, § 50 ("The intent required to show a trespass to land is the intent to enter or to commit the equivalent of an entry."). Thus, even if one intentionally enters a parcel of land under the mistaken belief that it is their own land, they have still committed trespass. DOBBS ET AL., *supra*, § 50.

The relevant jury instruction provides:

> "Trespass" occurs when a person intentionally:
>
> 1. *[Goes on land belonging to another person][or causes some object or third person to go on land]*, or
> 2. *[Stays on land after he or she is supposed to leave]*, or
> 3. *[Does not remove something on the land that he or she has a duty to remove].*

MINNESOTA PRACTICE, *supra*, at 60.42.

Minnesota courts distinguish trespass from nuisance claims, stating that "trespass is an invasion of the plaintiff's right to exercise exclusive possession of the land" while "nuisance is an interference with the plaintiff's use and enjoyment of the land." *Wendinger*, 662 N.W.2d at 550 (citation omitted); DOBBS ET AL., *supra*, § 51. While trespass and nuisance are not always mutually exclusive, nuisance claims often involve balancing the reasonableness of conflicting land uses, while trespass, on the other hand, is a "yes-or-no kind of tort," where the defendant is liable if he has "committed an act equivalent to an intentional entry." DOBBS ET AL., *supra*, § 51. Intangible interferences, where it can be difficult to determine if the defendant has truly "entered" the plaintiff's property, are often addressed by nuisance rather than trespass. *Id.* (noting that courts have often used nuisance to address claims related to smoke or pollution, migration of underground liquids, growth of tree roots, or high overflights by aircraft); *Wendinger*, 662 N.W.2d at 550–51 (finding that particulate matter invasions such as fumes or odors are properly treated as nuisance claims, not trespass claims).

Minnesota law allows a plaintiff to state a claim—and recover compensation—for trespass, even if the

trespass did not damage the plaintiff's property. *See Johnson v. Paynesville Farmers Union Co-Op. Oil Co.*, 817 N.W.2d 693, 701 (Minn. 2012). "In the absence of actual damages, the trespasser is liable for nominal damages." *Id.*

Similar to conversion, described above, the "intent" prong for trespass does not require a showing that the defendant intended for his entry on the plaintiff's land to be unlawful. Instead, the defendant need only intend to enter the property.[6] *See Johnson*, 817 N.W.2d at 701 ("[T]he tort of trespass is committed when a person 'intentionally enters or causes direct and tangible entry upon the land in possession of another.'" (citation omitted)); *Victor*, 222 N.W.2d at 340 n.1 ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so . . . ." (quoting RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965)). Further, because trespass is an intentional tort, reasonableness on the part of the defendant is not a defense to trespass liability. *See H. Christiansen & Sons, Inc. v. City of Duluth*, 31 N.W.2d 270, 273 (Minn. 1948).

Under Minnesota state law, police officers are generally entitled to broad immunity for trespass, but this immunity does not apply if the officer's conduct was willful or malicious. *See infra* Part V (explaining that under Minnesota common law, public officials are generally entitled to immunity for discretionary actions unless they acted willfully or maliciously).

H TRESPASS TO CHATTELS

Next, a "trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." *Olson v. Labrie*, 2013 WL 1788531, at *3 (Minn. Ct. App. 2013) (quoting RESTATEMENT (SECOND) OF TORTS § 217 (AM. L. INST. 1965)). Similar to trespass to land and conversion claims, the only intent required is that the "defendant had an intent to act upon the property." DOBBS ET AL., *supra*, § 60. Additionally, the court in *Olson* noted:

> Dispossessing includes taking the chattel from the person in possession without his consent, obtaining possession of the chattel by fraud or duress, "barring the possessor's access to the chattel," or destroying the chattel while it is in another's possession. "Intermeddling" means intentionally coming into physical contact with the chattel. Liability arises if the defendant dispossesses the possessor of the chattel, impairs its condition, quality, or value, or deprives the possessor of the chattel's use for a substantial period of time.

[6] If the defendant did not intend the entry, negligence is likely the more appropriate claim. *See* Am. Fam. Ins. v. City of Minneapolis, 129 F. Supp. 3d 674, 679 (D. Minn. 2015), *aff'd*, 836 F.3d 918 (8th Cir. 2016) (granting summary judgment on trespass claim where plaintiffs presented no evidence that defendant "intended" for the water main that flooded plaintiffs' condominium to break, "intended to cause the water to enter" the condominium, or "believed with substantial certainty that such events would occur").

2013 WL 1788531, at *3 (citations omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 217 cmt. e (AM. L. INST. 1965)).

The level of interference with the plaintiff's property right required for trespass to chattel is lower than the level of interference required to prove conversion. *See* Part II.E (discussing conversion); *Specialties, Inc. v. Large*, 18 F.4th 989 (8th Cir. 2021) ("Trespass to chattel differs from conversion only in degree and typically involves less than a complete divestment of the plaintiff's possessory rights in his property." (citation omitted)); *see also Bates v. Armstrong*, 603 N.W.2d 679, 682 (Minn. Ct. App. 2000) ("[C]onversion is 'properly limited to those serious, major, and important interferences with the right to control the chattel . . .'") (quoting RESTATEMENT (SECOND) OF TORTS § 222A cmt. c (AM. L. INST. 1965)); *Buzzell v. Citizens Auto. Fin., Inc.*, 802 F. Supp. 2d 1014, 1024 (D. Minn. 2011) (comparing conversion and trespass and explaining that "trespass to chattel differs from conversion only in degree and may be more appropriately used where the interference with the plaintiff's property right is incomplete" or limited (citation modified)).

Damages in trespass to chattel are likely limited to "the damage done" to the property, whereas in conversion the defendant "may justly be required to pay the other the full value of the chattel." *Herrmann*, 270 N.W.2d at 20–21 (citation omitted).

I NUISANCE

Minnesota Statutes § 561.01 defines a private nuisance as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." MINN. STAT. ANN. § 561.01 (West 2026). "[A]ny person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance" may bring an action. *Id.* A plaintiff must show that they have a real property interest that is affected by the conduct. *Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 192 (Minn. 2005).

Operationalizing these standards, the relevant jury instruction provides:

> A "nuisance" is anything that is:
>
> 1. Harmful to the health of a property owner, or
> 2. Indecent or offensive to the property owner's senses, or
> 3. An obstruction to the free use of the property,
>
> And that materially and substantially interferes with the comfortable enjoyment of life or property.
>
> In deciding whether the interference is material and substantial, you must compare the

interference with the standards of ordinary people in the area in which the property is located.

MINNESOTA PRACTICE, *supra*, at 60.80.[7]

The defendant's conduct must cause a "material and substantial" interference with the use or enjoyment of the plaintiff's property to constitute a nuisance. *Jedneak v. Minneapolis Gen. Elec. Co.*, 4 N.W.2d 326, 328 (Minn. 1942); *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. Ct. App. 2001). The degree of interference is considered "by the standards of ordinary people." *Citizens for a Safe Grant*, 624 N.W.2d at 803. Moreover, the reasonableness is dependent on the specific community: "What would be a substantial interference with the enjoyment of life in a residential area might very well be perfectly normal and inescapable in an industrial section." *Jedneak*, 4 N.W.2d at 328.

Although the Minnesota Supreme Court has stated that "there must be some kind of conduct . . . which is 'wrongful'" in order for a nuisance claim to succeed, *Highview N. Apartments v. Ramsey County*, 323 N.W.2d 65, 70 (Minn. 1982) (citation omitted), the Court of Appeals has interpreted "wrongful" to merely mean that nuisance claims are limited "to situations in which the defendant can be said to be at fault," *Wendinger*, 662 N.W.2d at 552 (finding that defendants' "aware[ness] of their operation's alleged impact" on the plaintiff's use and enjoyment of their property was sufficient to show intentional conduct); *see Citizens for a Safe Grant*, 624 N.W.2d at 804 (finding that no intent is required to establish a nuisance claim).

Given this standard, so long as a plaintiff "presents evidence that the defendant intentionally maintains a condition that is injurious to health, or indecent or offensive to the senses, or which obstructs free use of property," they "state[] an actionable claim in nuisance." *Wendinger*, 662 N.W.2d at 552; *Glacier Park Iron Ore Properties, LLC v. U.S. Steel Corp.*, 2021 WL 416695, at *4 (Minn. Ct. App. 2021) (reversing dismissal of

[7] Additionally, according to the jury instruction,

> *(Defendant)* wrongfully created a nuisance if:
> [1. *(He) (she)* created the nuisance intentionally. This means *(defendant)*:
> a. Purposely caused the nuisance, or
> b. Knew that *(his) (her)* conduct was causing the nuisance, or
> c. Knew that the nuisance was substantially certain to result.]
> [2. *(He) (She)* was negligent, and the nuisance was directly caused by *(defendant)*'s failure to use reasonable care. Negligence occurs when a person:
> a. Does something a reasonable person would not do in similar circumstances, or
> b. Fails to do something a reasonable person would do in similar circumstances.
> "Reasonable care" is the care a reasonable person would use in similar circumstances.]
> [3. *(He) (she)* acted in other ways to wrongfully create the nuisance.]

MINNESOTA PRACTICE, *supra*, at 60.80.

nuisance claim where the plaintiff alleged that the defendant's waste dumping procedures increased the cost of the plaintiff's operations and diminished the value of the plaintiff's property).

Unlike the private nuisance claim sketched above, a plaintiff can assert a claim for public nuisance for harm to the public at large. *See* MINN. STAT. ANN. § 609.74 (West 2026) (providing that "[w]hoever by an act or failure to perform a legal duty intentionally . . . maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public" commits misdemeanor public nuisance). Public nuisances are typically prosecuted by the state. *In re Change Healthcare, Inc.*, 2025 WL 3687895, at *23 (D. Minn. 2025). A plaintiff may only bring a civil cause of action based on a public nuisance if "he has suffered an injury special or peculiar to himself which is not common to the general public." *Hill v. Stokely-Van Camp, Inc.*, 109 N.W.2d 749, 753 (Minn. 1961).

There is an FTCA wrinkle here, in that the FTCA does not impose liability for strict liability torts—and, in some states, nuisance is a strict liability tort. *See, e.g.*, *Harper Lake, LLC v. United States*, 2009 WL 1444526, at *10 (C.D. Cal. 2009) ("Plaintiff's claim for recovery under a theory of private nuisance is barred by its failure to prove negligence under the Federal Tort Claims Act."); *W. Greenhouses v. United States*, 878 F. Supp. 917, 929 (N.D. Tex. 1995) ("The Court does not have jurisdiction over plaintiffs' nuisance claim or trespass claim to the extent plaintiffs seek to impose liability against the United States through those claims without proving negligence. The Federal Tort Claims Act does not waive the sovereign immunity of the United States with regard to strict liability claims. The statute requires a negligent act.").

Yet, in some states, nuisance claims require some degree of fault. In those states, the FTCA should encompass nuisance actions. *See, e.g.*, *Valet v. United States*, 2006 WL 624897, at *2 (E.D.N.Y. 2006) (rejecting the government's argument "that the FTCA requires an allegation of negligent conduct and that a nuisance claim is therefore not cognizable under the FTCA" because, under New York law, nuisance requires fault, and the plaintiff's complaint alleged that the defendant's conduct was "careless and unreasonable"); *New York v. United States*, 620 F. Supp. 374, 379 n.2 (E.D.N.Y. 1985) ("Defendants also argue that plaintiffs' public nuisance claim cannot be maintained under the FTCA because it is based on a strict liability standard of care under New York law and the FTCA abrogates sovereign immunity of the defendants only for their negligent or wrongful acts. Defendants, however, misconstrue New York law on public nuisance.").

In Minnesota, it appears that a plaintiff could theoretically state a nuisance claim under a strict liability theory. *Cf. Wendinger*, 662 N.W.2d at 551 (stating that nuisance "includes intentional harms and harms caused by negligence, reckless or *ultrahazardous conduct*" (emphasis added)). A claim under such a theory would founder on the FTCA. Accordingly, a plaintiff stating an FTCA nuisance claim should be very clear that, when inflicting injury, the government employee behaved negligently (or worse). If properly

couched, such a nuisance claim should be cognizable. *See, e.g.*, *Lhotka v. United States*, 114 F.3d 751, 754 (8th Cir. 1997) (reversing the trial court's dismissal of the plaintiff's trespass and nuisance claims under the FTCA while applying Minnesota law).

J THE MINNESOTA HUMAN RIGHTS ACT

The Minnesota Human Rights Act (MHRA) provides a private cause of action for redress of "unfair discriminatory practices" in areas such as employment, public accommodations, and public services. MINN. STAT. ANN. §§ 363A.08–19 (West 2026). The MHRA explicitly authorizes "[t]he commissioner *or a person* [to] bring a civil action seeking redress . . . directly to district court." *Id.* § 363A.33 (emphasis added). The MHRA applies to unfair discrimination in "the access to, admission to, full utilization of or benefit from any public service." *Id.* § 363A.12. The Minnesota Supreme Court has found that this includes discriminatory actions by law enforcement, as "[c]ivil, non-discriminatory treatment of citizens by police is an important part of the full utilization of and benefit from police services." *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 203 (Minn. 1976) (finding that use of a racial epithet by police officers supported a claim of discrimination under the MHRA). A plaintiff may establish discrimination by showing "adverse difference in treatment with respect to public services . . . when compared to the treatment accorded others similarly situated except for the existence of an impermissible factor such as race, color, creed, sex, etc.," or through circumstantial evidence that shows "treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." *Id.* at 202; *Minneapolis Police Dep't v. Kelly*, 776 N.W.2d 760, 766–67 (Minn. Ct. App. 2010).

Yet, the MHRA likely cannot support a viable FTCA claim against immigration officials for racial or national-origin discrimination. Although the MHRA permits private suits for discriminatory conduct in the provision of law enforcement services, the only provision that appears to cover such conduct applies only to *public* entities. That is likely dispositive under the FTCA, which waives sovereign immunity only where state law would impose liability on a *private* person under like circumstances. *See* 28 U.S.C. § 1346(b)(1); *FDIC v. Meyer*, 510 U.S. 471, 477 (1994). In other words, the FTCA waives sovereign immunity only under circumstances where local law would make a private person—not a state or municipal entity—liable in tort. *United States v. Olson*, 546 U.S. 43, 46 (2005) (holding that the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing the [g]overnment's liability under the FTCA").

III. SCOPE OF EMPLOYMENT

Above, we sketched various predicate tort law claims that plaintiffs could assert under the FTCA.

Beyond showing that the plaintiff has stated a tort law claim under circumstances in which "a private person" would be liable "in accordance with the law of the place where the act or omission occurred," the FTCA also requires that the tort be committed by a federal officer or employee acting "within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).[8]

The FTCA's scope-of-employment determination proceeds in two steps. When a federal employee is sued for the employee's tortious conduct, the Westfall Act empowers the Attorney General to (initially) certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* § 2679(d)(1). Then, if the plaintiff disputes the Attorney General's certification decision, the plaintiff can petition the court for a judicial determination. If the plaintiff does, the court will make a *de novo* determination. The court, not the Attorney General, gets the final say. *See De Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (rejecting the notion that Congress ever intended to make the Attorney General "the final arbiter of 'scope-of-employment' contests"); 14 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3658.1 (4th ed. 2025) (explaining that judicial review is *de novo*); Gregory C. Sisk, *Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. ST. THOMAS L.J. 295, 308 (2011) ("Under *Gutierrez de Martinez*, the Attorney General's certification of the scope of employment, for the purposes of extending immunity to the employee and substituting the United States as the sole defendant, is reviewable in federal court."); 28 U.S.C. § 2679(d)(3) (stating that if the Attorney General "has refused to certify scope of office or employment," the employee may "petition the court to find and certify that the employee was acting within the scope of his office or employment").

In making this scope-of-employment assessment, the Attorney General and reviewing court are to apply the law of the state where the conduct occurred. *See Johnson v. United States*, 534 F.3d 958, 963 (8th Cir. 2008); *see also Lyons v. Brown*, 158 F.3d 605, 609 (1st Cir. 1998) ("Federal law determines whether a person is a federal employee and defines the nature and contours of his official responsibilities; but the law of the state in which the tortious act allegedly occurred determines whether the employee was acting within the scope of those responsibilities."); 2 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 9.07 (2026) ("Although federal law controls the question of whether someone is a federal employee for purposes of the FTCA, state law governs the question of whether such an employee was acting within the scope of his federal employment when the tort was committed.").

[8] Under the FTCA, the plaintiff needs to focus on the conduct of an employee, not an agency, and "[t]he agency implicated in the wrongdoing cannot be named as the defendant." 14 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3658 (4th ed. 2025).

Here, Minnesota uses a two-part framework. An employer is vicariously liable for an employee's tortious conduct if "(1) the source of the [tort] is related to the duties of the employee, and (2) the [tort] occurs within work-related limits of time and place." *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 583 (Minn. 2008). Critically, in cases of intentional misconduct, Minnesota does not require the plaintiff to show that the employee acted to further the employer's interests. To the contrary, "an employee's act need not be committed in furtherance of his employer's business to fall within the scope of his employment" for purposes of respondeat superior. *Id.* at 575 (citation omitted); *see also Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999) (explaining that in cases of intentional misconduct "the employee's motivation should not be a consideration for imposition of vicarious liability"). In that respect, Minnesota departs from the Restatement approach, which would require that the employee's conduct be actuated, at least in part, by a purpose to serve the employer. *See* RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (AM. L. INST. 1957).

The jury instruction states that an employee acts within the scope of his or her authority for *negligent* conduct if:

> 1. The employee's conduct was substantially within work related limits of time and place; and
>
> 2. The employee's conduct is of a kind authorized by the employer or reasonably related to that employment; and
>
> 3. The employee's act was motivated at least in part by the employee's desire to further the employer's interests; and
>
> 4. The employer should have foreseen the employee's conduct, given the nature of the employment and the duties relating to it.

MINNESOTA PRACTICE, *supra*, at 30.15.

Then, under Minnesota law, *intentional torts* may fall within the scope of employment if it is "foreseeable, related to, and connected with acts otherwise within the scope of his employment." *Sterry v. Minn. Dep't of Corr.*, 8 N.W.3d 224, 234 (Minn. 2024) (citation omitted). Put differently, "an employer may be held liable *for even the intentional misconduct* of its employees when (1) the source of the attack is related to the duties of the employee, and (2) the assault occurs within work-related limits of time and place." *Fahrendorff*, 597 N.W.2d at 910. Of course, "[t]his does not mean that every intentional tort committed while an employee is 'on the clock' or on the employer's premises is subject to vicarious liability." *Sterry*, 8 N.W.3d at 236. But the doctrine is broad enough that even a sexual assault may, in the proper case, satisfy the test. *Id.*

Capturing the above, the jury instruction states that an employee acts within the scope of his or her authority for *intentional* conduct if:

> 1. The employee's conduct was substantially within work-related limits of time and place; and
>
> 2. The employee's conduct is of a kind authorized by the employer or reasonably related to that employment; and
>
> 3. The employer should have foreseen the employee's conduct given the nature of the employment and the duties relating to it.

Minnesota Practice, *supra*, at 30.20.

To the extent DHS officers and agents have transcended the scope of their employment, plaintiffs could potentially sue those officers in their personal capacities, since, if the DHS officer acted outside the scope of his employment, the FTCA does not apply. That would mean, presumably, that: (1) the officer would be personally liable for any monetary judgment, (2) punitive damages could be available (as explained below, when the claim is lodged against the federal government, punitive damages are not available), (3) the plaintiff would be entitled to a jury trial (again, as explained below, if the claim is against the federal government, it's otherwise), and (4) the officer would not be entitled to the benefit of any FTCA exception (such as the discretionary-function exception, described below). Of course, if the goal is to collect on a judgment, a finding that an officer is outside the scope of employment is troublesome. But, if the goal is to obtain discovery and/or deter individuals from working for and cooperating with the DHS, then personal liability could be salutary. For further discussion of this scope of employment question within the context of the FTCA, see *Carroll v. Trump*, 49 F.4th 759, 766 (2d Cir. 2022) (explaining that if the federal employee "engaged in conduct beyond the scope of his employment . . . the suit will proceed against the government employee in a personal capacity").

IV. FTCA EXCEPTIONS

Even where a plaintiff identifies a viable state-law tort committed within a federal employee's scope of employment, FTCA liability remains subject to thirteen statutory exceptions. Three are especially relevant here: (1) the "intentional-tort exception," 28 U.S.C. § 2680(h); (2) the "discretionary-function exception," *id.* § 2680(a); and (3) the "detention-of-goods exception," *id.* § 2680(c).[9] We address each in turn.

A THE INTENTIONAL-TORT EXCEPTION

The intentional-tort exception is straightforward. It preserves sovereign immunity (and thus bars suit against the United States) for "[a]ny claim arising out of" a long list of intentional torts, including defamation, "assault, battery, false imprisonment, false arrest, malicious prosecution, [and] abuse of process." 28 U.S.C. § 2680(h).[10]

But in 1974—upset about federal government overreach and eager to "provid[e] a remedy against the Federal Government for innocent victims of Federal law enforcement abuses"—Congress enacted the "law enforcement proviso." S. Rep. No. 93-588, at 2–3 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2792. That proviso creates an exception to the exception, bringing most intentional torts (but not defamation) back *within* the FTCA if they are committed by an "investigative or law enforcement officer." 28 U.S.C. § 2680(h). Pursuant to the statute, an "investigative or law enforcement officer" is "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*; *see Millbrook v. United States*, 569 U.S. 50, 52 (2013) (holding that the law enforcement proviso is not limited to conduct occurring during a search, seizure, or arrest, because "Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority").

Immigration officers—including ICE and U.S. Customs and Border Patrol (CBP) officers—fall

[9] Other FTCA exceptions could also come into play. For instance, the misrepresentation exception, 28 U.S.C. § 2680(h), preserves sovereign immunity for claims "wholly attributable to reliance on government's negligent misstatements," but not for "negligence actions" focused on the government's breach of a duty other than the duty to "use due care in communicating information." Block v. Neal, 460 U.S. 289, 297 (1983).

[10] IIED, conversion, and trespass are intentional torts but not on this list. This means: Unless the defendant's conduct falls within the discretionary-function exception, the federal government is not immune. *See, e.g.*, Levin v. United States, 568 U.S. 503, 507 n.1 (2013) (clarifying that "Section 2680(h) does not remove from the FTCA's waiver all intentional torts, *e.g.*, conversion and trespass"); Gross v. United States, 676 F.2d 295, 304 (8th Cir. 1982) (holding that IIED claims are not barred by the intentional-tort exception); *accord* Dobbs et al., *supra*, § 341 (explaining that "[t]he list notably omits such traditional intentional torts as trespass to land and conversion of personal property, and such newer torts as intentional infliction of emotional distress and privacy invasion" and that, given this omission, the FTCA "does not preclude suit for those torts unless" another FTCA exclusion applies).

comfortably within the definition of "investigative or law enforcement officers." Federal law authorizes designated immigration officers to interrogate, arrest, and search, and the implementing regulations designate multiple classes of CBP and ICE personnel to exercise arrest authority. *See* 8 U.S.C. § 1357(a)–(b) (authorizing delegation of authority to immigration officers to make arrests and conduct body searches); 8 C.F.R. § 287.5(c) (conferring those search and arrest authorities on ICE officers, immigration enforcement agents, border patrol officers, and CBP officers). Many courts of appeals have accordingly treated immigration officers as "investigative or law enforcement officers" within the scope of the law enforcement proviso. *See, e.g.*, *Caban v. United States*, 671 F.2d 1230, 1234 n.4 (2d Cir. 1982) (holding that "INS agents fall within the reach of § 2680(h)"); *Medina v. United States*, 259 F.3d 220, 224 (4th Cir. 2001); *Campos v. United States*, 888 F.3d 724, 737 (5th Cir. 2018) (holding that "CBP officers were law enforcement officers" within meaning of § 2680(h)).

Although the Eighth Circuit has not had occasion to squarely decide this question, its precedent points in only one direction. In *Celestine v. United States*, 841 F.2d 851, 853 (8th Cir. 1988), while construing the FTCA's definition of "investigative or law enforcement officer," the court cited the Second Circuit's decision in *Caban v. United States* as an example—specifically noting that "INS agents are investigative or law enforcement officers within the meaning of 28 U.S.C. § 2680(h)." The court then held that security guards at a Veterans Affairs hospital fell within the proviso because they were "empowered to make arrests for violation of federal law." *Id.* The Eighth Circuit has likewise held that Transportation Security Administration screening personnel at airports qualify as "investigative or law enforcement officer[s]" based on their power to execute searches, even though they are not "traditional law enforcement personnel." *Iverson v. United States*, 973 F.3d 843, 852 (8th Cir. 2020). And the Eighth Circuit has already recognized that immigration officers possess arrest authority. *See United States v. Chavez,* 705 F.3d 381, 383 (8th Cir. 2013) (noting that "[i]mmigration officials can make warrantless arrests in certain circumstances" and have "the power to arrest any alien in the United States"). Based on Eighth Circuit precedent, immigration officers fall comfortably within the proviso's text.

For present purposes, then, assault, battery, false-imprisonment, and false-arrest claims against ICE or CBP officers are not barred simply because they are intentional torts. *See* 28 U.S.C. § 2680(h). And IIED, conversion, and trespass claims can also lie, because they are not included in § 2680(h)'s list of "intentional torts." *See supra* note 10 (collecting authority); *see also Levin v. United States*, 568 U.S. 503, 507 n.1 (2013) (clarifying that "Section 2680(h) does not remove from the FTCA's waiver all intentional torts, *e.g.*, conversion and trespass"); *Gross v. United States*, 676 F.2d 295, 304 (8th Cir. 1982) (holding that IIED claims are not barred by the intentional-tort exception).

With this first hurdle cleared, the next question becomes whether some other FTCA exception—most importantly, the discretionary-function exception—nevertheless bars the claim.

B THE DISCRETIONARY-FUNCTION EXCEPTION

Even if a plaintiff clears the above hurdle, she next encounters another key FTCA exclusion: the discretionary-function exception. *See Martin v. United States*, 605 U.S. 395, 406–07, 414–15 (2025) (explaining how the law enforcement proviso and discretionary-function exception interact).

The discretionary-function exception precludes any FTCA action "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. § 2680(a). And it presents a steep hill to climb: One (admittedly dated) study reports that the federal government boasts a 75 percent success rate when it seeks dismissal of FTCA suits on discretionary-function grounds. Stephen L. Nelson, *The King's Wrong and the Federal District Courts: Understanding the Discretionary Function to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 290 (2009).

The Supreme Court has adopted a two-part test to determine whether the discretionary-function exception shields a federal government employee's conduct from scrutiny. First, a court must determine whether the employee's conduct "involv[ed] an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991). If it did, then the court must decide whether the relevant judgment or choice "is of the kind that the. . . exception was designed to shield." *Id.* at 322–23.

In engaging in this second inquiry, a court must grapple with the discretionary-function exception's purpose. Here, the Court has explained that "the purpose of this exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy," and so "the exception protects only governmental actions and decisions based on considerations of public policy." *Id.* at 323; *see* RESTATEMENT (SECOND) OF TORTS § 895B cmt. d (AM. L. INST. 1979) ("The purpose of the immunity is to insure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government if such a policy decision, consciously balancing risks and advantages, took place." (citation modified)); JAYSON & LONGSTRETH, *supra*, § 12.04 ("If the challenged conduct does involve a choice or judgment, to be protected by the exception such choice or judgment must involve considerations of public policy. Since the exception was designed to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy, the exception protects only governmental actions and decisions based on considerations of public policy."); Wang, *Tortious Constructions*, *supra*, at 1966 ("[T]he primary reason behind the discretionary function exception is the separation of powers: FTCA suits must not be a channel to challenge legislative and regulatory decisions through the judiciary.").

Illustrating the effect of this "purpose" inquiry, a plaintiff *can* bring a colorable FTCA claim complaining that a government employee did not comply with a statute or regulation; a plaintiff cannot bring a

colorable FTCA claim alleging that the same statute or regulation is, itself, unlawful. *See* JAYSON & LONGSTRETH, *supra*, § 12.03 (explaining that the discretionary-function doctrine "bars the use of a FTCA suit to challenge the constitutionality or validity of statutes or regulations"). That latter kind of claim would require the court to "pass judgment on policy decisions in the province of coordinate branches of government"—and that's impermissible. *See* Sisk, *Official Wrongdoing*, *supra*, at 301 ("Claims of injury arising out of an allegedly invalid statute or regulation do not give rise to tort liability for the government; the enactment of a statute or promulgation of a regulation cannot be characterized as a negligent act of governance.").

The Eighth Circuit has not conclusively resolved which party bears the burden on the discretionary-function exception, and it has acknowledged a circuit split on the issue. In *Hart v. United States*, 630 F.3d 1085, 1090 (8th Cir. 2011), the Eighth Circuit noted the plaintiff's argument that the government bears the burden of proving the exception applies and stated that it was "assuming without deciding" that she was correct. At the same time, *Hart* collected Eighth Circuit authority pointing the other way. *Id.* at 1090 n.3. Although the panel stated that the court had "not yet taken a formal position on this precise issue," it emphasized that the Eighth Circuit had repeatedly applied "the general rule that '[t]he burden of proving federal jurisdiction . . . is on the party seeking to establish it." *Id.* (quoting *Great Rivers Habitat All. v. FEMA*, 615 F.3d 985, 988 (8th Cir. 2010)); *see also Two Eagle v. United States*, 57 F.4th 616, 623 (8th Cir. 2023) (concluding that the government employee's "failure to act involved an element of judgment or choice" because the plaintiff "does not point to any mandatory statute or regulation requiring [the employee] to take any action"). The panel also flagged that prior Eighth Circuit decisions, at the second step of the discretionary-function exception, had stated that "it is [the plaintiff], not the United States, who must assert facts showing the decision was not based on policy considerations." *Hart*, 630 F.3d at 1090 n.3 (quoting *Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 796 (8th Cir. 1998)); *see also Compart's Boar Store, Inc. v. United States*, 829 F.3d 600, 605 (8th Cir. 2016) (stating that if a court concludes at the first step of the inquiry that the federal employee's conduct involved an element of judgment or choice, "we presume that the governmental action involved considerations of public policy" and "[i]t is the plaintiff's burden to rebut that presumption"). Finally, the *Hart* court noted that the Eighth Circuit had "affirmed a district court's decision placing the burden upon the plaintiff, *see Bacon v. United States*, 661 F. Supp. 8 (E.D. Mo. 1986), *aff'd* 810 F.2d 827 (8th Cir. 1987)." *Hart*, 630 F.3d at 1090 n.3. Thus, while the Eighth Circuit has not definitively assigned the ultimate burden on the discretionary-function exception, its cases suggest that, to survive dismissal, a plaintiff should plead either that the challenged conduct was nondiscretionary or that any discretionary conduct was not grounded in policy considerations.

One Eighth Circuit case deserves special mention in the law enforcement context. In *Hart*, 630 F.3d at 1090, the court held that "a federal law enforcement officer's on-the-spot decisions concerning how to effectuate an arrest—including how best to restrain, supervise, control or trust an arrestee—fall within the

discretionary-function exception . . . absent a specific mandatory directive to the contrary." Thus, where a plaintiff challenges the manner in which officers executed a stop or arrest, the government will often invoke *Hart* unless the plaintiff can point to one of the exceptions to the doctrine discussed below.

Courts have struggled mightily in their application of the discretionary-function exception. *See* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 35 cmt. g (Tentative Draft No. 1, 2022) (explaining that "existing case law is not a model of either coherence or clarity"); Olivia Goldberg, Note, *(Extra)ordinary Tort Law: Evaluating the FTCA as a Constitutional Remedy*, 76 STAN. L. REV. 481, 495 (2024) ("From the FTCA's inception, this exception has confounded courts and scholars."); Daniel Cohen, Note, *Not Fully Discretionary: Incorporating A Factor-Based Standard into the FTCA's Discretionary Function Exception*, 112 NW. U. L. REV. 879, 892 (2018) (lamenting the discretionary-function doctrine's "vagueness and ambiguity").

Yet, a few propositions are clear. First, the exception does not protect government conduct that violates a binding federal statute, regulation, or official policy. Second, in the Eighth Circuit, conduct that violates the Constitution is outside the exception. Third, the exception does not shield ordinary carelessness, inattention, or other conduct not grounded in policy judgment. Fourth and finally, plaintiffs can profitably argue that applying the exception to abusive or careless law enforcement conduct would be inconsistent with the law enforcement proviso's remedial purpose and the exception's own rationale. We expand on each of these points below.

1. Conduct that Violates a Binding Federal Statute, Regulation, or Official Policy

First, conduct that violates a binding federal statute, regulation, or official policy is not entitled to the protection of the discretionary-function exception. *See Gaubert*, 499 U.S. at 322 (explaining that government officials do not have relevant discretion when a "'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive'" (quoting *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988))); *see also Layton v. United States*, 984 F.2d 1496, 1499–500 (8th Cir. 1993) ("Where a statute, regulation, or policy prescribes a course of action to be followed by a government employee, the employee does not have discretion to violate the regulation; actions in contravention of the regulation are not protected by the discretionary-function exception."); Sisk, *Official Wrongdoing*, *supra*, at 301 ("If a statute, regulation, or (uncodified) policy specifically prescribes a particular course of action, then no discretion exists, and consequently, the [discretionary-function] exception has no application."); JAYSON & LONGSTRETH, *supra*, § 12.04 ("If a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, he has no choice but to adhere to the directive; hence his act is not discretionary and the exception is not applicable."); *cf. Two Eagle*, 57 F.4th at 623 (holding that, because

the plaintiff "does not point to any mandatory statute or regulation requiring [the federal employee] to take any action," the employee's "failure to act involved an element of judgment or choice").

Seizing on this exclusion, a litigant could argue that immigration officials violated nondiscretionary agency policies and therefore the wrongful conduct does not involve policy judgment. To make this argument, litigants should point to DHS or ICE policies that include mandatory language, such as "shall" or "must," while recognizing that even some seemingly mandatory provisions may still leave sufficient judgment to trigger the exception. Examples of such policies include, but are not limited to:[11]

- "Once used, physical force must be discontinued when resistance ceases or when the incident is under control." *See* Alejandro N. Mayorkas, U.S. Dep't of Homeland Sec., Use of Force Policy Update 2 (2023), https://perma.cc/4FRS-BN4C.
- "Deadly force shall not be used solely to prevent the escape of a fleeing subject." *Id.* at 8. "'[D]eadly force' is allowed only when agents believe lives are in danger." *See* Hamad Aleaziz & Nicholas Nehamas, *Under Trump, a Shift Toward 'Absolute Immunity' for ICE*, N.Y. Times (Jan. 15, 2026).
- "When feasible, authorized officers must employ tactics to deescalate by the use of communication or other techniques during an encounter to stabilize, slow or reduce the intensity of a potentially violent situation." *Id.*
- "As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a U.S. citizen." U.S. Immigr. & Customs Enf't, Policy No. 16001.2: Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE 1 (2015), https://perma.cc/S3GN-MKUN.[12]
- DHS officers "may use only the level of force that is objectively reasonable in light of the facts and circumstances confronting the [law enforcement officer] at the time force is applied." *Chi. Headline Club v. Noem*, 2025 WL 3240782, at *7 (N.D. Ill. 2025) (citations omitted). "The use of excessive force is unlawful and will not be tolerated." *Id.*
- ICE officers "may use only the level of force that is objectively reasonable in light of the totality

[11] Litigants should not assume that every policy quoted below will necessarily defeat the discretionary-function exception. Courts require a directive that is both mandatory and specific, and some of these provisions may be found too qualified, textured, or open-ended to eliminate all judgment or choice. *See* Berkovitz v. United States, 486 U.S. 531, 544 (1988) ("When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply."). In particular, a court may conclude that provisions qualified by phrases such as "when feasible," or standards that turn on what officers "believe" or what is "objectively reasonable," may be held to preserve officer judgment and thus remain discretionary.

[12] *See, e.g.*, Makowski v. United States, 27 F. Supp. 3d 901, 919 (N.D. Ill. 2014) ("In failing to investigate Makowski's claim to be a citizen and to cancel the detainer, the federal agents therefore failed to act in accord with a specific mandatory directive [specifically, the precursor to ICE Policy No. 16001.2], and the discretionary function exception does not apply."); Mayorov v. United States, 84 F. Supp. 3d 678, 689 (N.D. Ill. 2015) (concluding that the FTCA's discretionary-function exception did not bar a former ICE detainee's negligence claim against the United States).

of facts and circumstances confronting the Authorized Officer at the time force is applied." *Id.* at *12 (quoting ICE Directive 19009.3).

Litigants may face practical barriers here because ICE policies and internal guidelines are increasingly difficult to obtain and verify. Letter from Rep. Luz M. Rivas, U.S. House of Representatives, to Todd Lyons, Acting Dir., U.S. Immigr. & Customs Enf't (Feb. 19, 2025), https://perma.cc/6DJU-BSWT (discussing ICE's "secret memo" provided by whistleblowers).

Recognizing this difficulty, numerous courts have allowed limited discovery into internal government guidelines. *See, e.g.*, *Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) (reversing the district court's dismissal and holding court erred when denying discovery of internal secret service guidelines); *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1162 (9th Cir. 2017) (reversing the district court's decision granting the defendant's motion to dismiss; concluding that the plaintiff was entitled to discovery with regard to policies governing an IRS agent's use of private property during a tax fraud investigation to determine whether the conduct was discretionary), *opinion amended on reh'g*, 868 F.3d 1048 (9th Cir. 2017); *FDIC v. Dosland*, 50 F. Supp. 3d 1070, 1083 (D. Iowa 2014) (permitting jurisdictional discovery into the existence of internal policies and procedures). Courts are more likely to permit discovery if there is some evidence that mandatory internal policies or guidelines exist, such as statutory provisions granting the agency the authority to promulgate internal mandatory policies. *See Ignatiev*, 238 F.3d at 467 (permitting discovery because the statute's statement that the Secret Service "shall perform such duties as the Director . . . may prescribe" suggested the existence of internal mandatory policies).

2. Conduct that Violates the Constitution

Second, joining most other circuits (and contra the Seventh and Eleventh), the Eighth Circuit has held that conduct that violates the Constitution is per se outside the discretionary-function exception. *See Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights."). Thus, even if the government actor violates no statute, regulation, or policy, the government actor cannot benefit from the discretionary-function exception if his conduct violated (for instance) the First, Fourth, or Eighth Amendment.[13]

[13] Almost every circuit except the Seventh and Eleventh has held that the discretionary-function exception does not shield officials from FTCA liability when they exceed the scope of their constitutional authority. *See* Van Loo v. United States, 2024 WL 3082357, at *7 (W.D. Wash. 2024) (collecting cases for the proposition that "[n]early every circuit has held conduct cannot be discretionary if it violates the Constitution because federal officials do not possess discretion to violate constitutional rights"); Xi v. Haugen, 68 F.4th 824, 838 n.10 (3d Cir. 2023) (collecting cases). *But see* Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019); Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021). Note that "[t]he Fifth Circuit is unique in the sense that it issued an opinion regarding unconstitutional actions not falling with the discretionary function exception, then later vacated the decision." Laney Ivey, *It's Time to Resolve the Circuit Split: Unconstitutional Actions by Federal Employees Should Not Fall Within the Scope of the Discretionary Function Exception of the FTCA*, 73 Mercer L. Rev. 1352, 1367–68 (2022); *see also* Spotts v. United States, 613 F.3d 559, 569 (5th Cir. 2010) ("This court has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception.").

The constitutional limit becomes especially relevant when it comes to ICE officers.

As discussed in Part II.C.2 above, ICE officers' statutory authority to detain and arrest individuals suspected of immigration violations remains subject to the constraints imposed by the Fourth Amendment. Immigration officials must have reasonable suspicion to initiate a stop. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975) (holding that roving immigration officers may briefly stop a vehicle for immigration questioning only on reasonable suspicion); *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 1 (2025) (Kavanaugh, J., concurring). And any arrest for violation of federal immigration laws requires probable cause. *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010); *see supra* Part II.C. If a plaintiff was detained in violation of the Fourth Amendment, the government cannot assert that the detention is protected by the discretionary-function exception.

Meanwhile, the Eighth Circuit has held that observation alone is insufficient cause to arrest an individual for obstructing government operations. In *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005), the plaintiff stopped his car to observe two white police officers interacting with two young Black men. He "parked his van behind one police car and walked across the street to observe the encounter." *Id.* The Eighth Circuit observed that "no reasonable police officer could believe that he had arguable probable cause to arrest such an on-looker . . . for obstruction of governmental operations." *Id.*[14] Similarly, in *Chestnut v. Wallace*, 947 F.3d 1085, 1087 (8th Cir. 2020), a jogger stopped to observe a police officer conducting a traffic stop. Despite the police officer's belief that the jogger was "suspicious" since he was "'hiding in the treeline' and 'kind of peeking and lurking around a tree,'" the court found that the officer's brief twenty-minute detention of the jogger violated his "clearly established right to watch police-citizen interactions at a distance and without interfering." *Id.* at 1087, 1090. However, the court noted that where there was "large-scale civil unrest" in the area, the reasonable suspicion calculation may be different. *Id.* at 1092.

Recording or observing law enforcement officials in the course of their duties may be protected by the First Amendment. Several other circuits have explicitly held that individuals have a First Amendment right to record law enforcement activity. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 80, 82–83, 85 (1st Cir. 2011) (finding that police officers violated a plaintiff's First Amendment right by arresting him for recording an arrest that may have involved excessive force because "First Amendment principles . . . unambiguously" require a constitutionally protected "right to videotape police carrying out their duties in public"); *Fields v. City of Philadelphia*, 862 F.3d 353, 356, 359–61 (3d Cir. 2017) (finding that police violated a plaintiff's

[14] Although the court conducted a qualified immunity analysis in *Walker* and other cases discussed in this section, which were initiated under *Bivens* or § 1983, federal qualified immunity does not apply to FTCA suits. *See* 28 U.S.C. § 2674 (stating that the United States is liable like a private individual and expressly mentioning only judicial and legislative immunity); *Xi*, 68 F.4th at 842–44 (holding that qualified immunity's "clearly established" requirement "has no place" in FTCA discretionary-function analysis because the concerns motivating qualified immunity are absent "where only the federal government—not federal officers—can be liable").

First Amendment right when an officer "pushed . . . and pinned her against a pillar," when she attempted to record the arrest of another protester).

The Eighth Circuit has not definitively stated that the First Amendment protects the right to observe government officials. In *Molina v. City of St. Louis*, 59 F.4th 334, 337 (8th Cir. 2023), members of the National Lawyers Guild alleged that police officers shot tear gas at them in retaliation when another bystander yelled at police to "[g]et the fuck out of my park." The Eighth Circuit found that police officers were protected by qualified immunity because there was no "clearly established First Amendment right" to "observ[e] and record[] police-citizen interactions." *Id.* at 338. The court noted that "[i]t is not beyond the realm of possibility that a First Amendment right to observe police exists." *Id.* at 340 n.2. But the panel appeared skeptical that watching *alone* was sufficiently expressive to merit First Amendment protection. *See id.* ("[I]t is another matter to say that watching is itself expressive. Expressive of what?").

On the other hand, a recent case arising out of ICE conduct in Minneapolis found that bystanders' actions—which involved observing ICE agents *and* voicing disapproval of their actions—likely *were* protected by the First Amendment. *See Tincher v. Noem*, 2026 WL 125375, at *25–26 (D. Minn. 2026) (finding that ICE officers likely violated the First Amendment rights of bystanders who were arrested when "observing ICE agents where they had secured a perimeter" or "voic[ing] . . . disapproval of the ICE agents' actions, [and] t[elling] them that they should let go of a pregnant woman they were holding down"), *stay granted*, 164 F.4th 1097 (8th Cir. 2026) (finding the injunction was likely too broad and vague).

Recent cases from outside the Eighth Circuit point in the same direction. In *Los Angeles Press Club v. Noem*, 171 F.4th 1179 (9th Cir. 2026), the Ninth Circuit affirmed the district court's conclusion that journalists, legal observers, and protesters were likely to succeed on First Amendment retaliation claims arising from federal agents' response to immigration-raid protests. *Id.* at 1188. And in *Chicago Headline Club v. Noem*, 810 F. Supp. 3d 842 (N.D. Ill. 2025), *vacated as moot*, 168 F.4th 1033 (7th Cir. 2026), the Northern District of Illinois treated nonviolent demonstration, protest, observation, documentation, and recording at DHS immigration-enforcement operations as protected activity. *Id.* at 970–79.

Claims by protesters attempting to record, rather than merely observe, police action may have more luck gaining First Amendment protection. The Eighth Circuit has found that "taking photographs and recording videos are entitled to First Amendment protection" when the photographs are intended to be used to inform the public about a particular issue "because they are an important stage of the speech process that ends with the dissemination of information about a public controversy." *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (finding that a city ordinance prohibiting the recording of a child could not constitutionally be applied to a woman who was taking videos of a public park in order to gather evidence of an alleged violation of a joint use agreement).

3. Ordinary Carelessness, Not the Product of Policy Judgment

Third, the discretionary-function exception does not protect ordinary carelessness or negligence that is not *itself* the product of policy judgment. *See Coulthurst v. United States*, 214 F.3d 106, 110 (2d Cir. 2000) (explaining that, although decisions around the design of an inspection protocol are discretionary, any negligence or carelessness in the failure to diligently and periodically inspect are not discretionary); *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) (holding that the discretionary-function exception does not apply where "officials behaved in a negligent fashion, but without making the types of discretionary judgments that the statutory exception was intended to exempt from liability").

Likewise, even if the decision to engage in violence may amount to a discretionary act, the decision not to warn or protect bystanders may not be. *See Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011) (holding that, although the decision about whether and how to fight a forest fire was protected by the discretionary-function exception, the decision not to notify neighboring properties is not because there is no evidence that a decision not to communicate is susceptible to a policy analysis); *Van Loo v. United States*, 2024 WL 3082357, at *10 (W.D. Wash. 2024) (applying *Green*). *But see Layton v. United States*, 984 F.2d 1496, 1504 (8th Cir. 1993) (holding that the decision as to whether or not to warn contractors of dangers related to felling particular trees was "susceptible to policy analysis, since it involves balancing safety against cost").

If the challenged conduct is best characterized as carelessness, inattention, miscommunication, or failure to responsibly execute an already-chosen course of action, the government should founder in any attempt to characterize the conduct as the kind of policy judgment the discretionary-function doctrine shields.

4. An Application Inconsistent with the Discretionary-Function Doctrine's Purpose

Fourth, the discretionary-function exception only applies to the kinds of judgments that "the discretionary function exception was designed to shield." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

The FTCA's history supports an argument that ICE agent misconduct would not meet this requirement. As explained above, the United States retained sovereign immunity for intentional torts committed by federal employees until Congress added the law enforcement proviso to the FTCA in 1974. *See* John Charles Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. Rev. 497, 498 (1976). This 1974 amendment was prompted by—and, indeed, a direct response to—two wrong-house raids in Illinois. *Id.* at 539. In one, the officers ransacked a home, held its occupants at gunpoint, and threatened to shoot. *Id.* at 500. The other involved agents who drew pistols on an innocent couple before realizing they had entered the wrong home. *Id.* at 501.

These abuses sparked public outrage—and that outrage led Congress to add the law enforcement proviso, which waived sovereign immunity for certain intentional torts. *Id.* at 539.

Because the discretionary-function exception should not be construed to foreclose "liability in the very cases Congress amended the FTCA to remedy," *Martin v. United States*, 605 U.S. 395, 420 (2025) (Sotomayor, J., concurring), and because some of the misconduct by ICE agents in Minnesota eerily resembles the infamous raids in Illinois that prompted Congress's concern and led to the FTCA's 1974 expansion, a plaintiff may—depending on the facts—be able to argue that the exception does not apply here. *See also id.* at 415–21 (Sotomayor, J., concurring) (noting that on remand the lower court should consider the law enforcement proviso's history and "the factual context that inspired its passage" when analyzing the discretionary-function exception).

C THE DETENTION-OF-GOODS EXCEPTION

Property torts (such as the conversion and trespass to chattels claims addressed in Parts II.E. and II.G, respectively) raise another FTCA problem. Section 2680(c) preserves sovereign immunity for claims "arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). The Supreme Court has held that this exception "sweeps as broadly as its language suggests," and that the phrase "any other law enforcement officer" is not limited to officers enforcing customs or excise laws. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220, 226 (2008) (holding that Bureau of Prisons officers who allegedly lost inmate's personal property during his transfer to another prison were covered by the FTCA's detention-of-goods exception). And in *Kosak v. United States*, 465 U.S. 848, 855 (1984), the Court held that the language "arising in respect of" means any claim "arising out of" the detention of goods, and is not limited to claims for damage caused by the detention itself.

Like the Supreme Court, the Eighth Circuit has read the detention-of-goods exception broadly, barring many property claims when personal property is taken into law enforcement custody. *See, e.g.*, *Cheney v. United States*, 972 F.2d 247, 248 (8th Cir. 1992) (finding that claim based on damage to a vehicle after a DEA agent returned the car title to someone other than the owner was barred by the detention-of-goods exception); *Edwards v. United States*, 57 F. Supp. 3d 938, 945–46 (D. Minn. 2014) (holding that the detention-of-goods exception barred a claim based on ICE and CBP officers' separation of the plaintiff from her jewelry during airport detention, and that the exception may apply even when the goods "are never returned"); *Lewis v. United States*, 2008 WL 4838722, at *1, *4 (D. Minn. 2008) (barring claim where Federal Medical Center officials lost inmate's property). *But see Edwards*, 57 F. Supp. 3d at 947 (finding that the plaintiff's claim that federal officials forced her to withdraw money from an ATM was not barred, as the detention-of-goods exception does not extend to "the taking of goods that were not on the person . . .

which the person had the ability to access electronically or through some other means").

That does not mean every property claim is barred. The key question is whether the claim truly arises from the "detention" of goods. *See Edwards*, 57 F. Supp. 3d at 946 (finding that the exception "excludes from the immunity waiver circumstances in which a person's property is taken as part of an investigation or some other law enforcement conduct in which property is detained for law enforcement purposes, even if the property is never returned"). If the alleged wrong is independent of *detention*—for example, physical damage to a home or car during an entry and search, or destruction of property not meaningfully tied to later custody—then § 2680(c) likely would not apply. But if the theory is that officers seized personal property while exercising law enforcement authority and then retained, lost, or damaged that property, the government will likely argue that § 2680(c) bars such claims. The detention-of-goods exception may pose a particular challenge for conversion claims. *See DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1124–26 (9th Cir. 2019) (applying § 2680(c) to bar the plaintiff's conversion claim even when the seizure of the plaintiff's property was permanent and there was no allegation of criminal conduct).

V. MINNESOTA OFFICIAL-IMMUNITY DOCTRINE

In addition to invoking the FTCA's own limitations and exceptions, the government may argue that it can avail itself of state-law defenses that would protect analogous state or local officers from tort liability. Most relevant here, the government may contend that federal immigration officers sued under the FTCA may seek refuge in Minnesota's common-law doctrine of official immunity.

Under Minnesota common law, "a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Rico v. State*, 472 N.W.2d 100, 106–07 (Minn. 1991) (quoting *Susla v. State*, 247 N.W.2d 907, 912 (Minn. 1976)). The goal of this official immunity is to protect public officials from fear of personal liability, which might impair effective performance of their duties. *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988). Official immunity is distinct from both federal qualified immunity and Minnesota's separate statutory immunity doctrines. *See Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006); *Rico*, 472 N.W.2d at 109.

This Part addresses Minnesota official-immunity doctrine in three steps. First, the threshold question is whether Minnesota's official-immunity doctrine applies in an FTCA suit at all. The FTCA asks whether the United States would be liable as a private person under like circumstances, and plaintiffs can therefore argue that a state-law immunity designed for public officials should not be imported into the FTCA analysis. If a court rejects that argument and concludes that the doctrine does apply, the second question is whether the challenged conduct was discretionary or ministerial, because official immunity protects only discretionary acts. Finally, if the court rejects the plaintiff's argument that the conduct was ministerial, the question becomes whether the officer acted willfully or maliciously, in which event official immunity does not apply. Below, we address those three questions in order.

A DOES MINNESOTA OFFICIAL IMMUNITY APPLY TO FTCA CLAIMS?

Federal courts are split on the question of whether the United States is entitled to protection from state-law immunities that would apply to state employees. *Compare, e.g.*, *Villafranca v. United States,* 587 F.3d 257, 263–64 (5th Cir. 2009) (allowing federal officers to claim civil privilege defense available to peace officers under Texas law), *with, e.g.*, *Stuart v. United States,* 23 F.3d 1483, 1487–88 (9th Cir. 1994) (finding that California statute providing immunity for law enforcement officers involved in pursuits does not apply to FTCA claims). In *Brownback v. King*, 592 U.S. 209, 216 (2021), the Supreme Court noted the split and reserved this question.

The Eighth Circuit has not addressed the matter. In *Sorace v. United States*, 788 F.3d 758, 763–64 & n.3

(8th Cir. 2015), the Eighth Circuit declined to reach an analogous question—whether South Dakota's public-duty rule applied to FTCA claims—because the plaintiff's claim failed under both ordinary private-negligence principles and the state's public-duty rule. *See also White v. United States*, 959 F.3d 328, 332 n.3 (8th Cir. 2020) (declining to address whether Missouri public-duty doctrine applies to FTCA wrongful death claims because the plaintiff's claims "fail under either the negligence standard for a private citizen or the public duty rule"). In *Holthusen v. United States*, 498 F. Supp. 2d 1236, 1243 (D. Minn. 2007), however, a judge in the District of Minnesota concluded that Minnesota law governing local law enforcement liability supplied the "closest analogue" to a tribal-officer pursuit claim and therefore analyzed official immunity as part of the FTCA inquiry. But *Holthusen* deserves little weight: It is a nonbinding district court decision, and it largely assumed rather than analyzed the threshold FTCA question whether state official-immunity doctrine carries over at all.

Plaintiffs can credibly argue that Minnesota's official-immunity doctrine should not be imported into an FTCA action at all, and that prior decisions such as *Holthusen* rest on a mistaken understanding of the FTCA's "private party analogue" requirement. The FTCA asks whether a "private individual" would be liable under state law "under like circumstances," not whether a state or municipal officer would be liable or immune. 28 U.S.C. § 2674. As a result, the Supreme Court has repeatedly rejected efforts to import public-entity or public-officer liability rules into the FTCA analysis. *Indian Towing Co. v. United States*, 350 U.S. 61, 65–69 (1955) (rejecting importation of municipal-liability distinctions into the FTCA and focusing instead on private-person liability under like circumstances, even where the conduct is "uniquely governmental"); *United States v. Muniz*, 374 U.S. 150, 164 (1963) (declining to import state-law immunities for public jailers into the FTCA analysis). In *United States v. Olson*, 546 U.S. 43, 45–46 (2005), the Court reiterated that the FTCA requires courts to look to the liability of a private person or private entity, "not to that of public entities," even when the challenged conduct involves uniquely governmental functions. The private-party analogue should be dispositive here, because official immunity is not a rule of private-person liability; it is a public-officer doctrine meant to protect governmental decision-making from the potential chilling effect of personal damages suits. In other words, importing Minnesota official immunity would require treating a government-specific immunity as part of the FTCA's substantive liability inquiry, despite the FTCA's contrary focus on private liability.

The FTCA's text also cuts against importing state-law official immunity into FTCA suits. Section 2674 specifies the defenses the United States may assert by reference to immunities "otherwise . . . available to the employee," but it does so only for judicial or legislative immunity. 28 U.S.C. § 2674. It provides that the United States may invoke "any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim," and likewise that "the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity." *Id.*

Indeed, the Supreme Court recently underscored the same point in a related context, instructing that FTCA courts must ask whether a private individual under like circumstances would be liable, "subject to the defenses discussed in § 2674," not to a defense "nowhere mentioned there." *Martin v. United States*, 605 U.S. 395, 414 (2025). By expressly preserving those immunity-based defenses, while saying nothing about state-law official immunity or other public-officer immunities, Congress strongly suggested that such defenses do not—and should not—carry over into FTCA litigation. *See* Goldberg, *(Extra)ordinary Tort Law*, *supra*, at 518.

B WAS THE IMMIGRATION OFFICIAL'S CONDUCT DISCRETIONARY?

In our view, a court would err by importing Minnesota's official-immunity doctrine into the FTCA. Such an approach would be at odds with the statute's text and inconsistent with the Supreme Court's interpretation of that text.

But, if a court nevertheless adopts such a reading, it would then ask "whether the conduct at issue involve[d] ministerial or discretionary duties." *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). Minnesota courts "have distinguished between the performance of discretionary duties—which is immunized, and ministerial duties—for which officers remain liable." *Rico*, 472 N.W.2d at 107.

"The nature of the act determines whether it is ministerial or discretionary." *Holthusen*, 498 F. Supp. 2d at 1241. A duty is ministerial if "nothing is left to discretion; it is 'absolute, certain, and imperative.'" *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315–16 (Minn. 1998) (quoting *Cook v. Trovatten*, 274 N.W. 165, 167 (Minn. 1937)); *see also Rico*, 472 N.W.2d at 107 (stating that a duty is ministerial "when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts").

Though the question of official immunity ultimately "turns on the facts of each case," many law enforcement duties "are of an 'executive character involving the exercise of discretion.'" *Elwood*, 423 N.W.2d at 678 (quoting *Cook*, 274 N.W. at 167) (holding that sheriff deputies had official immunity when they entered a house without a warrant in an emergency situation). In particular, the official-immunity doctrine appears to protect at least some officers who engage in dangerous high-speed car chases of fleeing suspects. *See, e.g.*, *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992). However, the Minnesota Supreme Court has declined to extend official immunity to a situation where Minneapolis officers were said to have no objective reason to initiate or continue the chase. *Mumm*, 708 N.W.2d at 491–92. And, in another case where officers initiated a vehicular pursuit, the Minnesota Supreme Court found they had no discretion regarding matters covered by the police department's pursuit policy. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 675 (Minn. 2006).

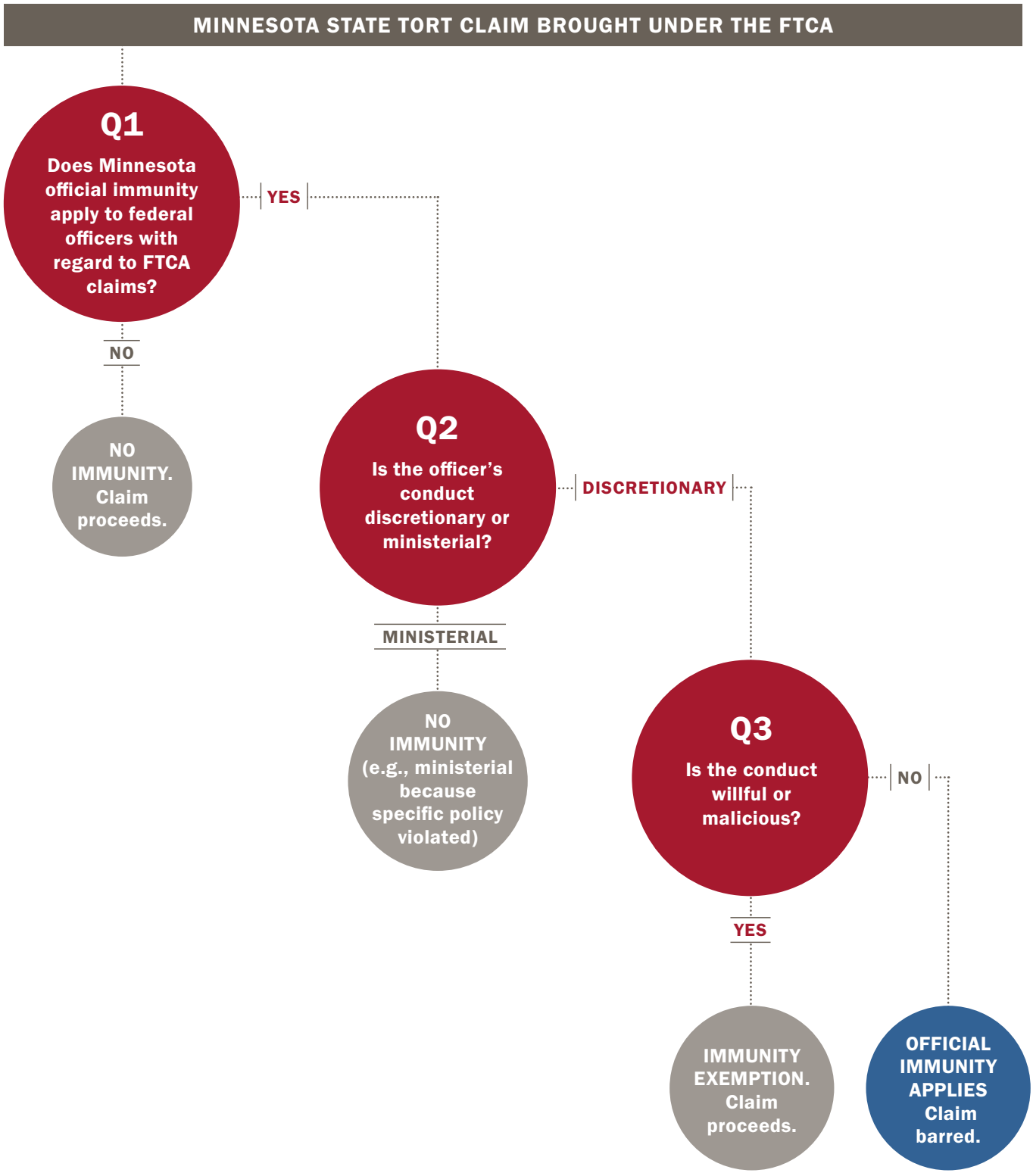
Nor, under Minnesota law, is conduct "discretionary" for official-immunity purposes where a statute or policy imposes a sufficiently specific, mandatory duty that the official is compelled to follow. In that circumstance, the officer's conduct is deemed ministerial, and official immunity does not protect ministerial conduct, a failure to perform it, or its negligent performance. *See Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 658–59 (Minn. 2004) (concluding that the existence of a policy that sets a narrow standard of conduct renders a public employee's conduct ministerial if he is bound to follow the policy); *Wiederholt*, 581 N.W.2d at 314 (finding that a sidewalk inspector's failure to comply with a policy requiring him to immediately repair sidewalk protrusions greater than one inch was a ministerial act).

C WAS THE OFFICER'S ACT MALICIOUS OR RECKLESS?

Even where official immunity applies, plaintiffs can overcome that immunity by showing that the officer acted maliciously or willfully. *See Johnson*, 453 N.W.2d at 42 (explaining that "[a]n exception to the immunity doctrine exists if the officer acted maliciously or willfully"); *Rico* 472 N.W.2d at 107 (observing that "the official-immunity doctrine does not protect the officer who commits a wilful or malicious wrong").

Within the meaning of the official-immunity doctrine, malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Rico*, 472, N.W.2d at 107 (quoting *Carnes v. St. Paul Union Stockyards Co.,* 205 N.W. 630, 631 (Minn. 1925)). Malice is an objective inquiry. This test is met whenever an officer either subjectively knows or has reason to know that his act is prohibited. *See id.* It is not enough that the officer "*intentionally* commits an act that a court or a jury subsequently determines is a wrong." *Id.* "[T]he exception anticipates liability only when an official intentionally commits an act that he or she then has reason to believe is prohibited." *Id.*

Consider *Johnson,* 453 N.W.2d at 42. There, a suspect was already stopped, his vehicle was immobilized, and two other armed officers were on the scene with at least one revolver already drawn—yet the defendant officer nonetheless pointed his service revolver at the suspect's head and threatened to shoot. These facts led the Supreme Court of Minnesota to find that "facts exist which would permit a jury to infer that, with respect to the pointing of the revolver and [making a] threat," the police officer acted "maliciously and willfully." *See id.*


MINNESOTA STATE TORT CLAIM BROUGHT UNDER THE FTCA
Q1
Does Minnesota official immunity apply to federal officers with regard to FTCA claims?
YES
NO
NO IMMUNITY. Claim proceeds.
Q2
Is the officer's conduct discretionary or ministerial?
DISCRETIONARY
MINISTERIAL
NO IMMUNITY (e.g., ministerial because specific policy violated)
Q3
Is the conduct willful or malicious?
NO
YES
IMMUNITY EXEMPTION. Claim proceeds.
OFFICIAL IMMUNITY APPLIES Claim barred.

VI. BRINGING AN FTCA CLAIM

This Part moves from substance to procedure. It addresses the mechanics of filing and litigating an FTCA case. In order, counsel should: exhaust administrative remedies, file an FTCA complaint in federal court against the United States, prepare pre-trial motions, particularly those addressing subject-matter jurisdiction and sovereign-immunity exceptions, complete discovery, and, if settlement is not possible or appropriate, prepare for trial.

A CONTINGENCY FEES, ADMINISTRATIVE EXHAUSTION, TIMELINESS, AND THE ADMINISTRATIVE FILE

The first FTCA requirement comes at the time of retention and involves attorney compensation. In particular: Contingency fees in FTCA cases are capped at 25 percent of any judgment or settlement, with a lower 20 percent cap for certain administrative awards. 28 U.S.C. § 2678. When entering into a retention agreement with FTCA clients, lawyers should adhere to these limitations.

The second requirement involves administrative exhaustion. Soon after retention, the lawyer needs to present the claim to the relevant federal agency—here, the Department of Homeland Security. This claim must be presented to the agency within two years after accrual. 28 U.S.C. § 2401(b). An FTCA claim accrues when the plaintiff knows or reasonably should know of her injury and its cause—although not its wrongfulness. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979).

When presenting a client's claim, the lawyer should utilize and complete Standard Form 95. *See* 28 C.F.R. § 14.2(a); U.S. Dep't of Just., Standard Form 95 (2007), https://perma.cc/A2NL-5XTV.[15] The Form asks for the basis of the claim, including "the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence[,] and the cause thereof." U.S. Dep't of Just., *supra*. An account of the relevant property damage or personal injury alleged is also required. *Id.*

Concerning additional appropriate documentation to submit alongside this information, Form 95 instructs:

> (a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the

[15] A lawyer need not *necessarily* use Form 95, but "Counsel for a claimant might be well-advised to use the standard form to avoid any question about the adequacy of the administrative claim and to ensure that it will be efficiently handled by the receiving agency." Sisk, *supra*, § 3.3.

> injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.
>
> (b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.
>
> (c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

When completing Form 95, the claimant must specify a "sum certain"; he must quantify any damages he has incurred or will incur as a result of the tortious action. *GAF Corp. v. United States*, 818 F.2d 901, 919 (D.C. Cir. 1987).[16] The sum supplied generally fixes the maximum amount that may be sought in court, as any judicial complaint ordinarily may not demand more than the amount specified on Form 95, except on a showing of newly discovered evidence not reasonably discoverable at the time of presentment or intervening facts relating to the amount of the claim. 28 U.S.C. § 2675(b); Sisk, *supra*, § 3.3 (explaining that "[t]he sum requested in the administrative claim . . . ordinarily sets the ceiling for damages requested in a later lawsuit"). Given this restriction, if a claimant's injuries materially worsened before final agency action and before suit is filed, counsel should consider amending the administrative claim first. *See* 28 C.F.R. § 14.2(c). However, such an amendment will generally restart the six-month period for agency review. *Id.*

Following this presentment, the agency will either deny the claim or fail to respond. 28 U.S.C. § 2675(a). If there is no response after six months, the plaintiff can proceed; six months of silence satisfies the exhaustion requirement. *Id.* Any claim must be filed within six months of the agency's response or the satisfaction of the exhaustion requirement through silence.

Thus, critically, there are two time limits: (1) Form 95 needs to be filed within two years after the claim

[16] In the Eighth Circuit, plaintiffs are not necessarily required to set forth a single-dollar value to meet the "sum certain" requirement; a plaintiff may instead express her demand as a range. A.M.L. v. United States, 61 F.4th 561, 564 (8th Cir. 2023). But a claimant would likely be wise to err on the side of greater specificity.

accrues, and (2) a lawsuit needs to be filed within six months of the agency's denial or exhaustion-through-silence. *See United States v. Wong*, 575 U.S. 402, 405 (2015) ("The Federal Tort Claims Act (FTCA or Act) provides that a tort claim against the United States 'shall be forever barred' unless it is presented to the 'appropriate Federal agency within two years after such claim accrues' and then brought to federal court 'within six months' after the agency acts on the claim." (quoting 28 U.S.C. § 2401(b))). Although these time limits are nonjurisdictional and subject to equitable tolling, *id.* at 420, counsel should not rely on tolling in ordinary cases.

When filing suit after denial of the administrative claim, certain additional documents should be assembled. Attached to the initial agency presentation documents should also be any amendments to these documents that were submitted to the agency during the administrative process. *See McNeil v. United States*, 508 U.S. 106, 111–13 (1993) (holding that a prematurely filed FTCA action must be dismissed and that subsequent exhaustion does not cure a prematurely filed suit). Also required is proof of delivery of Form 95 to the agency, all correspondence between the agency and the claimant from the agency litigation, and the final denial letter from the agency if one is issued. *Id.*

Special care is required if the administrative claim was submitted by a representative—such as a parent or guardian. Federal regulations provide that presentment requires "the title or legal capacity of the person signing" and "evidence of his authority to present a claim of behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative." 28 C.F.R. § 14.2(a). Interpreting this requirement, the Eighth Circuit has held that the administrative filing must contain proof of the representative's authority to act on behalf of the claim's beneficiaries under state law. *Mader v. United States*, 654 F.3d 794, 803 (8th Cir. 2011) (en banc). That means that plaintiffs must satisfy any state law requirements governing representation prior to filing an administrative complaint. Illustrating the rigor of this requirement, in *Rollo-Carlson v. United States*, 971 F.3d 768, 770–71 (8th Cir. 2020), the Eighth Circuit held that parents who filed an FTCA wrongful-death claim as next of kin had not properly exhausted because, when the agency claim was filed, neither had been appointed trustee under Minnesota's wrongful death statute, *see* MINN. STAT. ANN. § 573.02 (West 2023).

B PROPER DEFENDANT, VENUE, RELIEF, AND THE STRUCTURE OF THE COMPLAINT

An FTCA claim is brought against the United States, not against a particular agency or the individual officers in their official or individual capacities. 28 U.S.C. §§ 1346(b)(1), 2679(c). The complaint should therefore name the United States as the FTCA defendant and keep separate any non-FTCA claims—such as *Bivens* claims—by count and defendant.

Venue lies only in the district where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

Service must comply with Federal Rule of Civil Procedure 4(i) (the manner in which process shall be served) and 4(e) (by whom service shall be made). "Upon the filing of the complaint, the court clerk issues the summons, and the plaintiff must then effect service by (1) delivering a copy of the summons and complaint to the United States Attorney (or his designee) for the district in which the action is brought, or by sending the summons and complaint by registered or certified mail to the civil process clerk at the U.S. Attorney's Office, and (2) sending, via registered or certified mail, another copy of the summons and complaint to the Attorney General of the United States at Washington, D.C." JAYSON & LONGSTRETH, *supra*, § 4.03; *see* also FED. R. CIV. P. 4(i)(1)(A). If the complaint also names officers individually on non-FTCA counts, those defendants must be served as well. FED. R. CIV. P. 4(i)(3), 4(e).

The complaint should plead the FTCA's jurisdictional and merits prerequisites expressly. An FTCA complaint therefore should allege, if possible, with respect to jurisdiction: (1) the federal employees whose conduct is at issue acted within the scope of employment under Minnesota law, *see supra* Part III; (2) administrative remedies were exhausted, *see supra* Section A;[17] (3) the complaint is timely under 28 U.S.C. § 2401(b), *see supra* Section A; (4) venue is appropriate under 28 U.S.C. § 1402(b); (5) why the likely FTCA exceptions, such as the discretionary-function exception, do not bar the claim, *see supra* Part IV; and, with respect to merits: (6) Minnesota tort violations, supported by relevant facts, *see supra* Part II.

For assault, battery, false-imprisonment, and false-arrest counts, the complaint should also allege that the officers were "investigative or law enforcement officers" within the meaning of 28 U.S.C. § 2680(h). (This is key to trigger the law enforcement proviso, discussed above at IV.A.) For property claims, the complaint should distinguish between (a) physical damage inflicted during a stop or seizure, and (b) later detention, retention, or loss of personal property in law enforcement custody, because the latter will likely draw a defense under the detention-of-goods exception. *See* 28 U.S.C. § 2680(c). (For discussion of that exception, see Part IV.C. above.)

The prayer for relief should seek compensatory damages only. The FTCA does not authorize punitive damages or prejudgment interest. 28 U.S.C. § 2674. And because the complaint ordinarily cannot exceed the administrative claim amount (see Section A above), counsel should align the prayer for relief with the administrative claim amount, unless there is a good-faith basis to plead newly discovered evidence or intervening facts. *See id.* § 2675(b).

FTCA claims are bench-tried, as there is no jury right. 28 U.S.C. § 2402. That fact should shape the

[17] The complaint should state: "Pursuant to 28 U.S.C.S. § 2675(a), the claim set forth herein was presented to [here specify the appropriate federal agency, e.g., the Department of the Army] on [insert date]. The [agency] denied the claim on [insert date]." JAYSON & LONGSTRETH, *supra*, § 4.03. Or if no response was proffered, the complaint should state: "More than six months before this action was instituted, the claim set forth herein was presented to [specify the appropriate federal agency]. Said agency having failed to make a final disposition of the claim within that time, plaintiff deems such failure to be a denial thereof." *Id.*

complaint and case strategy from the beginning. The pleading should ideally read like a set of proposed findings: Each tort count should be tied to concrete facts, and each anticipated exception should be addressed with equally concrete allegations.

Counsel should also account for the FTCA judgment bar when initiating FTCA actions. A judgment in an FTCA case—favorable or unfavorable—"shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. That means that the judgment in an FTCA case bars a *Bivens* action against the relevant employee, even if the FTCA and *Bivens* actions are brought together. *See White*, 959 F.3d at 333 ("We join other circuits in holding that the FTCA's judgment bar provision precludes a *Bivens* claim regarding the same subject matter, even if the claims arose within the same suit."); *Brownback*, 592 U.S. at 215 n.4 (reserving the issue). Any case that combines FTCA and individual-capacity claims should therefore be planned with that risk in mind from the outset.

C EARLY MOTION PRACTICE

In most FTCA cases, the first serious fight is over subject-matter jurisdiction and sovereign-immunity exceptions. The United States commonly moves to dismiss under Rule 12(b)(1) challenging presentment, timeliness, scope of employment, and/or an FTCA exception such as the discretionary-function or detention-of-goods exception.

As discussed above in Part IV.B, the Eighth Circuit has not definitively assigned the ultimate burden on the discretionary-function exception. At a minimum, though, the plaintiff must rebut the presumption that discretionary conduct was grounded in policy considerations. Given the unsettled state of the law, when the government raises the discretionary-function exception in a Rule 12(b)(1) motion, plaintiffs should be prepared to show either that the challenged conduct was nondiscretionary or that any discretionary conduct was not the kind of policy-based judgment the exception protects.

D DISCOVERY

Jurisdictional discovery, requested under Rule 56(d), may be warranted if facts necessary to resolve the jurisdictional inquiry are "either unknown or can be genuinely disputed." *FDIC v. Dosland*, 50 F. Supp. 3d 1070, 1077 (N.D. Iowa 2014). The Eighth Circuit has explained that a court may be guided by Rule 56(d) when considering whether jurisdictional discovery is necessary and has identified several factors relevant to determining whether jurisdictional discovery is appropriate. *See Johnson*, 534 F.3d at 965. To request jurisdictional discovery, "a party must file an affidavit describing: (1) what facts are sought and how they are to be obtained; (2) how these facts are reasonably expected to raise a genuine issue of material fact;

(3) what efforts the affiant has made to obtain them; and why the affiant's efforts were unsuccessful." *Id.*

After jurisdictional hurdles are cleared,[18] formal discovery under Federal Rule of Civil Procedure 26 can commence. Formal discovery begins only after the parties conduct a discovery conference. *See* FED. R. CIV. P. 26(f). Both parties will then make the initial, routine disclosures—either 14 days after this initial conference or at a time the court specifies. If expert witnesses are to be used, then their identity must be disclosed, and they, unless otherwise stipulated by the Court, must provide a written report detailing their conclusions, reasoning, and qualifications. *See id.* 26(a)(2)(B). This report must be provided 90 or more days before the date for trial or for the case to be ready for trial. *Id.* 26(a)(2)(D)(i).

Discovery scope may sometimes be extended beyond the specific federal agency involved in the incident. Although there is no clear Eighth Circuit precedent on this point, some district courts in the Eighth Circuit have allowed this practice. *See, e.g.*, *North Dakota v. United States*, 2021 WL 6278456, at *4 (D.N.D. 2021). For example, even if the claim is directed at DHS, if discovery from the Department of State could be relevant, it may be allowed.

When considering what to seek in discovery, consider what is most persuasive to a judge, as the judge will be the factfinder. Potentially useful documents may include:

1. Agency manuals or training materials, which can help overcome the discretionary-function exception by showing that federal officials' conduct violated mandatory policies

2. Incident reports (e.g., documentation of relevant arrest, property seizure)

3. Internal agency investigation reports, including agency correspondence and internal discussions not protected by privilege from the initial claim deliberations

4. Body cameras *(if available, consider asking your client if the officer was wearing a body camera, and if they are unsure, whether or not they saw a "red" flashing light)*

5. Contact information for other employees or other bystanders who witnessed or may have witnessed the incident

[18] Although FTCA and *Bivens* claims are parallel, complementary remedies, an adverse ruling on the FTCA claim can doom a *Bivens* claim. The FTCA's judgment bar provision, 28 U.S.C. § 2676, precludes constitutional tort claims against individual federal employees once judgment is entered on an FTCA claim arising from the same subject matter. In *White v. United States*, 959 F.3d 328, 333 (8th Cir. 2020), the Eighth Circuit held that "the FTCA's judgment bar provision precludes a *Bivens* claim regarding the same subject matter, even if the claims arose within the same suit."

Potentially useful interrogatories may include:

1. Names, positions, and job descriptions of employee(s)

2. Questions to confirm employee was on duty or performing assigned task

3. Questions to confirm supervisor's knowledge of occurrence or risk factors for occurrence, to help demonstrate negligence.[19]

E TRIAL, DAMAGES, AND POST-JUDGMENT CONSEQUENCES

Because FTCA cases are tried to the court, not a jury, counsel should plan for a Rule 52 presentation: proposed findings of fact, proposed conclusions of law, a tight chronology, and a claim-by-claim explanation of why each FTCA exception does not apply.

Damages are governed by state law, subject to the FTCA's federal limits—i.e., no punitive damages and no prejudgment interest. *See* 28 U.S.C. § 2674; *Lockhart v. United States*, 834 F.3d 952, 955 (8th Cir. 2016) ("Under the FTCA, damages are determined according to the relevant state law." (citation modified)). Minnesota law therefore governs compensatory damages for bodily injury, emotional distress, loss of liberty, property damage, and loss of use.

Because the FTCA mandates application of state substantive law, and because state statutes capping damages constitute part of the substantive law, state damage caps tend to apply. *See Scheib v. Fla. Sanitarium & Benevolent Ass'n*, 759 F.2d 859, 864 (11th Cir. 1985) ("The limitation of the Government's liability under the [FTCA] to the same extent as a private party applies to any limitation on damages . . . ."); *see, e.g.*, *Lozada ex rel. Lozada v. United States*, 974 F.2d 986, 987 (8th Cir. 1992) (concluding that, "the United States, when sued under the FTCA for an act of medical malpractice occurring in Nebraska, is entitled to the protection of the one million dollar limitation on medical malpractice awards that Nebraska law provides to 'qualified health care providers'"); *Lucas v. United States*, 807 F.2d 414 (5th Cir.1986) (holding

[19] Discovery can be supplemented with Freedom of Information Act (FOIA) requests. But FOIA requests against the DHS will likely face the law enforcement exception obstacle. FOIA's law enforcement exception, or exemption seven, allows the government to withhold certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). And the Eighth Circuit considers all "records of a criminal law enforcement agency" as falling within exemption seven. Kuehnert v. FBI, 620 F.2d 662, 667 (8th Cir. 1980); *see also* Kuntz v. Dep't of Just., 2020 WL 6324343, at *11 (D.N.D. 2020), *adopted*, 2020 WL 6324340 (D.N.D. 2020) (continuing to apply *Kuehnert* despite 1996 amendments to FOIA). District courts in the Eighth Circuit have held that ICE is entitled to exemption seven's protection. *See, e.g.*, Guillen v. U.S. Dep't of Homeland Sec., 2021 WL 4482985, at *8 (D. Minn. 2021). But all FOIA requests can be filed in the D.C. Circuit, which applies a less categorical rule. *See* 5 U.S.C. § 552(a)(4)(B) (allowing FOIA suits to be filed in D.C. where agencies are headquartered). In the District of Columbia, the agency asserting exemption seven must provide facts which enable a court to "identify a law enforcement purpose underlying withheld documents." Campbell v. Dep't of Just., 164 F.3d 20, 32 (D.C. Cir. 1998) (quoting Quiñon v. FBI, 86 F.3d 1222, 1229 (D.C. Cir. 1996)).

that Texas's malpractice damage cap limited the liability of the United States).

However, Minnesota has no across-the-board damage cap. Minnesota's primary damage cap statute, *see* MINN. STAT. § 3.736 subdiv. 4, curtails liability only for claims against the state of Minnesota and its employees. It does not apply to private parties. Similarly, Minnesota Statutes § 466.04 limits the liability of municipalities (not private persons). Accordingly, the appropriate private analog in an FTCA case arising from Minnesota conduct provides no cap derived from Minnesota state law.

But as noted above in Section A, the United States remains immune from punitive damages, and attorney'sfees are capped by statute: No more than 20 percent of an administrative settlement, and no more than 25 percent of a judgment or post-suit settlement, 28 U.S.C. § 2678.

VII. APPLICATION TO PARTICULAR FACT PATTERNS

This Part applies the foregoing FTCA and Minnesota-law principles to recurring fact patterns that have arisen because of immigration-enforcement operations. The categories below are not mutually exclusive —a single incident may support multiple tort theories, and the same conduct may raise overlapping questions of state-law privilege, federal authority, and FTCA immunity. For each scenario, the analysis identifies the Minnesota torts most likely to fit, the principal state-law defenses or privileges the government is most likely to assert, the FTCA exceptions most likely to be raised, and the factual questions that will often determine whether a claim survives jurisdictional motion practice and succeeds on the merits.

A PRETEXTUAL STOPS OR SEIZURES

Many individuals in Minnesota have been stopped, harassed, confined, or seized owing to their appearance, language, or perceived immigration status. These individuals may have claims for false arrest (also called false imprisonment), IIED or possibly assault and/or battery.[20]

With respect to false arrest, the key question will often be whether the officer had legal justification for the arrest, which requires determining whether the officer exceeded his authority under federal law. *See supra* Part II.C. Without legal justification, an arrest is false. With legal justification, it is not.

Under the Immigration and Nationality Act (INA), ICE has broad authority to briefly stop and question individuals in the interior if there is reasonable suspicion that they are in the country illegally. *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 2 (2025). But ICE loses authority to continue questioning as soon as the stopped person demonstrates citizenship or lawful presence. *Id.* at 6.

ICE also exceeds this authority whenever it either stops someone *without* reasonable suspicion or arrests someone without probable cause. *See id.* at 2. Reasonable suspicion is a "totality of circumstances" inquiry, which can include factors such as race, ethnicity, and English language skills. *Id.* at 1–2. But "apparent ethnicity alone cannot furnish reasonable suspicion"; it is, instead, a "relevant factor" that must be considered alongside "other salient factors." *Id.* at 5–6 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975)).

Notably, an initial brief investigatory stop is not an arrest, and thus not a false arrest, but it can morph into one. Duration is relevant to determining whether an investigative detention has turned into an arrest.

[20] Where an incident's facts support both false-arrest and assault claims, both may be able to proceed. *See, e.g.*, Jacobson v. Sorenson, 236 N.W. 922 (Minn. 1931); Rauma v. Lamont, 85 N.W. 236 (Minn. 1901).

See El-Ghazzawy v. Berthiaume, 708 F. Supp. 2d 874, 883 n.5 (D. Minn. 2010), *aff'd*, 636 F.3d 452 (8th Cir. 2011) (observing that "an investigative stop can become a de facto arrest if [it is] unduly lengthy"). Additionally, even a brief stop can constitute an arrest under particular circumstances. *Id.* ("Even a short detention may be an arrest if an officer utilizes unreasonable force."); *see, e.g.*, *Peterson v. City of Plymouth*, 945 F.2d 1416, 1420 (8th Cir. 1991) (finding that an encounter constituted an arrest where officers removed plaintiff from his home and detained him in the back of a squad car for twenty minutes); *Fakorzi v. Dillard's, Inc.*, 252 F. Supp. 2d 819, 829 (S.D. Iowa 2003) (concluding that a thirty-minute detention constituted an arrest because the detainees were handcuffed and placed in squad cars).

IIED claims, too, would be possible, although IIED claims tend to be tricky. First of all, an IIED claim can only proceed where there is no legal justification for the stop at issue. *See El-Ghazzawy*, 708 F. Supp. 2d at 915–16 (holding that where there is a probable cause justification for an arrest, an IIED claim based on that arrest is not possible). Moreover, under Minnesota law, IIED claims demand a high burden—requiring "extreme and outrageous conduct," that is "intentional and reckless" and causes "severe" "emotional distress." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438–39 (Minn. 1983); *see also Elkharwily v. Mayo Holding Co.*, 955 F. Supp. 2d 988, 999 (D. Minn. 2013), *aff'd*, 823 F.3d 462 (8th Cir. 2016). For further discussion of IIED's prerequisites, see Part II.D above.

Although investigatory stops and arrests are discretionary, and thus tend to fall within the discretionary-function exception, the exception does not apply to conduct that violates a clear federal directive—whether a federal statute, regulation, agency policy or the Fourth Amendment. *See Berkovitz*, 486 U.S. at 536; *supra* Part IV.B.1. Thus, proving an officer exceeded his legal authority also tends to be crucial to overcoming this exception for these claims.

The government may also attempt to invoke Minnesota official-immunity doctrine. *See supra* Part V. Minnesota state law provides official immunity to officers who must use judgment or discretion in the course of their duties. *Elwood*, 423 N.W.2d at 677. Under Minnesota law, "official immunity doctrine provides that 'a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.'" *Id.* at 677 (quoting *Susla v. State*, 247 N.W.2d 907, 912 (Minn. 1976)). Recall, however, that "[a]n exception to the immunity doctrine exists if the officer acted maliciously or willfully." *Johnson*, 453 N.W.2d at 42 (citing *Susla*, 247 N.W.2d at 912).

B HIGH-RISK VEHICLE STOP TACTICS

Other individuals in Minnesota have been harmed when ICE officers have used high-risk maneuvers to stop or divert vehicles. These individuals may have claims for simple negligence, negligent hiring, retention, or supervision, false arrest, and/or assault.

For negligence, the plaintiff would only need to show that the officer failed to exercise reasonable care under the circumstances and that the officer's negligence caused a cognizable injury. If the plaintiff is physically injured or faced a credible threat of bodily injury, negligent hiring, retention, or supervision claims, set forth in Part II.E. above, may also be possible.

For false arrest, the plaintiff will have to show that she was confined. Recall, to establish false arrest under Minnesota law the plaintiff must show: "(1) words or acts by defendant intended to confine plaintiff, (2) actual confinement of plaintiff, and (3) awareness by plaintiff that she is being confined." *Parada v. Anoka County*, 555 F. Supp. 3d 663, 676 (D. Minn. 2021), *aff'd*, 54 F.4th 1016 (8th Cir. 2022). Yet, a plaintiff seeking to establish this claim can point to some potentially persuasive authority. There are state cases holding that blocking in vehicles constitutes a *seizure* for the purposes of the Fourth Amendment. *See Illi v. Comm'r of Pub. Safety*, 873 N.W.2d 149, 152 (Minn. Ct. App. 2015) (interpreting boxing in a car as constituting seizure where "the officer positions his squad car so as to prevent the other vehicle from leaving").

An assault claim may also lie. Recall, an assault occurs where the defendant "acted with the intent to cause apprehension or fear of imminent" harm to or offensive contact with the plaintiff, "had the ability to cause" the harm or offensive contact, and the plaintiff "had a reasonable apprehension or fear that the imminent" harm or offensive contact would occur. *See supra* Part II.A. A contact is "imminent" if it will happen without significant delay. MINNESOTA PRACTICE, *supra*, at 60.20.

To rebut these claims, the government may insist that ICE officers are protected by Minnesota's official-immunity doctrine. *See supra* Part V. Minnesota state law provides official immunity to officers who must use judgment or discretion in the course of their duties. *Elwood*, 423 N.W.2d at 677. Under Minnesota law, "official immunity doctrine provides that 'a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.'" *Id.* at 677 (quoting *Susla*, 247 N.W.2d at 912). Recall, however, that "[a]n exception to the immunity doctrine exists if the officer acted maliciously or willfully." *Johnson*, 453 N.W.2d at 42 (citing *Susla*, 247 N.W.2d at 912).

C WEAPON INTIMIDATION DURING STOPS

ICE officers have also used their weapons to intimidate individuals. The brandishing of a weapon gives rise to claims for assault and possibly IIED. If the offending officer's background should have precluded his hiring—or if his training was deficient—a claim for negligent hiring or supervision also might lie, but only if the plaintiff alleges actual bodily injury or a credible threat of bodily injury. *See supra* Part II.E.

As far as assault, recall that the first element requires a showing that the defendant intended to cause apprehension or fear of imminent harm. Intent to cause apprehension or fear can be established from circumstantial evidence, including officers' conduct. *See Dahlin v. Fraser*, 288 N.W. 851, 853 (Minn. 1939) ("Intent may be inferred from all the facts and circumstances, such as exhibitions of anger, threats, gestures and other conduct."). Minnesota plaintiffs can point to the totality of ICE officers' behavior, including armed intimidation, to show that officers intended to instill fear. *Cf. State v. Kastner*, 429 N.W.2d 274, 275 (Minn. Ct. App. 1988) (finding, in a criminal assault case, that the defendant intended to instill fear in the plaintiff where the defendant made verbal threats and drew "scissors and screwdriver out of her pockets. . . pointed them at [the plaintiff] and assumed a position which [the plaintiff] considered was offensive").

The second element of civil assault requires demonstrating that the defendant had the apparent present ability to carry out the threatened harm or contact. *Elwood*, 423 N.W.2d at 679. ICE officers pointing guns at a person clearly satisfies this element. *See Johnson v. Morris*, 453 N.W.2d 31, 41 (Minn. 1990) (noting that, when a police officer threatened to shoot a suspect if he didn't put up hands, the officer "obviously had the ability to carry out the threat").

Finally, plaintiffs have to show that they reasonably apprehended harmful contact. *See Zapata v. Metro. Council*, 2010 WL 2160909, at *4 (Minn. Ct. App. 2010). Plaintiffs can also easily show apprehension of "immediate" harm or contact, given the immediacy of the threat from a brandished weapon. *See Longtin v. Pollard*, 2020 WL 5507808, at *3–4 (Minn. Ct. App. 2020).

Indeed, Minnesota courts have previously found that similar conduct gives rise to liability for assault. *See, e.g., Johnson*, 453 N.W.2d at 41 (holding that a police officer aiming a service weapon at a suspect met the tort requirements for assault if the threat was unlawful); *id.* ("When [the police officer] threatened to shoot [the plaintiff] if he did not put up his hands, he obviously had the ability to carry out the threat. Thus, unless the threat was lawful, an assault did occur.").

Assault claims based on immigration officers' threatened use of force may turn on whether that threatened force was lawful. In *Johnson v. Morris*, the Minnesota Supreme Court explained that a peace officer's

threatened use of force is lawful "if it is a reasonable use of force when used in affecting an arrest." 453 N.W.2d at 41 (citing MINN. STAT. ANN. § 609.06(1)(a) (West 2024)). The court further noted that this privilege is limited by Minnesota Statutes § 629.32, which provides that a "peace officer" "may not subject the person arrested to any more restraint than is necessary for the arrest and detention." *Id.* While § 629.32 does not define "peace officer," other Minnesota Statutes define "peace officer" as describing licensed state and local law enforcement. *See* MINN. STAT. ANN. § 626.84, subdiv. 1(c) (West 2025) (defining "peace officer" as "an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the board, charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest"); *see also id.* § 609.066, subdiv. 1 (adopting § 626.84's definition for use-of-deadly-force statute); *id.* § 629.40, subdiv. 1 (same). Under *Johnson*, if officers invoke a law enforcement privilege, plaintiffs can still argue that pointing firearms or otherwise threatening force was unlawful if it exceeded the force reasonably necessary to carry out the arrest or detention. For further discussion of assault, see Part II.A above.

Next, the government may invoke the discretionary-function exception, 28 U.S.C. § 2680(a), to argue that ICE officers' threatened use of force involved the kind of judgment the exception was designed to shield. Plaintiffs can defeat the exception by demonstrating that the officers' conduct violated a specific mandatory directive—whether the Fourth Amendment or a federal statute, regulation, or agency policy—that left no room for judgment or choice. *See Berkovitz*, 486 U.S. at 536; *supra* Part IV.B.1. For instance, Plaintiffs could argue that ICE officers pointing weapons at them goes beyond "the level of force that is objectively reasonable in light of the facts and circumstances confronting the [law enforcement officer] at the time force is applied," thus violating DHS policy. *Chi. Headline Club v. Noem*, 2025 WL 3240782, at *7 (N.D. Ill. 2025) (citations omitted).

The government may also claim that ICE officers are protected by Minnesota's official-immunity law. As Part V explains above, Minnesota state law provides official immunity to officers who must use judgment or discretion in the course of their duties. *Elwood*, 423 N.W.2d at 677. Under Minnesota law, the "official immunity doctrine provides that 'a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.'" *Id.* at 677 (quoting *Susla*, 247 N.W.2d at 912). Recall, however, that "[a]n exception to the immunity doctrine exists if the officer acted maliciously or willfully." *Johnson*, 453 N.W.2d at 42 (citing *Susla*, 247 N.W.2d at 912). For further discussion, see Part V above.

D VEHICLE DAMAGE AND DESTRUCTION

Some ICE officers have intentionally damaged property, particularly vehicles. Suits involving claims regarding trespass to chattels and conversion are most appropriate in these circumstances. When this

destruction causes an entry into a plaintiff's vehicle, intrusion upon seclusion, a privacy tort, may also be appropriate.[21] But it does not appear that any Minnesota court has directly applied this tort to the vehicle context, so it would be a novel claim.

Trespass to chattels is most appropriate here, although conversion may be appropriate for extremely severe damage that totals a vehicle. Minnesota has adopted these torts as they are defined in the Restatement (Second) of Torts. *Rydrych v. GK CAB Co.*, 2011 WL 5829337, at *2 n.1 (Minn. Ct. App. 2011) (citing *Herrmann v. Fossum*, 270 N.W.2d 18, 20–21 (Minn. 1978)). The Restatement defines trespass to chattels as "intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." Restatement (Second) of Torts § 217 (Am. L. Inst. 1965). For more on trespass to chattels, see Part II.G above.

Conversion has a higher burden, requiring the "intentional exercise of dominion or control" which "so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Restatement (Second) of Torts § 222A (Am. L. Inst. 1965). Minnesota Court of Appeals decisions have narrowed conversion as applying only to "serious, major, and important interferences with the right to control chattel." *TCI Bus. Cap., Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 428 (Minn. Ct. App. 2017) (quoting *Bates v. Armstrong*, 603 N.W.2d 679, 682 (Minn. Ct. App. 2000)).

The government has some defenses to these claims. Most notably, as explained above, the use of force resulting in damage is privileged if the force used is reasonable to effectuate a lawful arrest. *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 829 (Minn. 2005). This privilege is lost when the underlying force becomes unreasonable. *Id.* Minnesota case law suggests that excessive force damaging property is only unreasonable if the force "directly threaten[s]" the person being seized. *See Johnson*, 453 N.W.2d at 36 (holding that it was not unreasonable for an officer to shoot out a plaintiff's tires since the plaintiff was not in the vehicle).

The government may invoke the discretionary-function exception, 28 U.S.C. § 2680(a). *See supra* Part IV.B. Plaintiffs can defeat this argument by showing that the officers' conduct violated a specific mandatory directive—whether a federal statute, regulation, or agency policy—that left no room for judgment or choice. *See Berkovitz*, 486 U.S. at 536. For example, plaintiffs could argue that officers smashing a car window exceeded "the level of force that is objectively reasonable in light of the facts and circumstances," thus violating DHS policy. *See Chi. Headline Club*, 2025 WL 3240782, at *7 (citations omitted).

[21] Intrusion upon seclusion has three elements: "(1) an intrusion, (2) that is highly offensive, and (3) into some matter in which a person has a legitimate expectation of privacy." Swarthout v. Mut. Serv. Life Ins. Co., 632 N.W.2d 741, 744 (Minn. Ct. App. 2001); *see also* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 (Minn. 1998).

The government may also claim that ICE officers are protected by Minnesota's official-immunity law. As Part V explains, Minnesota state law provides official immunity to officers who must use judgment or discretion in the course of their duties. *Elwood*, 423 N.W.2d at 677. Under Minnesota law, "official immunity doctrine provides that 'a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.'" *Id.* at 677 (quoting *Susla*, 247 N.W.2d at 912). Recall, however, that "[a]n exception to the immunity doctrine exists if the officer acted maliciously or willfully." *Johnson*, 453 N.W.2d at 42 (citing *Susla*, 247 N.W.2d at 912). For further discussion, see Part V above.

E EXCESSIVE FORCE DURING ARREST

Some ICE officials have injured arrestees by exerting excessive force upon them. The most natural Minnesota tort analogues in these circumstances are battery and assault. For a discussion of these torts generally, see Part II, Sections A and B, respectively. Under Minnesota law, assault and battery are distinct claims, and a plaintiff may plead both. *Schumann v. McGinn,* 240 N.W.2d 525, 528 n.2 (Minn. 1976); *see also Doe 271 v. Pyfferoen*, 10 N.W.3d 496, 502 (Minn. Ct. App. 2024) (allowing claims for both sexual assault and sexual battery to proceed). IIED may also be possible in especially egregious cases, but see Part II.D and Part VII.A above for discussion of the demanding standard that claim requires.

Excessive force during an otherwise lawful arrest can still give rise to tort liability. Even when an officer is privileged to arrest or detain a person, that privilege extends only to force that reasonably appears necessary to accomplish the arrest. *See* KEETON ET AL., *supra*, § 26 (explaining that, even if an arrest is valid, when effecting the arrest "the defendant can never use more force than reasonably appears to be necessary"). Under Minnesota law, an officer is ordinarily privileged to use reasonable force, including handcuffing or other restraints, in effecting a lawful arrest. *Johnson*, 453 N.W.2d at 40–41. But once the officer uses more force, or more restraint, than is reasonably necessary to effect the arrest or detention, the contact may become offensive and actionable as battery. *See id.*; *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155–56 (Minn. 1980); *Johnson v. Peterson*, 358 N.W.2d 484, 485 (Minn. Ct. App. 1984); *see also Altman v. Knox Lumber Co.*, 381 N.W.2d 858, 863 (Minn. Ct. App. 1986) (applying the same standard to the actions of private citizens conducting a citizen's arrest).

The Minnesota Supreme Court has recognized that excessive force in handcuffing can constitute battery but requires substantial evidence that the force used was excessive. Thus, in *Johnson v. Morris*, the Court rejected the plaintiff's handcuffing-based battery claim where he never complained to the officer who applied the cuffs and the only evidence of excessiveness was "very minor bruises." 453 N.W.2d at 41. But in *Paradise v. City of Minneapolis*, the Minnesota Supreme Court found that the lower court erred

in dismissing the plaintiff's complaint because a jury could find that though the plaintiff was being uncooperative, "there was no need to apply the handcuffs and lift plaintiffs from the ground" and "testimony regarding the officer's tightening of his handcuffs after he requested that they be loosened provides a reasonable basis for finding that unnecessary force was used." 297 N.W.2d at 155–56.

In addition to an assault or battery claim, a plaintiff may be able to claim that the particular officer's supervisor engaged in negligent hiring, retention, or supervision—and that this negligent hiring, retention, or supervision proximately caused the plaintiff's injury. *See supra* Part VII.C (discussing these claims under Minnesota law).

In an FTCA case, the principal defenses will likely be official immunity, *see supra* Part V, and the discretionary-function exception, *see supra* Part IV.B. To rebut the latter, plaintiffs can argue that no officer has discretion to use force or restraints in a manner contrary to mandatory policy—and DHS's current use-of-force policy authorizes only force that is necessary and objectively reasonable and states that physical force must stop when resistance ceases or the incident is under control. *See supra* Part IV.B.1. The court's assessment of whether the claim survives or is precluded may well come down to its assessment of whether the force was reasonable or excessive under the circumstances.

F CHEMICAL AGENTS USED AGAINST BYSTANDERS

Federal agents have deployed chemical agents, including tear spray and pepper gas, against observers and bystanders.[22] Battery and assault are potentially appropriate claims in these circumstances.[23]

Under Minnesota law, possession and use of "authorized tear gas compounds," including pepper spray, fall under a separate statute, with the only authorized use of these compounds being "reasonable force" to defend the person or their property. MINN. STAT. ANN. § 624.731(2)(b) (West 2009). Subdivision 6 of that provision generally exempts law enforcement agencies and peace officers acting in their official duties from these restrictions, but subdivision 4(d) separately prohibits the use of "tear gas or tear gas compound in an immobilizing concentration against another person." *Id.* § 624.731, subdivs. 6, 4(d).

Minnesota courts sometimes look to criminal use-of-force statutes to define the privilege or justification defense in civil assault and battery claims against officers. *See Schumann*, 240 N.W.2d at 538 (acknowledging the ability of the courts to distinguish between the "scope of the officer's privilege" in criminal law and

[22] DHS has not disclosed specifically which chemical agents were deployed. *See* Matthew Blake et al., *'My Eyes Were Stinging': The Chemicals Used by ICE When they Confront Protesters*, MINNPOST (Jan. 15, 2026), https://perma.cc/7LS7-DK9Z.

[23] As above, if the offending officer's background should have precluded his hiring—or if the officer's training or supervision was deficient—a claim for negligent hiring or supervision also might lie. *See supra* Part II.E.

tort but declining to do so in favor of "conforming to the legislative policy relating to the use of force in law enforcement"). This complicates tort claims of assault or battery, particularly against law enforcement officers. *See, e.g.*, *State v. Bolster*, 2023 WL 12091582, at *3 (Minn. Dist. Ct. 2023) (holding that electronic incapacitation devices, also regulated under § 624.731, could not be considered a dangerous weapon to support a charge of assault in the second degree). Because they are addressed in a separate statute, the use of tear gas compounds cannot be prosecuted as the intentional release of a "harmful substance" under § 624.732. *See* MINN. STAT. ANN. § 624.731(7) (West 2009). Additionally, the Minnesota Supreme Court also recently distinguished pepper spray from dangerous weapons because the former could not be considered to cause "great bodily harm." *State v. Blevins*, 10 N.W.3d 29, 38 (Minn. 2024). *But see State v. Eliason*, 1999 WL 486578, at *2–3 (Minn. Ct. App. 1999) (holding that mace, as a chemical compound that did not expressly fall within the statutory definition of § 624.731(1)(1) might still be considered a "dangerous article or substance" within the meaning of § 609.66(1)(5) because it "may be dangerous, particularly when used in excessive quantities").[24]

There may be an argument for tort liability for any property damage caused by such tear gas compounds. Minnesota has established a path to liability under Article I, section 13 of the Minnesota Constitution for property damage caused by law enforcement deployment of tear gas. *See Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991) (requiring compensation for damage caused by 25 canisters of tear gas police deployed into the home a fleeing suspect entered). *Wegner* held that the government—but not individual officers—was responsible for compensating "innocent third part[ies]" for damage to their property caused "by the police in the course of apprehending a suspect." *Id.* at 41–42. This holds even if that damage was done out of necessity or served a public purpose. *Id.* at 41.

G CHEMICAL AGENT USE ON AN ALREADY-RESTRAINED PERSON

Border Patrol agents have also aggressively used chemical agents even on individuals already restrained by handcuffs. The use of a chemical agent on a restrained individual may give rise to a claim for assault, battery, false imprisonment, and/or IIED. If the offending officer's background should have precluded his hiring, if his training was deficient, or if his supervision was lax, a claim for negligent hiring, training, or supervision also might lie. *See supra* Part II.E.

We have not surfaced a case where a Minnesota court has confronted this situation in a tort context. But the Court of Appeals recently held similar conduct to be outside the duties of law enforcement. In *In re Severance*, 2025 WL 3002515, at *1–3 (Minn. Ct. App. 2025), the City of Minneapolis denied

[24] Section 624.731(1)(1) was subsequently amended to include oleoresin capsicum, the chemical compound in *Eliason*, which is also the compound for pepper spray.

indemnification to an officer who sprayed pepper spray into the face of a journalist who was lying face down on the ground and not resisting. The City concluded that the officer had "deliberately acted in an unprofessional manner during his duty," terminated his employment, and denied indemnification on the grounds that he was "guilty of malfeasance in office, willful neglect of duty, or bad faith." *Id.* at *3–4. The court defined "willful neglect of duty" as "intentionally or recklessly fail[ing] to exercise due diligence" and upheld the City's determination. *Id.* at *11 (applying substantial evidence review standard because the City's indemnification decision was administrative).

Minnesota courts have also found similar conduct to be egregious in the criminal context. In *State v. Schantzen*, a robber sprayed mace in the faces of handcuffed pharmacy employees to facilitate his escape. 308 N.W.2d 484, 486 (Minn. 1981). The Minnesota Supreme Court affirmed the trial court's decision to depart from the presumed sentence on the basis that this constituted treating the victims with "particular cruelty" and constituted "gratuitous infliction of pain." *Id.* at 487.

As above, even if the plaintiff states a prima facie claim, the government may be able to evade liability pursuant to the discretionary-function doctrine, *see supra* Part IV.B, or possibly Minnesota's common-law doctrine of official immunity, *see supra* Part V.

H FALSE-IMPRISONMENT VARIANTS

In addition to boxing in vehicles, officers may be liable for false imprisonment for other detention variants.

As discussed above in Part II.C, to establish false imprisonment a plaintiff must generally show "(1) words or acts by defendant intended to confine plaintiff, (2) actual confinement of plaintiff, and (3) awareness by plaintiff that she is being confined." *Parada*, 555 F. Supp. 3d at 676, *aff'd*, 54 F.4th 1016 (8th Cir. 2022). If the confinement is legally justifiable, it is not false imprisonment. *See supra* Part II.C.

Because plaintiffs must show that the officers lacked legal justification for the confinement, they must establish that the officers lacked sufficient authority under federal law to continue the stop or make an arrest. Federal immigration officers need reasonable suspicion to conduct a stop and probable cause to make an arrest. *See supra* Part II.C.

If the encounter did become an arrest—or if the confinement otherwise lacked legal justification—the next question is one of Minnesota tort law: whether the confinement was sufficient to support a false-arrest or false-imprisonment claim. Under Minnesota tort law, limited detentions, such as a twenty-minute involuntary transport, may be sufficient to warrant damages for false arrest, if the relevant officer lacked legal authority for the arrest. In *Kor ex rel. Kor v. Mall of Am. Cos., Inc.,* 2000 WL 558067, at *1

(Minn. Ct. App. 2000), a court of appeals held that a seventeen-minute detention was sufficient for false imprisonment.

In addition to a false-imprisonment claim, a plaintiff may be able to claim that the particular officer's supervisor engaged in negligent hiring, retention, or supervision—and that this negligent hiring, retention, or supervision proximately caused the plaintiff's injury. *See, e.g.*, DOBBS ET AL., *supra*, § 341 (discussing negligent supervision claims within the context of the FTCA). Those theories may be available only if the confinement also involved actual bodily injury or credible threat of bodily injury. *See supra* Part VII.C (discussing negligent hiring, retention, and supervision under Minnesota law).

If a false-arrest claim is established, the government may be able to evade liability pursuant to the discretionary-function doctrine, *see supra* Part IV.B, or possibly Minnesota's common-law doctrine of official immunity, *see supra* Part V.

I SEIZURE OF PERSONAL PROPERTY

Some ICE officers have deprived individuals of personal property, including phones, wallets, drivers' licenses, passports, and even automobiles. Such conduct may give rise to claims for conversion or trespass to chattels.

Where officers permanently seize a plaintiff's possessions or vehicle, conversion is the more likely tort analogue. *See supra* Part II.E; *Bates v. Armstrong*, 603 N.W.2d 679, 682 (Minn. Ct. App. 2000) (describing conversion as limited to "serious, major, and important interferences" with property); *TCI Bus. Cap., Inc.*, 890 N.W.2d at 429 (finding no conversion where the defendant "intended that [the plaintiff's property] would be returned").

If a conversion claim lies, the seriousness of the interference may justify requiring the defendant to pay "the full value of the chattel." RESTATEMENT (SECOND) OF TORTS § 222A (AM. L. INST. 1965).

Where the deprivation is temporary rather than permanent, trespass to chattels is the more natural fit. *See supra* Part II.G; *Cent. Specialties, Inc. v. Large*, 18 F.4th 989, 999 (8th Cir. 2021) (explaining that trespass to chattels "typically involves less than a complete divestment" of the plaintiff's property interest). As stated above, Minnesota has adopted the Restatement's definition of trespass to chattels, which covers "intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." RESTATEMENT (SECOND) OF TORTS § 217 (AM. L. INST. 1965).

A related issue arises when immigration officials seize a plaintiff's phone and then delete videos or other

recordings without permission. For the reasons discussed above, trespass to chattels is the strongest Minnesota tort analogue. Intrusion upon seclusion may be a possible alternative theory if the officers viewed or copied private contents while accessing the phone.[25] Conversion is a weaker fit unless the phone itself was retained, destroyed, or otherwise subjected to serious and extended interference. As discussed in Part II.E above, Minnesota conversion law generally protects tangible personal property from serious interferences with possession. Minnesota decisions continue to describe conversion as limited to tangible personal property—"items that can be seen and touched"—and Minnesota has not clearly extended the tort to stand-alone electronic files. *See TCI Bus. Cap., Inc.*, 890 N.W.2d at 428–29. Thus, if officers returned the phone and the only loss was deleted recordings, a stand-alone "conversion of data" theory remains uncertain under Minnesota law.

Additionally, if the object was in the plaintiff's hand or pocket or otherwise attached to her body when it was seized, a battery claim may lie. As we explain in Part II.B above, under Minnesota law, battery is an intentional, unpermitted offensive contact with another's person. *Johnson*, 453 N.W.2d at 40–41. Minnesota courts define the tort of battery by reference to the Restatement, *see Schumann*, 240 N.W.2d at 529 n.4, which provides that "[u]npermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person" constitutes contact with another's person, including "anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person," RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (AM. L. INST. 1965). Thus, if officers wrest a phone, wallet, passport, or keys from a plaintiff's hand, reach into a pocket to remove an item, or yank away an object being worn on the body, the plaintiff can state a claim for battery.

These claims face several potential obstacles. First, Minnesota law requires that interference with property be "without lawful justification" to constitute conversion. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (quoting *Larson v. Archer–Daniels–Midland Co.*, 32 N.W.2d 649, 650 (Minn. 1948)). A plaintiff

[25] Minnesota recognizes intrusion upon seclusion where a defendant intentionally intrudes—physically or otherwise—upon another's solitude or private affairs in a manner highly offensive to a reasonable person. *Lake*, 582 N.W.2d at 233–35 (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)); Hunter v. Anderson, 2013 WL 3974342, at *13 (D. Minn. 2013) ("A successful intrusion upon seclusion claims requires sufficient proof of (a) an intrusion; (b) that is highly offensive; and (c) into some matter which a person has a legitimate expectation of privacy. An intrusion is considered highly offensive if a reasonable person in the same situation would be highly offended by the intrusion.") (citation modified), *aff'd*, 563 F. App'x 508 (8th Cir. 2014). Courts have allowed recovery for intrusion upon seclusion "where the defendant commits a virtual trespass," such as "by hacking into the plaintiff's email account." DOBBS ET AL., *supra*, § 580. In this setting, if officers had to open the phone, browse its contents, or copy recordings in order to delete them, plaintiffs may be able to plead intrusion upon seclusion—especially if the phone contained personal photographs, messages, or other private material. An intrusion-upon-seclusion theory is less likely to fall under the detention-of-goods exception because its gravamen is the unlawful examination of private digital contents rather than the detention of the device as property, but the government may still argue that the claim arose "in respect of" the phone's detention. *See* 28 U.S.C. § 2680(c). For authority showing that intrusion upon seclusion claims are cognizable under the FTCA, *see* Helton v. United States, 191 F. Supp. 2d 179, 184 (D.D.C. 2002) ("Plaintiffs may proceed with an intrusion upon seclusion claim under the FTCA . . . ."); and Escamilla v. United States, 2015 WL 12734050, at *7 (W.D. Tex. 2015) ("The Government has not identified any exception under the FTCA that precludes recovery for a claim of intrusion upon seclusion, and indeed, courts in this circuit and elsewhere have recognized a litigant may recover for such a tort under the FTCA.")

therefore must plausibly allege that law enforcement officials acted outside the scope of their lawful authority. *Strei*, 996 F. Supp. 2d at 791 (granting summary judgment where the arrest was supported by probable cause, and the officer was "authorized, in the interest of his own safety, to search for and seize weapons incident to that arrest"); *Hassan v. City of Minneapolis*, 2000 WL 1051910, at *2, *4 (Minn. Ct. App. 2000) (finding lawful justification where officers seized items not listed in the warrant and later destroyed them because of roach infestation); *Rachuy v. Pauly*, 2014 WL 103388, at *3 (Minn. Ct. App. 2014).

Second, even if officials acted outside the scope of their authority, the government may argue that Minnesota official immunity applies to FTCA claims. *See supra* Part V (explaining official immunity and its potential application to FTCA claims). If that doctrine applies, a plaintiff would also have to show that the officers acted willfully or maliciously. *Strei*, 996 F. Supp. 2d at 789 n.15; *Hassan*, 2000 WL 1051910, at *4.

Finally, claims based on the seizure of property during the course of a stop or arrest are likely barred by the detention-of-goods exception described in Part IV.C above. Section 2680(c) preserves sovereign immunity for claims arising out of the detention of property by law enforcement officers.

J CLAIMS RELATED TO DEFICIENT MEDICAL CARE IN DETENTION OR THE NEGLIGENT DENIAL OF A DETAINEE'S BASIC NEEDS

Some individuals who need medical care are being deprived of necessary attention. *See* Jazmine Ulloa, Allison McCann & Emiliano Rodríguez Mega, *Deaths in ICE Custody Are Growing*, N.Y. Times (Mar. 29, 2026) (discussing deaths in detention facilities generally). Others are being deprived of other basic necessities. Under the FTCA, these claims are governed by the law of the state where the alleged negligence occurred. Thus, Minnesota tort law applies to claims related to acts and omissions that took place in Minnesota.

As discussed below, it will be straightforward to establish that ICE had a special relationship with detainees once in detention. But causation, the discretionary nature of medical decisions, and threshold questions about whether contractors or ICE agents are responsible, may make the FTCA a difficult route for these claims.

The problem is that the FTCA expressly excludes claims based on the acts of independent contractors. 28 U.S.C. § 2671 (explaining that, under the FTCA, liability does not extend to the act of "any contractor with the United States"). And, ICE detention facilities are often operated by independent contractors, not government employees. *See Detention by the Numbers,* Freedom for Immigrants, https://perma.cc/2DYB-VE5V (archived May 3, 2026) (showing that, according to ICE data, more than 90 percent

of people in ICE detention are held in facilities owned or operated by private prison companies). If injured in a contractor-run facility, the plaintiff may need to pursue a claim directly against the private contractor; FTCA claims may be DOA.[26]

Yet, even under § 2671, the government can be liable if it exercises adequate control over the independent contractor's "day-to-day operations." *Knudsen v. United States*, 254 F.3d 747, 750 (8th Cir. 2001); *see, e.g.*, *Logue v. United States*, 412 U.S. 521, 528, 530 (1973) (finding no government FTCA liability for torts in local-run jails where "the day-to-day operations of the contractor's facilities were to be in the hands of the contractor, with the Government's role limited to the payment of sufficiently high rates to induce the contractor to do a good job" and the United States had no "authority to physically supervise the conduct of the jail's employees"); *Knudsen*, 254 F.3d at 750–51 (holding that doctor who contracted with VA hospital was an independent contractor and so the government was not liable for his actions); WRIGHT & MILLER, *supra*, § 3658.2 (explaining that, in assessing whether to impose FTCA on the government for an injury inflicted by a government contractor, courts tend to assess whether "the Government supervises the day-to-day activities of the contractor").

Next, consider the scope of government employees' duties to detainees. Minnesota courts have adopted the Second Restatement of Torts § 314 and § 314A, and, consistent with those provisions, impose on custodians an affirmative duty to take reasonable care of detainees, based on the custodian-detainee special relationship. *See Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995) (implicitly endorsing § 314 and § 314A); *Cooney v. Hooks*, 535 N.W.2d 609, 611 (Minn. 1995) (imposing a duty to protect detainees from violence based on the "special relationship that exists between custodian and detainee" wherein the detainee is deprived of the ability to protect themselves); *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 64 (Minn. 2000) (noting that "jailer-detainee relationship is an exceptional circumstance" giving rise to a duty to protect); *Rusness v. Becker County*, 31 F.4th 606, 617 (8th Cir. 2022) (stating that, under Minnesota law, "[j]ailers owe an affirmative duty of care to detainees and inmates").

Now turn to breach. A custodian breaches his duty of care if he fails to take reasonable steps to provide or

[26] That direct action would ordinarily sound in Minnesota negligence, wrongful-death, or medical-malpractice law against the contractor and the relevant personnel, using the same state-law duty, breach, and causation framework discussed below. Minnesota law permits malpractice suits against prison physicians hired through private contractors. Haavisto v. Perpich, 520 N.W.2d 727, 729, 734 (Minn. 1994) (remanding for trial of medical malpractice claim against contract prison physician). Any Minnesota medical-malpractice claim, however, must satisfy Minnesota Statute § 145.682. That provision requires, in any malpractice action against a health care provider in which "expert testimony is necessary to establish a prima facie case," that the plaintiff must serve two affidavits of expert review, including serving the first one simultaneously with the summons and complaint. MINN. STAT. ANN. § 145.682 (West 2014).

In a direct suit under state tort law, the contractor may attempt to invoke a federal-contractor defense if the federal government lawfully "authorized and directed" the contractor to perform the challenged conduct. *See* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 20–21 (1940) (holding that a federal contractor cannot be held liable for conduct that the government lawfully authorized and directed); Geo Group, Inc. v. Menocal, 146 S. Ct. 774, 785–86 (2026) (holding that, because *Yearsley* provides a defense to liability rather than an immunity from suit, a pretrial order denying *Yearsley* protection is not immediately appealable).

arrange for appropriate care when he knows or should know that a detainee requires medical attention. A custodian who unreasonably ignores a detainee's express request to see a doctor, delays transport to a medical facility without justification, or fails to follow up on visible signs of injury or illness breaches his duty. *See, e.g.*, *Lundman v. McKown*, 530 N.W.2d 807, 828–29 (Minn. Ct. App. 1995) (holding that caregivers breached their duty as a matter of law where they failed to seek medical help despite "continuous and dramatic indications" of life-threatening illness).

Further, private prisons in Minnesota are required to provide detainees with certain basic necessities. *See, e.g.*, MINN. STAT. ANN. § 241.021 (West 2025) (mandating that private facilities meet minimum standards for the "security, safety, health, treatment, and discipline of persons confined or incarcerated therein"); MINN. R. 2960.0270, subp. 6.C (2025) (specifying that detention facilities serving children or juveniles must have "minimum furnishings in the facility, consisting of telephone, radio, television, table, chairs, storage space, bed, lamps, first aid kit, bedding, replacement clothing, personal hygiene items, and leisure activity materials"). It is conceivable that a failure to furnish these necessities may give rise to a claim of negligence per se.

Regarding causation, Minnesota common-law causation standards require that a plaintiff show that it is "more likely than not that the defendant's conduct was a substantial factor in bringing about the result." *Rygwall v. ACR Homes, Inc.*, 6 N.W.3d 416, 429 (Minn. 2024) (citation omitted). For delayed care cases, Minnesota plaintiffs must provide expert testimony addressing what care should have been provided, when it should have been provided, and how the delay specifically contributed to the harm. Courts will not permit recovery based on speculation about what might have happened had care been properly supplied. *See id.* at 429–30; *see also id.* at 435 (finding sufficient for causation that a doctor "expressly stated his opinion to a reasonable degree of medical certainty that had [the plaintiff's] condition been 'immediately acted on with rapid evaluation and treatment, there is a reasonable degree of medical certainty her condition never would have deteriorated'").

If the plaintiff makes it this far, the government may invoke the discretionary-function exception, 28 U.S.C. § 2680(a), to argue that those making care decisions were using the kind of discretionary judgment the exception was designed to shield. As in other contexts, the plaintiffs can overcome the exception by demonstrating that the officers' conduct violated specific mandatory policy directives that left no room for policy judgment. *See Berkovitz*, 486 U.S. at 536.

Relevant to that inquiry, the ICE Performance-Based National Detention Standards (PBNDS 2011, revised 2025), impose various requirements of immigration detention facilities. These include:

- "No later than 12 hours after arrival, all detainees shall receive, by a health care practitioner or

a specially trained detention officer, an initial medical, dental and mental health screening and be asked for information regarding any known acute, emergent, or pertinent past or chronic medical conditions, including history of mental illness, particularly prior suicide attempts or current suicidal/homicidal ideation or intent, and any disabilities or impairments affecting major life activities. Any detainee responding in the affirmative shall be sent for evaluation to a qualified, licensed health care practitioner as quickly as possible, but no later than two working days." U.S. IMMIGR. & CUSTOMS ENF'T, NATIONAL DETENTION STANDARDS § 4.3 (2025).

- "The facility will conduct and document a comprehensive health assessment, including a physical examination and mental health screening, on each detainee within 14 days of the detainee's arrival at the facility. Health assessments shall be performed by a physician, physician assistant, nurse practitioner, registered nurse (RN) (with documented initial and annual training provided by a physician), or other health care practitioner, as permitted by law. When a physical examination is not conducted by a provider, it must be reviewed by a provider." *Id.*

Similarly, where the challenged conditions occurred in CBP custody (rather than in an ICE detention facility), during CBP transport, or in a CBP hold room or holding facility, CBP's National Standards on Transport, Escort, Detention, and Search impose additional mandatory requirements. These include:

- "Upon a detainee's entry into any CBP hold room, officers/agents must ask detainees about and visually inspect for any sign of injury, illness, or physical or mental-health concerns and question the detainee about any prescription medications. Observed and reported injuries or illnesses should be communicated to a supervisor, documented in the appropriate electronic system(s) of record, and appropriate medical care should be provided in a timely manner." U.S. CUSTOMS & BORDER PROT., NATIONAL STANDARDS ON TRANSP., ESCORT, DETENTION & SEARCH § 4.3 (2015).

- "Medication prescribed in the United States, validated by a medical professional if not U.S.-prescribed, or in the detainee's possession during general processing in a properly identified container with the specific dosage indicated, must be self-administered under the supervision of an officer/ agent." *Id.* § 4.10.

- "Food and water should never be used as a reward, or withheld as punishment. Food provided must be in edible condition (not frozen, expired or spoiled)." *Id.* § 4.13.

- "Detainees must be provided with basic personal hygiene items, consistent with short term detention and safety and security needs." *Id.* § 4.11.

To the extent that Plaintiffs' claims center around negligent acts at detention facilities, Plaintiffs will need to argue that the National Detention Standards, as incorporated into the detention facility's contract with ICE, constituted binding directives that removed discretion over whether to provide medical care to meet the Eighth Circuit's reading of the *Berkovitz* test. *See supra* Part IV.B.

After establishing breach, claims concerning the conditions of confinement will generally unspool like the claims related to deficient medical care, sketched directly above.

K NUISANCE CLAIMS ON BEHALF OF BUSINESSES AND RESIDENTS

Others may be able to contend that they have suffered injury because immigration-enforcement activities have disrupted commercial districts and neighborhoods, causing businesses to lose customers or close temporarily and depriving residents of the quiet enjoyment of their homes. Nuisance is a possible fit for these facts, but any FTCA negligence claim faces long odds.

As discussed in Part II.I above, Minnesota defines a private nuisance as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." MINN. STAT. ANN. § 561.01 (2025). Private nuisance is limited to real-property interests. *Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 192 (Minn. 2005). The interference must be material and substantial. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. Ct. App. 2001).

A business may have a plausible negligence claim if officers repeatedly staged vehicles outside the premises, blocked entrances, flooded the property with lights, or otherwise created a sustained condition that interfered with access to, or use of, the business. *See Schmidt v. Village of Mapleview*, 196 N.W.2d 626, 628 (Minn. 1972) (holding that "an *unlawful* denial of reasonable access to property may constitute a nuisance") (emphasis added). Likewise, a resident may have a plausible claim if repeated operations outside her dwelling materially interfered with sleep, conversation, ingress and egress, or ordinary residential use. *Alevizos v. Metro. Airports Comm'n*, 216 N.W.2d 651, 662 (Minn. 1974) (recognizing relief where repeated aircraft noise deprived owners of the practical enjoyment of their homes).

If the alleged disruptive activity is consistently impacting an entire neighborhood or commercial district, the theory may begin to resemble public nuisance rather than private nuisance. Minnesota allows a private plaintiff to recover for a public nuisance only upon a showing of special or peculiar injury not common to the public at large. *Hill v. Stokely-Van Camp, Inc.*, 109 N.W.2d 749, 753 (Minn. 1961). That means a business whose particular entrance was repeatedly blocked during community-wide patrols, or a resident whose building was repeatedly targeted for enforcement, has a better argument than a plaintiff

alleging only that the neighborhood as a whole became less quiet or less commercially active.

Even where nuisance might be viable under Minnesota law, two further hurdles remain. First, because the FTCA only recognizes negligence-based torts (or worse), the plaintiff needs to be clear that she is not complaining of activity under a strict liability theory; the plaintiff needs to show that the government was at fault. Second, the discretionary-function exception is a serious barrier to any nuisance theory that attacks broad enforcement judgments, including where to concentrate operations and how many officers to deploy. The Eighth Circuit has held that a law enforcement officer's "decisions concerning how to effectuate an arrest" fall within the discretionary-function exception absent a specific mandatory directive to the contrary. *Hart v. United States*, 630 F.3d 1085, 1090 (8th Cir. 2011). Deployment choices at the area-wide level are even more likely to be characterized as policy-based resource-allocation decisions. Plaintiffs therefore have the best chance only if they can tie the nuisance claim to narrower operational conduct that violated a specific mandatory federal directive or clear constitutional limitation, rather than to ICE's overall enforcement strategy itself. *See supra* Part IV.B.