IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2798

XIAOXING XI, QI LI, and JOYCE XI,
Appellants

v.

UNITED STATES OF AMERICA et al.,
Appellees

BRIEF FOR APPELLANTS

Appeal from the March 31, 2021 Order of the United States District Court for the Eastern District of Pennsylvania, Surrick, J., Docket No. 2:17-cv-02132-RBS

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction over plaintiffs' Federal Tort Claims Act ("FTCA") claims under 28 U.S.C. § 1346(b)(1) and over plaintiffs' claims for violations of the Constitution under 28 U.S.C. § 1331. The district court's order of March 31, 2021, dismissing nine out of ten claims brought by plaintiffs, was certified as a final judgment under Fed. R. Civ. P. 54(b) by order dated September 17, 2021. This Court has appellate jurisdiction over the district court's final decision under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

This appeal presents the following issues:

1. Whether plaintiffs have properly stated claims under the Federal Tort Claims Act, which are not subject to a discretionary function defense, where the facts alleged plausibly demonstrate unconstitutional conduct by federal law enforcement agents in obtaining an indictment and a search warrant through intentional, knowing, or reckless false statements.

2. Whether plaintiff Xiaoxing Xi may proceed with constitutional claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), where the conduct at issue involves traditional law enforcement activities, governed by the Fourth and Fifth Amendments, that lie at the core of the *Bivens* line of cases and where courts have recognized the availability of a remedy.

Plaintiffs raised these issues in the district court in their opposition to the defendants' motions to dismiss. Doc. 41.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Plaintiffs are not aware of any pending cases or proceedings related to this one.

INTRODUCTION

In May 2015, plaintiff Xiaoxing Xi, a professor of physics at Temple University and a naturalized U.S. citizen, was indicted and arrested for allegedly sharing information about a "pocket heater" with academic colleagues in China. The government cast Professor Xi as a technological spy for China, claiming he had illicitly emailed information about a "revolutionary" superconductor technology that belonged to an American company. Federal agents descended on Professor Xi's home outside Philadelphia early one morning, arresting him as they held his wife and daughters at gunpoint in the family's living room. The agents took Professor Xi into custody, where he was subjected to DNA sampling, a mug shot, fingerprinting, interrogation, and a strip search. The family's house and belongings were searched from top to bottom. Thus began a devastating ordeal, as Professor Xi faced the prospect of years in prison, was suspended from his tenured position at Temple, and the Xi family lived under a cloud of suspicion and fear.

The criminal charges were false and fabricated. Professor Xi did not share any information about the pocket heater. As the device's inventor had informed defendant FBI Special Agent Andrew Haugen before charges were filed, the emails in question described an "entirely different" device—one based on a process that Professor Xi had invented and published. Nor was the pocket heater a

"revolutionary" device, despite the indictment's sensational allegations. These and other falsehoods in the indictment resulted directly from the actions of defendant Haugen: he intentionally, knowingly, or recklessly made false statements and material omissions in his reports, affidavits, and communications with federal prosecutors, culminating in the malicious prosecution of Professor Xi. Like a number of other prosecutions of Chinese American scientists in recent years, the case against Professor Xi ultimately collapsed before trial and was dismissed on the government's motion.

Professor Xi and his family filed this lawsuit seeking remedies for the government's misconduct, but the district court dismissed all of their damages claims on the pleadings. The court rejected plaintiffs' FTCA claims after holding that plaintiffs had failed to allege clearly established constitutional violations, and that the discretionary function defense shielded the United States from liability. This holding was erroneous. Plaintiffs' detailed allegations of unconstitutional conduct are well-pled and plausible, and this Court has repeatedly held that government agents have no discretion to violate the Constitution.

The court also rejected Professor Xi's *Bivens* claims against defendant Haugen, ruling that this case presented a "new context" and that special factors counseled hesitation. That ruling, too, was wrong. For more than forty years since

the Supreme Court's decision in *Bivens*, courts have recognized claims for damages when federal agents conducting ordinary law enforcement activities commit constitutional violations. Professor Xi's claims challenge the baseless arrest and searches caused by defendant Haugen and fit squarely within the long-recognized *Bivens* rule.

STATEMENT OF THE CASE

I. Facts Alleged in the Second Amended Complaint

The plaintiffs in this action are Professor Xi, an internationally recognized expert in the field of thin-film superconducting technology who is widely respected by his academic colleagues and students;[1] his wife Qi Li, also an accomplished professor of physics; and his daughter Joyce Xi, a 2016 graduate of Yale University. Second Amended Complaint ("SAC") ¶¶ 13-14, 25, 92-94.[2]

A. The indictment

The indictment charging Professor Xi was issued in the Eastern District of Pennsylvania on May 14, 2015. *Id*. ¶ 24. It charged him with four separate counts

[1] A superconductor is material that conducts electricity without electrical resistance when it is cooled below a certain temperature. Professor Xi's areas of academic and technical expertise include the development of superconducting thin films and coatings using the chemical compound magnesium diboride.

[2] The SAC is included in the Appendix. App. 72-106. Citations to the facts pled therein refer to the paragraph number.

of wire fraud in violation of 18 U.S.C. § 1343 and, in essence, accused him of acting as a technological spy for China. The four counts of the indictment were predicated on four emails that Professor Xi sent to scientific counterparts in China. The indictment alleged that, in each of the four emails, Professor Xi had pursued a scheme to share information about a "pocket heater" that belonged to an American company, Superconductor Technologies, Inc. ("STI"), in violation of a non-disclosure agreement. *Id.* ¶¶ 1, 26, 29. The pocket heater is a device used for depositing thin films of oxides and magnesium diboride on flat services. *Id.* ¶ 27.

The criminal charges brought against Professor Xi were based on a series of false claims. *Id.* ¶¶ 2, 26. None of the emails cited in the indictment had anything to do with the STI pocket heater. Moreover, the allegation that the STI pocket heater had "revolutionized" the field of superconducting magnesium diboride thin-film growth was highly exaggerated, as the design of the device had been widely known since 2003, when details of the design were presented at an international conference. *Id.* ¶¶ 28, 43-46. In this and other respects, the indictment painted a false and fabricated picture of a scientist illegally transferring sensitive technology to counterparts in China.

Count One of the indictment was based on a 2010 email from Professor Xi "confirming that certain technology had been delivered to a laboratory in China

and offering his personal assistance therewith." *Id.* ¶ 49(a). That email did not reference the STI pocket heater; rather, it concerned an entirely different tubular heating device that employed a process Professor Xi and his colleagues had invented and publicized in 2002. The allegation that this email referenced the STI pocket heater was false. *Id.* ¶¶ 49(a), (f).

Counts Two through Four of the indictment asserted that Professor Xi sent emails "offering to build a world-class thin film laboratory in China," and alleged that Professor Xi was using information he improperly obtained from the STI pocket heater for this purpose. *Id.* ¶ 50(a). But none of the emails had anything to do with the STI pocket heater. Each email related solely to the development of a lab for basic research on oxide thin films. *Id.* ¶ 50(b). Oxide thin films are created with oxygen, and they are materially different from magnesium diboride films like those created in the STI pocket heater. Accordingly, STI's pocket heater would not have any role in an oxide film research laboratory. *Id.* ¶¶ 50(d)-(g).

B. Defendant Haugen's use of false and fabricated information to initiate the prosecution against Professor Xi

The allegations in the indictment were the direct result of defendant Haugen's false statements and material omissions of facts in his reports, affidavits, and other communications with prosecutors. *Id.* ¶ 54. As alleged in the Second Amended Complaint, defendant Haugen made these statements and omissions

intentionally, knowingly, or recklessly. *Id.* Multiple falsehoods permeated the investigation and were known to defendant Haugen before he transmitted them to prosecutors and before the grand jury considered and returned the indictment. The falsehoods known to Haugen before the grand jury issued the indictment include:

- The false assertion that Professor Xi built a version of the STI pocket heater for an entity in China in violation of a nondisclosure agreement, notwithstanding defendant Haugen having learned during his investigation *from the actual inventor of that device* that the materials Professor Xi emailed were "entirely different" and "not related to the STI pocket heater," and that the information Professor Xi sent was based on a process that Professor Xi invented himself, *id.* ¶ 55(a);
- The false assertion that the STI pocket heater was a "revolutionary" device, notwithstanding defendant Haugen having learned that it was neither a trade secret nor subject to any intellectual property protections, *id.* ¶ 55(b);
- The false assertion that Professor Xi transmitted diagrams or photographs of the STI pocket heater to colleagues at Peking University and Tsinghua University, notwithstanding defendant Haugen's knowledge, based on schematics and emails in his possession, that Professor Xi's

communications with Chinese colleagues did not include diagrams or photographs of the STI pocket heater, *id.* ¶ 55(e)-(f);

- The false assertion that Professor Xi shared samples produced by the STI pocket heater with entities in China, notwithstanding defendant Haugen's knowledge that none of the materials shared by Professor Xi with Chinese colleagues were products of the STI pocket heater, *id.* ¶ 55(g);
- The false assertion that Professor Xi sought to "orchestrate a scheme" to obtain the STI pocket heater technology, notwithstanding defendant Haugen's knowledge that information about the STI pocket heater was publicly available and accessible to anyone, *id.* ¶ 55(c); and
- The false assertion that Professor Xi purchased a pocket heater from STI with a specific fraudulent intent to defraud STI, notwithstanding defendant Haugen's knowledge that Professor Xi purchased the pocket heater from a different company, Shoreline Technologies, *id.* ¶ 55(d).

In sum, defendant Haugen made repeated statements throughout the course of the investigation alleging unlawful conduct by Professor Xi, knowing that those assertions were false and that there was no basis to conclude that Professor Xi's communications were anything other than normal and legitimate academic collaboration. *Id.* ¶¶ 56-57. Haugen made each of these false statements to federal

prosecutors intentionally, knowingly, or recklessly to facilitate a criminal indictment without any factual basis. *Id.* ¶ 56.

C. Professor Xi's prosecution and the Xi family's harms and losses

The false charges had a devastating impact on Professor Xi and his family. *Id.* ¶ 76. After the filing of the indictment, in the early morning hours of May 21, 2015, federal agents went to Professor Xi's home, awakened him with loud and aggressive knocks, and, upon entry, handcuffed and arrested him. *Id.* ¶¶ 32-33, 77. While taking Professor Xi into custody, the agents held at gunpoint plaintiff Qi Li, plaintiff Joyce Xi, and Professor Xi's younger daughter, who was then 12 years old. *Id.* ¶¶ 34, 78. Later that day, without probable cause, they searched plaintiffs' property and possessions, including their private papers, computers, and other electronic devices.

Professor Xi was taken to the FBI's Philadelphia field office where he was subjected to DNA sampling, a mug shot, fingerprinting, a two-hour interrogation, and a strip search. *Id.* ¶¶ 36-37. After an initial appearance, Professor Xi was required to post bond and surrender his passport. *Id.* ¶¶ 38-39. At the instigation of defendant Haugen and other investigators involved in the prosecution, the arrest was widely publicized in national and international media, leaving Professor Xi's friends and colleagues with the false impression that he was a criminal and a spy

for China. *Id.* ¶¶ 40, 75, 87. Professor Xi was placed on administrative leave at Temple University and suspended from his position as the interim chair of the University's Physics Department. He could not participate in his research, he was prevented from talking to his graduate students, he suffered substantial financial losses, and he was emotionally traumatized. *Id*. ¶¶ 88-90, 95.

Plaintiffs Qi Li and Joyce Xi, likewise, suffered severe emotional trauma and harms to their respective educational and professional pursuits. *Id.* ¶¶ 96-97. Even after charges were dismissed, Professor Xi, Qi Li, and Joyce Xi continued to experience the adverse effects of the defendants' wrongful conduct in their personal and professional lives and a well-founded fear that the government would again wrongfully accuse their family of unlawful conduct. *Id.* ¶¶ 91-94, 96-97.

D. The dismissal of the indictment and the pattern of similar baseless prosecutions against Chinese American scientists

Following his arrest, Professor Xi retained counsel who secured information showing the patently false nature of the indictment—information that defendant Haugen had known, deliberately ignored, and withheld from prosecutors. *Id.* ¶¶ 41-51. Soon after this information was presented to prosecutors, the government moved to dismiss the indictment and, on September 18, 2015, the district court granted that motion. *Id.* ¶¶ 5, 52.

Given the circumstances surrounding the indictment and its rapid dismissal after the refutation of defendant Haugen's false allegations, Professor Xi had good reason to believe that he was charged in large part because he is racially and ethnically Chinese. *Id.* ¶ 80. Professor Xi was aware of ethnic bias and prejudice directed at him and other Chinese American academics and scientists who were engaged in scientific collaboration with colleagues in China. *Id.* During a 10-month period in 2014 and 2015, the federal government brought three indictments against Chinese American scientists for alleged technological espionage; in each case, criminal charges were dismissed prior to trial. *Id.* ¶ 68. Defendant Haugen made false statements concerning Professor Xi at least in part because Professor Xi was, prior to his naturalization as a U.S. citizen, a Chinese national and because he is ethnically Chinese. *Id.* ¶¶ 69-70.

II. Proceedings in the District Court and the Ruling on the Motions to Dismiss

This lawsuit was initiated on May 10, 2017. Plaintiffs twice amended their complaint. The SAC, which includes ten separate counts, is the operative pleading.

In Counts I through III, Professor Xi brought claims against defendant Andrew Haugen, in his individual capacity, for violations of the Constitution under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). App. 97-98. Professor Xi's constitutional claims alleged that Haugen: initiated a malicious prosecution

and fabricated evidence in violation of the Fourth and Fifth Amendments (Count I); racially and ethnically profiled Professor Xi in violation of his Equal Protection and Due Process rights (Count II); and unlawfully searched and seized Professor Xi's home, private papers, information, communications, and belongings in violation of the Fourth Amendment (Count III).

In Counts IV through IX, Professor Xi, joined by Qi Li and Joyce Xi, brought claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, for the commission of state-law torts by federal employees acting within the scope and course of their employment. App. 99-102. Those claims are for malicious prosecution (Count IV); invasion of privacy–intrusion upon seclusion (Count V); invasion of privacy–false light (Count VI); intentional infliction of emotional distress (Count VII); negligent infliction of emotional distress (Count VIII); and negligence (Count IX).

In Count X, plaintiffs sought equitable relief ordering the Director of the FBI, the Attorney General, and the Director of the National Security Agency ("official-capacity defendants") to return to plaintiffs and/or expunge all information obtained from plaintiffs' electronic devices, communications, and papers.

On January 23, 2018, defendant United States moved to dismiss the tort claims brought against it in Counts IV through IX (Doc. 34), and defendant Haugen moved to dismiss the constitutional claims brought against him in Counts I through III (Doc. 35). On February 2, 2018, the official-capacity defendants moved to dismiss the injunctive claims brought in Count X (Doc. 38). All three motions were fully briefed as of May 22, 2018.

On March 31, 2021, the district court issued a Memorandum and Order granting the motions filed by defendants United States and Haugen and dismissing all claims brought in Counts I through IX. App. 4-62. The decision did not address the injunctive claims in Count X except to note that the motion seeking dismissal of those claims would be addressed in a separate ruling. App. 6 n.4.

Six months later, the district court had not issued any ruling on the motion seeking dismissal of Count X. On September 17, 2021, plaintiffs, with the consent of all defendants, filed a motion under Fed. R. Civ. P. 54(b) requesting that the court enter final judgment as to Counts I through IX so that plaintiffs could appeal the court's March 31, 2021 ruling. On September 17, 2021, the district court granted that motion and entered final judgment for defendant Haugen with respect to Counts I through III and entered final judgment for defendant United States with respect to Counts IV through IX. App. 3.

On September 24, 2021, plaintiffs filed a timely notice of appeal. App. 1-2.

SUMMARY OF THE ARGUMENT

Plaintiffs' Second Amended Complaint asserts plausible and actionable FTCA claims against the United States and *Bivens* claims against defendant Haugen.

In holding otherwise, the district court erred in several respects. First, the district court's holding that the discretionary function defense bars plaintiffs' FTCA claims was wrong and rested on a distortion of bedrock pleading standards. As the district court acknowledged, this defense does not apply where a plaintiff has plausibly alleged unconstitutional conduct—because government actors do not have discretion to violate the Constitution. But the district court then went on to ignore or reject plaintiffs' detailed allegations, which establish multiple constitutional violations, as it repeatedly failed to accept all factual allegations as true and failed to draw reasonable inferences in plaintiffs' favor. Applying the correct motion-to-dismiss standards, plaintiffs' complaint plausibly alleges the malicious prosecution of Professor Xi, the fabrication of evidence to secure an indictment of Professor Xi, the falsification of reports and affidavits to obtain a warrant for the search of the Xi family's home and belongings, and the

discriminatory prosecution of Professor Xi on the basis of his race and ethnicity. These well-pled allegations bar any reliance on the discretionary function defense.

Second, and relatedly, the court's conclusion that plaintiffs must plead "clearly established" constitutional violations wrongly imported the qualified immunity framework into the FTCA. Its analysis is inconsistent with federal circuit precedent and contrary to the central purpose of the qualified immunity defense, which is to protect *individual* defendants—not the United States—from suit. In any event, plaintiffs have alleged constitutional violations that are clearly established under this Court's decisions.

Finally, *Bivens* claims are available here because the law enforcement conduct at issue in this case—including unlawful search and seizure in violation of the Fourth Amendment—closely resembles the challenged conduct in *Bivens* in all material respects. Indeed, the constitutional claims here fall within the heartland of cases in which courts have allowed *Bivens* remedies. This case does not involve a "new" context or "special factors" that would counsel hesitation against applying *Bivens* remedies, and the district court erred in holding otherwise.

The district court's ruling should be reversed, and this case should be remanded to allow plaintiffs to pursue discovery in support of their claims.

STANDARD OF REVIEW

The Court reviews a district court's ruling granting a motion to dismiss de novo. *Doe v. Univ. of the Sciences*, 961 F.3d 203, 208 (3d Cir. 2020). To survive a motion to dismiss, the "complaint must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). The complaint must assert a "facially plausible" claim—"one that permits a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The plausibility analysis is not exacting. Rather, the question is "whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief," *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)), and "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Id*. at 231. When conducting this analysis, the Court accepts as true all factual allegations in the complaint and views those facts in the light most favorable to the plaintiff. *Doe*, 961 F.3d at 208.

ARGUMENT

I. Plaintiffs' Allegations of Unconstitutional Conduct Establish Liability Under the Federal Tort Claims Act.

The district court dismissed all five counts brought by the Xi family under the FTCA, holding that the "discretionary function exception" precludes liability for the conduct at issue. App. 61-62. Under this exception to the FTCA's waiver of sovereign immunity, there is no liability when a claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). However, as this Court has consistently held, government agents have no discretion to violate the Constitution and, therefore, the discretionary function exception cannot bar FTCA claims when the plaintiff has plausibly alleged unconstitutional conduct. *See U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1998); *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013).[3]

[3] A majority of circuits that have addressed the issue have adopted the same rule. *See Loumiet v. United States*, 828 F.3d 935, 945 (D.C. Cir. 2016); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009); *Nguyen v. United States*, 556 F.3d 1244, 1256 (11th Cir. 2009); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987). *But see*

In holding that the discretionary function exception bars plaintiffs' claims, the district court made two fundamental errors. First, in ruling that plaintiffs failed to allege constitutional violations, the district court mischaracterized the complaint and misapplied bedrock Rule 12(b)(6) standards. Because plaintiffs have alleged facts plausibly showing that Haugen's conduct was unconstitutional under the Fourth and Fifth Amendments, the discretionary function exception does not apply under this Court's precedents.

Second, the district court conflated this FTCA exception with the qualified immunity doctrine. It held that because plaintiffs had not adequately alleged "clearly established" constitutional violations, the government could invoke the exception. App. 61-62 n.29. But qualified immunity is a common-law doctrine that limits the liability of individual officers; it does not govern the liability of the United States, which is controlled by statute. There is no requirement that constitutional violations be "clearly established" before the *government* can be subject to liability under the FTCA. In any event, even if the "clearly established" standard applied, the constitutional violations alleged by the Xi family were in fact clearly established at the time of the events here.

Shivers v. United States, 1 F.4th 924 (11th Cir. 2021); *Linder v. United States*, 937 F.3d 1087 (7th Cir. 2019).

A. Plaintiffs alleged facts plausibly showing unconstitutional conduct by defendant Haugen.

The district court addressed plaintiffs' pleading of unconstitutional conduct only within its analysis of defendant Haugen's qualified immunity defense. App. 48-59. On a motion to dismiss, a qualified immunity defense presents two issues: first, whether the complaint pleads facts plausibly showing a constitutional violation and, second, whether the constitutional violations were clearly established at the relevant time. *Dennis v. City of Philadelphia*, 19 F.4th 279, 287 (3d Cir. 2021). In addressing the first question, the district court ruled that the SAC did not plead facts plausibly supporting claims that defendant Haugen violated plaintiffs' Fourth and Fifth Amendment rights.[4]

In doing so, the court failed to adhere to the cardinal principle of Rule 12(b)(6): that all facts alleged by the plaintiffs are presumed to be true and must be considered in the light most favorable to the plaintiffs. Applying this standard, the facts alleged in the SAC are more than sufficient to support plausible claims of unconstitutional conduct: (1) the malicious prosecution of Professor Xi in violation of the Fourth Amendment; (2) the fabrication of evidence in support of a

[4] As detailed below, the second component of the qualified immunity defense, whether the rights at issue were clearly established, is of no relevance to the discretionary function analysis. *See infra* § I.B.

prosecution against Professor Xi in violation of the Fifth Amendment; (3) the unlawful searches of the plaintiffs' home, offices, and persons in violation of the Fourth Amendment; and (4) the targeting of Professor Xi based on his race and ethnicity in violation of the Fifth Amendment.

1. Haugen's malicious prosecution of Professor Xi

A law enforcement agent engages in malicious prosecution when the agent causes a seizure of the plaintiff pursuant to legal process, without probable cause, and the criminal proceedings terminate in plaintiff's favor. *Halsey v. Pfeiffer*, 750 F.3d 273, 296-97 (3d Cir. 2014). The district court ruled that plaintiffs' pleading did not establish the absence of probable cause. App. 51-52. That ruling, however, failed to credit plaintiffs' extensive allegations that the indictment was based solely on defendant Haugen's intentional, knowing, or reckless communication of false information to prosecutors. App. 51-57.

Where a law enforcement agent intentionally, knowingly, or recklessly provides materially false information to a prosecutor who then uses that evidence to establish probable cause for a prosecution (by arrest, indictment, or preliminary hearing), the Fourth Amendment provides a claim for malicious prosecution. *See Black v. Montgomery Cty.*, 835 F.3d 358, 372 (3d Cir. 2016) (false and omitted allegations in affidavit of probable cause regarding scientific facts about origin of

fire negated probable cause for arrest); *Halsey v. Pfeiffer*, 750 F.3d at 289 (falsification of confession supports claim for malicious prosecution).

Plaintiffs alleged seven discrete instances of Haugen's intentional, knowing, and/or reckless false statements that were material to the finding of probable cause to support the arrest of Professor Xi. *See* SAC ¶ 55. Remarkably, the district court held these allegations to be inadequate on the *sole* ground that plaintiffs failed to allege the *specific time* when Haugen became aware of the falsity of the relevant statements. *See* App. 53-54 (describing SAC to have alleged that Haugen knew material facts "at *an unspecified time*") (emphasis in original). But the SAC makes clear that the relevant exculpatory information was provided to Haugen *before* he transmitted the incorrect information to the prosecutor and *before* the indictment was returned. *See* SAC ¶ 3 ("Before the indictment was sought and returned, defendant Haugen knew or recklessly disregarded the fact that Professor Xi did not share with scientific colleagues in China information about the 'pocket heater.'"); *id*. ¶ 4 (in context, same assertions as to timing); *id.* ¶ 53 ("The information presented to prosecuting authorities by Professor Xi and his counsel [after the indictment was issued] was, in fact, already known or recklessly disregarded by defendant Haugen."); *id.* ¶ 54 ("Defendant Haugen . . . made . . . false statements and misrepresentations and material omissions of facts in his reports, affidavits and

other communications with federal prosecutors . . . ."). In short, by ignoring these allegations, the district court viewed plaintiffs' pleading as to the "timing" of defendant Haugen's knowledge in the light *least* favorable to the plaintiffs.[5]

The district court made three additional errors in concluding that it was not possible to determine whether Haugen acted "deliberately, intentionally, or recklessly" in his misrepresentation of the evidence, or instead "simply erroneously concluded that the emails were connected to illegal conduct." App. 54.

First, this issue, which lay at the heart of the district court's analysis, presents a classic question of fact. Yet the court once again drew inferences in Haugen's favor, not plaintiffs', improperly flipping the Rule 12(b)(6) standard on its head. Discovery is designed to produce the relevant facts to enable a jury to make a reliable determination on the issue of whether a defendant acted intentionally, deliberately, recklessly, negligently, or without any culpability. *See Halsey v. Pfeiffer,* 750 F.3d 273, 300 (3d Cir. 2014) (quoting *Groman v. Twp. of Manalapan*, 47 F.3d 628, 635 (3d Cir. 1995)) (noting that, even at the summary judgment stage of a malicious prosecution case, "[c]ourts should exercise caution"

[5] Notably, defendant Haugen made no argument in his motion to dismiss that the SAC did not establish his possession of information regarding Professor Xi's innocence before he provided false information to the prosecutors and before the grand jury considered and issued the indictment.

because it "is inappropriate for a court to grant a defendant officer's motion . . . if 'reasonable minds could differ' on whether he had probable cause for the institution of the criminal proceedings based on the information available to him"); *Winfrey v. Rogers* 882 F.3d 187, 192 (5th Cir. 2018) (denying qualified immunity on malicious prosecution claim and remanding for jury determination of whether defendant acted "recklessly, knowingly, or intentionally by omitting and misrepresenting material facts [in an affidavit for an arrest warrant]"). At this stage, the only relevant question is whether, drawing all reasonable inferences in plaintiffs' favor, the complaint plausibly alleges such reckless, knowing, or intentional conduct. Given plaintiffs' multiple allegations that Haugen received information demonstrating the innocence of Professor Xi's communications, the SAC easily meets this test.

Second, the district court committed serious error in asserting that "the SAC carefully avoids alleging that Haugen knew of the allegedly innocent nature of Xi's communications." App. 55. To the contrary, *that is the central theme of the SAC*, which alleges that Haugen told prosecutors that Professor Xi had sent diagrams of a version of the STI pocket heater *after* Haugen had been told by the *inventor* of that device that the diagrams showed a completely different technology. SAC ¶¶ 54, 55(a). *See supra,* Statement of the Case, § II.B.

There is little more one could say to demonstrate the falsity of a law enforcement officer's statements, and these allegations establish that Haugen intentionally or recklessly ignored exculpatory evidence or misrepresented evidence to prosecutors to secure an indictment and search warrants. *See Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000) (probable cause may be subverted where an officer "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood").

Third, the district court's conclusion that the facts alleged amount to nothing more than negligent conduct is equally erroneous. App. 55-56. If the court were correct that in cases involving complex matters, FBI agents have no duty to inform themselves on issues beyond their own expertise or that agents could permissibly claim ignorance by willfully failing to consider evidence undermining suspicions of criminal conduct, it would give a free pass for misconduct by agents in a wide range of federal investigations. Individuals prosecuted in cases involving, for example, complex financial fraud schemes, new digital technologies, or sophisticated forensic analysis do not lose their constitutional rights by virtue of the complexity or difficulty of the issues in the case. Law enforcement agents who make false representations regarding "scientific" evidence are not afforded a safe harbor from accountability.

Indeed, in this case, defendant Haugen's misrepresentations were not the result of complexity as he had all of the dispositive scientific evidence when he made the accusations against Professor Xi. As the SAC explains, defense attorneys for Professor Xi were able to show that there was no basis for the indictment by relying *on the same facts and by consulting with the same expert that defendant Haugen consulted in the course of the investigation*. SAC ¶¶ 52, 55(a). The critical scientific evidence demonstrating Professor Xi's innocence was not beyond Haugen's understanding. Haugen had the evidence in his possession, but simply ignored and suppressed it.

Importantly, this was not a case where an agent had to make a quick judgment in a situation where suspects were acting in manner that could pose immediate danger to others. *See, e.g.*, *Mullinix v Luna*, 136 S. Ct. 305, 309-11 (2015) (per curiam) (high-speed car chase). To the contrary, defendant Haugen investigated this case over many months and had access to expert and other resources to inform him of the relevant science. Haugen had a duty to take reasonable steps to ensure that his representations were made with a reliable factual basis and that no exculpatory material information was omitted.

In sum, Haugen will be free to argue his "ignorance" in this litigation. But whether that claimed ignorance was borne of an innocent mistake or, rather, was an

intentional, knowing, or reckless disregard for the facts, is a question for the factfinder. *See Black*, 835 F.3d at 362 (allowing malicious prosecution and fabrication claims to proceed based on plaintiff's allegations that fire inspector included several material falsehoods in affidavit of probable cause accusing plaintiff of arson); *Mills v. Barnard*, 869 F.3d 473, 484-85 (6th Cir. 2017) (allowing fabrication claim to proceed based on allegations that DNA analyst ignored results exonerating plaintiff and chose to report that results supported prosecution's theory that plaintiff committed rape); *Brown v. Miller*, 519 F.3d 231, 237-38 (5th Cir. 2008) (holding laboratory technician could be liable for preparing a "misleading and materially inaccurate inculpatory serology" report); *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004) (allowing claim to proceed against forensic examiner on ground that "a police forensic analyst who prevaricates and distorts evidence to convince the prosecuting authorities to press charges is no less reprehensible than an officer who, through false statements, prevails upon a magistrate to issue a warrant").

2. Haugen's fabrication of evidence

The facts in the SAC also support a claim that Haugen violated the Fifth Amendment's Due Process Clause by fabricating evidence. The law is clear that a "stand-alone fabrication of evidence claim can proceed [even] if there is no

conviction," notwithstanding an independent Fourth Amendment claim of malicious prosecution. *Black*, 835 F.3d at 369; *see also Dennis*, 19 F.4th at 289; *Halsey* 750 F.3d at 289-95.[6] The same allegations demonstrating that Professor Xi's arrest lacked probable cause because it was based on defendant Haugen's false and manufactured assertions also support an independent claim that defendant Haugen fabricated evidence in violation of Professor Xi's Fifth Amendment rights.

3. Haugen's obtaining of search warrants without probable cause

The facts in the SAC also support a finding of unlawful searches and seizures of the plaintiffs' home and of Professor Xi's person and academic office, without probable cause. The district court did not address this issue. Because

[6] The district court, citing *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017), asserted that the Fifth Amendment's Due Process Clause does not cover Professor Xi's fabrication claim because he was subjected only to pretrial detention. App. 35-36. But as this Court has made clear in the context of an unlawful arrest and detention, the dividing line between the Fourth Amendment and the Fifth Amendment turns on whether the plaintiff has had an appearance in court. *See DeLade v. Cargan*, 972 F.3d 207, 212 (3d Cir. 2020) ("[T]he Fourth Amendment always governs claims of unlawful arrest and pretrial detention when the detention occurs before the detainee's first appearance before a court."). The SAC explains that Professor Xi had an initial appearance in court, SAC ¶ 38, and thus he has a freestanding claim for fabrication of evidence under the Due Process Clause. Moreover, even if there were no independent fabrication claim, the fact that defendant Haugen fabricated evidence in support of Professor Xi's arrest is still relevant to the unconstitutional nature of Haugen's conduct in maliciously prosecuting Professor Xi. *Wilson*, 212 F.3d at 786-87.

plaintiffs have plausibly alleged that the searches were the result of defendant Haugen's intentional, knowing, or reckless false representations, SAC ¶ 67, warrants issued as a result of those representations were unconstitutional. *See Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997) (holding that where defendant officer submitted affidavit with deliberate, knowing, or reckless false statements or omissions, and where such statements were material to a finding of probable cause, § 1983 plaintiff had claim for unlawful search pursuant to a warrant); *see also Aponte Matos v. Toledo Davila*, 135 F.3d 182, 187 (1st Cir. 1998) ("An officer who obtains a warrant through material false statements which result in an unconstitutional search may be held personally liable for his actions under § 1983.").

4. Haugen's targeting of Professor Xi on the basis of race and ethnicity

The district court held that Professor Xi did not properly plead a Fifth Amendment equal protection claim, ruling that there were no plausible allegations to support a claim of discriminatory purpose. App. at 58. The court stated that "to the extent race and ethnicity were factors in the investigation and prosecution of Xi, those factors were the product of executive branch counterintelligence policy," *id.,* and those motivations are not attributable to defendant Haugen. However, Professor Xi's equal protection claim is not based on the government's general

policies. Rather, the SAC alleges facts from which discriminatory intent can be inferred given the extraordinary nature of defendant Haugen's misconduct.

Haugen's investigation was predicated on the assumption that Professor Xi, as a Chinese American scientist conducting international research on cutting-edge matters, was likely doing so for an illegal purpose. He was primed to see criminal conduct in Professor Xi's actions because of his ethnicity and national origin, and that bias prompted Haugen to pursue criminal charges notwithstanding the evidence to the contrary. At this juncture in the proceedings, there is nothing else to explain why defendant Haugen would, as alleged in the SAC, intentionally or recklessly misrepresent the evidence. His misconduct is entirely consistent with discriminatory intent, and with the wider governmental pattern of profiling and wrongfully prosecuting Chinese American scientists.

Circumstantial evidence is sufficient to show discriminatory intent. In *Pitts v. State of Delaware*, 646 F.3d 151 (3d Cir. 2011), this Court affirmed a jury verdict finding an equal protection violation where the defendant police officer arrested plaintiff in circumstances that suggested racial bias. In *Pitts*, the defendant officer responded to a call concerning a fight between two men, one Black and one white. The officer arrested the Black man (plaintiff Pitts) at the scene, and later also filed an affidavit of probable cause for the arrest of the white man. The Court

sustained the intentional race bias claim on the grounds that the officer (1) inaccurately reported critical facts regarding the incident, (2) did not properly investigate the case before arresting the plaintiff, (3) filed charges not supported by the evidence, and (4) provided more details against Pitts than the other participant. *Id.* at 153-58. Here, defendant Haugen engaged in even more serious misconduct, as he fabricated evidence and provided false information to prosecutors—all while knowing or, at a minimum, recklessly ignoring, that the information in his possession showed Professor Xi to be innocent.

In the district court, Haugen relied on *United States v. Armstrong*, 517 U.S. 456 (1996), to argue that there was no equal protection violation, but *Armstrong* was a suit for selective *prosecution*, not selective enforcement, and the holding there relied on the strong presumption of prosecutorial privileges. This Court has applied a different framework in selective enforcement suits against law enforcement agents. *See United States v. Washington*, 869 F.3d 193, 219-21 (3d Cir. 2017). Unlike in *Armstrong*, individuals at the initial stage of a selective enforcement case need not show that "similarly situated persons of a different race or equal protection classification were not arrested or investigated by law enforcement." *Id.* If comparator evidence is relevant to the claim here at all,

discovery will show the extent to which persons of other ethnicities were prosecuted for similar innocent contacts with Chinese scientists.[7]

B. The discretionary function exception does not apply when the agent's conduct violated constitutional rights.

In ruling that plaintiffs' FTCA claims are barred by the discretionary function exception, the district court was wrong in two additional respects. It imported elements of the qualified immunity doctrine, requiring plaintiffs to allege "clearly established" constitutional violations to rebut the government's discretionary function defense, contrary to this Court's precedents. The district court further erred in concluding that the rights at issue in this case were not clearly established at the time of the alleged conduct.

1. Constitutional rights need not be clearly established to rebut a discretionary function defense.

For more than 30 years, it has been the rule in this Circuit that the discretionary function exception does not apply where a law enforcement agent violates the Constitution, without reference to whether rights were "clearly

[7] In *Washington*, 869 F.3d at 219-21, this Court held that pretrial discovery on a selective enforcement claim would be appropriate when a criminal defendant makes a proffer that supports "a reasonable inference of discriminatory intent and non-enforcement," and that such a proffer may be based on "patterns of prosecutorial decisions."

established." *Pooler*, 787 F.2d at 871; *see also U.S. Fid. & Guar. Co.*, 837 F.2d at 120. Those rulings are correct and control this appeal.

The district court's suggestion that this FTCA exception applies only to rights that are "clearly established," App. 61-62 n.29, is without legal support. In *Loumiet v. United States*, 828 F.3d at 946, the D.C. Circuit refused to adopt such an analysis. Responding to the government's argument "that principles similar to those that undergird qualified immunity should extend to preserve discretionary-function immunity for some unconstitutional acts," the court stated it had "found no precedent in any circuit holding as the government urges." *Loumiet*, 828 F.3d at 946.[8]

As a doctrinal matter, a governmental entity is not entitled to a qualified immunity defense. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court ruled that municipalities could not assert qualified immunity defenses to *Monell* claims and expressly distinguished the "common-law immunity

[8] The D.C. Circuit ultimately noted that it "would leave for another day" the question whether constitutional violations must be clearly established to foreclose the discretionary function defense, *Loumiet*, 828 F.3d at 946, but the point remains that no circuit court has adopted the district court's position here.

for 'discretionary' functions" from the good-faith principles underlying qualified immunity:

> That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

Id. at 649. The same rationale that applies to an entity sued under § 1983 applies to the United States when it is sued for unconstitutional conduct under the Federal Tort Claims Act. *See Simmons v. Himmelreich*, 578 U.S. 621, 631 (2016) (observing that a core purpose of the Federal Tort Claims Act is to "channel[] liability away from individual employees and toward the United States"). If anything, this principle is even stronger in the context of FTCA claims against the United States, where the discretionary function exception has been codified by statute. 28 U.S.C. § 2680.

This Court's ruling in *Bryan v. United States*, 913 F.3d 356, 364 (3d Cir. 2019), that the plaintiffs could not pursue FTCA claims where the relevant officers "did not violate clearly established constitutional rights," is not to the contrary. In

Bryan, the plaintiffs argued that certain border searches were impermissible under *United States v. Whitted*, 541 F.3d 480 (3d Cir. 2008), a ruling issued *one day* before the searches in question occurred. In these unique circumstances, the Court ruled that the defendant officers were entitled to qualified immunity, as the officers could not reasonably have been informed of the *Whitted* ruling. *Bryan*, 913 F.3d at 363.

When the *Bryan* Court turned to the plaintiffs' FTCA claims, it did not analyze the "clearly established" question presented here because the *plaintiffs* themselves accepted that standard as controlling. As the Court explained, the plaintiffs had argued that the officers in this case, though exercising their discretion, "violated '*clearly established* . . . constitutional rights of which a reasonable person would have known.'" *Id.* at 364 (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Under this Court's precedents, however, there was no reason for the plaintiffs to assume a burden of showing a "clearly established" right with respect to their FTCA claims.[9] Not surprisingly, the

[9] The plaintiffs' invocation of the "clearly established" standard, inadvertent or otherwise, was especially unnecessary given the district court's holding that there was no constitutional violation at all: "While the Court acknowledges that the discretionary function exception 'does not encompass conduct which violates the Constitution, a statute, or an applicable regulation,' the Court finds that no constitutional violation occurred here." *Bryan v. United States*, No. CV 2010-0066, 2017 WL 781244, at *31 (D.V.I. Feb. 28, 2017) (quoting *Garcia v. United States*,

government accepted the plaintiffs' formulation. *See* Brief for Appellees at 50-51, *Bryan v. United States,* No. 17-1519 (3d Cir. Oct. 24, 2017). The Court did so as well. *Bryan*, 913 F.3d at 364.

Given this background, where the addition of a "clearly established" element to the discretionary function analysis was not briefed by the parties or addressed on the merits by the panel, where no prior decision of this Court considered the question, and where the most recent circuit decision to have addressed the issue noted the absence of any precedential authority to support such a requirement, *Loumiet*, 828 F.3d. at 946, the district court erred when it ruled that plaintiffs are required to show clearly established constitutional violations to proceed with their FTCA claims.

2. The constitutional rights were clearly established.

Even if a clearly established requirement applied to FTCA claims against the United States involving unconstitutional conduct, the rights at issue here were clearly established at the time defendant Haugen conducted the investigation that led to Professor Xi's prosecution.

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896 F. Supp. 467, 473 (E.D. Pa. 1995), and citing *Pooler*, 787 F.2d at 871)). The "clearly established" question was not an issue the plaintiffs needed to raise to prevail on appeal.

The right to be free from a malicious prosecution—a prosecution based on intentional, knowing, or reckless false statements—has been long recognized. *See, e.g.*, *Andrews v. Scuilli*, 853 F.3d 690, 705 (3d Cir. 2017) (citing *Donahue v. Gavin*, 280 F.3d 371, 380 (3d Cir. 2002); *Orsatti v. N.J. State Police*, 71 F.3d 480, 483 (3d Cir. 1995)) (holding in context of malicious prosecution claim that officer's omissions and misleading assertions in affidavit were material to finding of probable cause, and that the rights to be free from arrest and prosecution without probable cause were clearly established); *Wilson*, 212 F.3d at 786 (knowing, deliberate, or recklessly false statements or material omissions invalidate arrest warrant).[10] The same is true for claims of fabrication of evidence, unlawful searches, and equal protection violations. *See Halsey*, 750 F.3d at 296 (holding with respect to 1985 investigation that "[r]easonable officers should have known

[10] The district court's sole comment on the issue was that there are no cases that previously established a right "to expert validation of the technical or scientific evidence that was the basis of a probable cause determination in an investigation or prosecution." App. 57. But plaintiffs do not argue that an indictment could issue in this case only if the government sought and obtained a scientific expert's "validation" of the agent's theory about why the emails showed wire fraud. Instead, plaintiffs have made the straightforward claim that when an agent intentionally, knowingly, or recklessly makes false representations to secure an indictment, that is a clearly established constitutional violation. The technical nature of the false representations is of no consequence. What matters is that Haugen *knew* that the emails were about Professor Xi's own tubular heating device and not the STI pocket heater—because the inventor of the STI pocket heater told him that. SAC ¶ 55(a).

that . . . they certainly could not fabricate inculpatory evidence against a suspect or defendant"); *Gibson v. Superintendent of NJ Dep't of L. & Pub. Safety-Div. of State Police*, 411 F.3d 427, 441 (3d Cir. 2005) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)) ("[I]t has long been a well-settled principle that the state may not selectively enforce the law against racial minorities."); *Sherwood*, 113 F.3d at 399 (holding in 1997 that search based on falsified affidavit could violate the Fourth Amendment).

This Court has long recognized that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope v. Pelzer,* 536 U.S. 730, 741 (2002), and that "clearly established law" may exist even where the prior precedent did not involve the precise facts of the matter under consideration. *See, e.g.*, *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011); *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000); *see also Dennis*, 19 F.4th at 290 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.").

Accordingly, to the extent plaintiffs must plead violations of clearly established rights to rebut the government's discretionary function defense (which plaintiffs maintain is not required), the allegations in the SAC are more than sufficient to do so. Plaintiffs should be permitted to proceed with their tort claims under the FTCA.[11]

II. Professor Xi May Pursue Remedies for Fourth and Fifth Amendment Violations Under *Bivens*.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971), the Supreme Court recognized a damages remedy for constitutional violations committed by federal law enforcement agents in a criminal investigation. Professor Xi's Fourth and Fifth Amendment claims for malicious prosecution and fabrication of evidence, SAC ¶¶ 98-100 (Count I); racial and ethnic profiling, *id*. ¶¶ 101-02 (Count II); and unlawful search and seizure, *id.* ¶¶ 103-05 (Count III), fit within the heartland of *Bivens*.

In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court reaffirmed *Bivens* as a "fixed principle of law" in the "common and recurrent sphere of law

[11] In the district court, the United States argued, separately from its discretionary function defense, that the SAC did not properly plead tort claims under Pennsylvania law. Doc. 34 at 11-17. Plaintiffs rebutted these contentions and provided detailed arguments outlining the viability of each of their five claims. Doc. 41 at 51-61. The district court did not address the merits of plaintiffs' tort claims.

enforcement." *Id.* at 1857. *Bivens* remains an essential mechanism to "deter individual federal officers from committing constitutional violations," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001), and to "provide[] instruction and guidance to federal law enforcement officers going forward," *Abbasi*, 137 S. Ct. at 1857. *See also id.* ("[C]hallenges to individual instances of discrimination or law enforcement overreach . . . due to their very nature are difficult to address except by way of damages actions after the fact."). Although *Abbasi* clarified the limitations on when a *Bivens* remedy is available, the Court also emphasized that it was "not cast[ing] doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose[.]" *Id.* at 1856.

Abbasi first requires courts to determine whether a case presents "a new *Bivens* context" because it "is different in a meaningful way from previous *Bivens* cases decided by the Court." *Abbasi*, 137 S. Ct. at 1859. The Supreme Court has recognized *Bivens* remedies in three cases: *Bivens* itself, a Fourth Amendment challenge to law enforcement misconduct; *Davis v. Passman*, 442 U.S. 228 (1979), an equal protection challenge under the Due Process Clause of the Fifth Amendment; and *Carlson v. Green*, 446 U.S. 14, 23 (1980), an Eighth Amendment violation for inadequate prison medical care. If the plaintiff's claims arise in a

similar context to one of these cases, no further analysis is needed, and the claims go forward.

It is only when a case presents a new *Bivens* context that the court moves to the second step of the *Abbasi* analysis: whether there are "special factors counselling hesitation." *Abbasi*, 137 S. Ct. at 1857 (quoting *Carlson*, 446 U.S. at 18). These factors speak to the question of "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58.

Abbasi, in short, is not a "silver bullet[]" that dooms all *Bivens* claims. *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019). *Bivens* continues to function as a vital means of pursuing accountability for constitutional violations that arise within the contexts the Court has previously recognized, *see, e.g.*, *Shorter v. United States*, 12 F.4th 366, 371 (3d Cir. 2021), as well as within new contexts where no special factors counsel against recognizing a remedy, *see, e.g.*, *Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2018).

A. This case does not present a new *Bivens* context.

The Supreme Court has never questioned *Bivens*'s application to Fourth and Fifth Amendment claims of law enforcement misconduct during a criminal

investigation, including searches and seizures without probable cause, and the claims here fall squarely within that context.

1. Professor Xi's claims closely resemble those in *Bivens*.

The misconduct in this case closely resembles that in *Bivens* in all material respects. There, the plaintiff alleged that federal law enforcement agents, acting without probable cause, entered his home, handcuffed and arrested him in front of wife and children, searched his apartment, and subjected him to a strip search. *Bivens*, 403 U.S. at 389. Here, federal law enforcement agents, acting without probable cause, stormed Professor Xi's home with weapons drawn, held Professor Xi and his wife and children at gunpoint, arrested Professor Xi, searched his house, and subjected him to a strip search. SAC ¶¶ 32-37. Agent Haugen caused these violations by knowingly or recklessly making false statements to procure an indictment and a warrant unsupported by probable cause. *Id.* ¶¶ 54-58, 67. Central to both cases is the classic Fourth Amendment violation of an unjustified search and seizure.

This Court has recognized that minor factual or doctrinal distinctions do not create a new *Bivens* context. *See Shorter*, 12 F.4th at 373 (Eighth Amendment claim of deliberate indifference to danger of assault involved same context as *Carlson* Eighth Amendment claim of deliberate indifference to medical needs);

Bistrian v. Levi, 912 F.3d 79, 88 (3d Cir. 2018) (pre-trial detainee's Fifth Amendment deliberate indifference claim involved same context as post-conviction inmate's Eighth Amendment deliberate indifference claim in *Carlson*). For this reason, Professor's Xi's claims do not present a meaningfully different context from *Bivens*. This is true with respect to his arrest and search claims under the Fourth and Fifth Amendments, as well as his equal protection claim, which is directly related to the illegal arrest and searches. The factual circumstances here—an unjustified, forcible search and arrest in the course of a criminal investigation—are essentially the same as in *Bivens*.[12] The relevant question is whether any difference is *meaningful*, not whether there is any difference at all. *Abbasi*, 137 S. Ct. at 1859; *Brunoehler v. Tarwater*, 743 F. App'x 740, 744 (9th Cir. 2018).

Post-*Abbasi*, other circuit courts have continued to apply *Bivens* where a plaintiff seeks a remedy for basic violations of the Fourth and Fifth Amendments by law enforcement. *See Jacobs*, 915 F.3d at 1028 (excessive force, false arrest,

[12] In *Davis*, a case involving employment discrimination, the Supreme Court recognized an implied cause of action for damages resulting from an equal protection violation. *See* 442 U.S. at 228. There is no reason to allow an equal protection claim in the employment discrimination context but treat that claim as presenting a new context when it arises in the "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1856-57. Where an agent's unlawful search and seizure is actionable under *Bivens*, a claim that this same misconduct was motivated by racial and/or ethnic bias may also go forward.

malicious prosecution, fabrication of evidence, and civil conspiracy by FBI officers); *Brunoehler*, 743 F. App'x at 743 (FBI search and seizure, pursuant to a deficient warrant, of a person arrested for securities violations). As the Sixth Circuit put it, *Abbasi* is not a barrier to "run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself." *Jacobs*, 915 F.3d at 1038.

2. The *Abbasi* factors do not support the district court's conclusion that this case presents a new context.

The district court identified some minor factual distinctions between Professor Xi's claims and those recognized in *Bivens* and *Davis*, but none rises to the level of a "new context." In *Abbasi*, the Supreme Court listed six factors that may indicate a new context: (1) "the rank of the officers involved"; (2) "the constitutional right at issue"; (3) "the generality or specificity of the official action"; (4) "the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted"; (5) "the statutory or other legal mandate under which the officer was operating"; and (6) "the risk of disruptive intrusion by the Judiciary into the functioning of other branches." *Abbasi*, 137 S. Ct. at 1860. None of these factors is present here.

First, as in *Bivens*, the defendant in this case is a line-level law enforcement agent. *See* 403 U.S. at 389. Professor Xi's *Bivens* claims do not challenge the actions of a high-ranking or supervisory official.

Second, Professor Xi's *Bivens* claims involve constitutional rights for which the Supreme Court has recognized an implied cause of action. Like *Bivens*, this case involves Fourth Amendment violations committed during a criminal investigation, including a search and seizure without probable cause. *See id*. at 389. And, like *Davis*, this case involves intentional discrimination, an equal protection violation under the Fifth Amendment. *See* 442 U.S. at 228.

Third, Professor Xi does not challenge a general governmental policy; rather, he alleges a specific agent's malicious prosecution, fabrication of evidence, unlawful search and seizure, and discriminatory treatment based on race and/or ethnicity. SAC ¶¶ 98-105. Indeed, the specificity of his *Bivens* claims resembles those brought in *Bivens* and *Davis* themselves. *See infra* § II.A.3.

Fourth, FBI agents have ample judicial guidance establishing that the Constitution prohibits malicious prosecution, falsification of evidence, unlawful searches and seizures, or racial and/or ethnic discrimination.

Fifth, this case does not involve an unusual statutory or legal mandate. Agent Haugen's baseless allegations of wire fraud against Professor Xi occurred under the FBI's general law enforcement mandate.

Sixth, the *Bivens* claims do not present special separation-of-powers concerns, as they do not challenge an executive branch policy or risk upsetting a carefully drawn statutory scheme. Unlike the claims in *Abbasi*, Professor Xi's *Bivens* claims involve the unconstitutional conduct of a single FBI agent who is not a high-ranking policymaker. *See* 137 S. Ct. at 1853.

The district court ruled that this case implicated a "new context" because the investigation was "conducted pursuant to an executive branch, multi-agency effort to prevent international economic espionage." App. 41. But the mere existence of a larger policy initiative does not distinguish Professor Xi's case from *Bivens*, which involved a narcotics investigation conducted pursuant to a multi-agency executive branch effort to stop national and international drug trade. *See* Lisa N. Sacco, Cong. Rsch. Serv., R34749, *Drug Enforcement in the United States: History, Policy, and Trends* at 4-5 (2014),), https://sgp.fas.org/crs/misc/R43749.pdf (discussing coordinated executive branch efforts to respond to drug abuse in the 1960s). As this Court has recognized, "challenges [to] particular individuals' actions or inaction in a particular incident" are not challenges to executive policies,

even where "[a]ddressing that incident will . . . unavoidably implicate [executive] policies." *Bistrian*, 912 F.3d at 93.[13]

Further, while the SAC notes a pattern of unfounded prosecutions of Chinese American scientists, it does not allege that Agent Haugen was acting pursuant to an official policy of violating the constitutional rights of Chinese Americans. The existence of similar misconduct in other cases does not transform Agent Haugen's actions in *this* case into a "policy" insulated from challenge under *Bivens*. *See Lanuza*, 899 F.3d at 1033 (9th Cir. 2018) ("[I]f this problem is indeed widespread, it demonstrates a dire need for deterrence, validating *Bivens*'s purpose.").

3. The other factors that the district court relied on do not support its conclusion that Professor Xi's claims present a new context.

In conducting the "new context" analysis, courts may also consider other "potential special factors that previous *Bivens* cases did not consider." *Abbasi*, 137

[13] That the SAC contains "extensive background allegations regarding the government's use of FISA, Section 702, and EO 12333," and a challenge in Count Ten to the government's interception of Xi's communications, App. 39-40, is beside the point. Count Ten presents a separate cause of action—directed at a different set of defendants—which has still not been decided by the district court.

S. Ct. at 1860. But the additional factors the district court cited do not transform this challenge to law enforcement misconduct into a new context.

First, the district court characterized Agent Haugen's false statements as "case-building activities," and thus distinct from the warrantless "apprehension, detention, and physical searches at issue in *Bivens*." App. 38 (quoting *Farah v. Weyker*, 926 F.3d 492, 499 (8th Cir. 2019)). But this distinction is not meaningful because the unconstitutional acts were directed at precisely the same end: effectuating a search and arrest without probable cause. Agent Haugen's false statements caused the court to authorize a search warrant, and thereby directly enabled the unconstitutional search of the Xis' home. The fact that the unlawful search was predicated on a warrant supported by a *false* showing of probable cause is not meaningfully different from *Bivens*, where the agents acted without probable cause in executing the search. Fourth Amendment malicious prosecution and fabrication of evidence claims are cognizable under *Bivens* as they are part of "routine police duties" arising in the "'common and recurrent sphere of law enforcement.'" *Jacobs*, 915 F.3d at 1038 (quoting *Abbasi*, 137 S. Ct. at 1856-57). Here, the district court's search for "perfect factual symmetry" ignores the

overarching point that unconstitutional searches and arrests by law enforcement agents sit at the very core of *Bivens*. *See Brunoehler*, 743 F. App'x at 744.[14]

Second, the district court erred in ruling that Xi's equal protection claim "involve[d] a different mechanism of injury than *Davis*, in which the plaintiff's injury resulted directly from the individual discriminatory attitude and actions of her employer." App. 43. Agent Haugen specifically relied on Professor Xi's "race and ethnicity in providing false information and withholding exculpatory evidence from prosecutors with the intent to secure false charges against Professor Xi," SAC ¶ 70. Like the plaintiff in *Davis*, Professor Xi's injuries flowed directly from this discriminatory motivation and conduct. The fact that the discrimination arose in the law enforcement context is not a *meaningful* distinction, particularly in light of the fact that the underlying Fourth Amendment violations are actionable under *Bivens*. *See Abbasi*, 137 S. Ct. at 1859.

[14] The published circuit court cases cited by the district court in support of its approach involve claims and facts farther afield from *Bivens*. App. 37-39. One key similarity between the instant case and *Bivens* is the violation of privacy inherent in a home invasion and search unsupported by probable cause. *See Jacobs*, 915 F.3d at 1038 (concluding that law enforcement misconduct involving the entry and search of plaintiff's home belonged to the same "context" as *Bivens*). Additionally, both Professor Xi and the *Bivens* plaintiff were subject to a strip search as part of the illegal detention. Neither *Cantú v. Moody*, 933 F.3d 414, 421-24 (5th Cir. 2019), *cert denied*, 141 S. Ct. 112 (2020), nor *Farah*, 926 F.3d at 496, analyzed police misconduct that infringed on the privacy of the home or the body.

B. Even if this case presented a new context, special factors do not counsel against allowing Xi's *Bivens* claims to proceed.

Even if the Court concludes that some or all of Xi's *Bivens* claims present a new context, no special factors counsel against recognizing a *Bivens* remedy in these narrow circumstances.

1. No alternative remedy is available.

"The existence of an alternative remedial structure" is a "particularly weighty" special factor that can counsel against allowing a *Bivens* claim to proceed. *Bistrian*, 912 F.3d at 90. But as the district court properly recognized, no alternative remedy is available to vindicate the constitutional violations here. App. 47.[15]

2. The *Bivens* claims do not present special national security, counterintelligence, or foreign policy concerns.

The false and discriminatory prosecution of a respected American physicist engaged in normal scientific collaboration does not implicate national security, counterintelligence, or foreign policy concerns. Professor Xi's *Bivens* claims concerning law enforcement misconduct are standard and well recognized, and the district court's assertion that these claims "arguably implicate[] the government's

[15] This Court has ruled that the FTCA is not an alternative remedy for purposes of *Bivens*. *Bistrian*, 912 F.3d at 92.

response to the threat of foreign economic espionage," App. 45, is without support. Professor Xi was charged with ordinary wire fraud, not espionage, and even those charges were meritless. SAC ¶ 24.

There was never a legitimate national security connection to defendant Haugen's investigation, and Haugen's false suspicions and statements do not operate as a shield to *Bivens* liability. The supposed nexus of "national security" derives solely from Haugen's deliberately false and malicious assertions that Professor Xi was acting as a technological spy for China. What would otherwise be a traditional Fourth Amendment violation subject to *Bivens* does not become exempt from suit because a law enforcement agent has deliberately, recklessly, or falsely asserted that the investigation, search, and prosecution was tied to national security interests. As the Supreme Court emphasized in *Abbasi*, "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). It is one thing to consider special factors rooted in objective facts, like the cross-border nature of an injury and claim. *See Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020). But where the "special factor" itself rests on an agent's false allegations, it cannot provide a shield against

liability. Instead, *Bivens* applies as it would absent the false "national security" claims.

Similarly, the mere fact that Haugen was "assigned to Chinese counterintelligence," App. 45, does not create a national security or foreign affairs nexus that counsels against a *Bivens* claim. First, whatever speculative concerns Haugen may have had at the start of his investigation were shown to be false as the investigation unfolded. SAC ¶ 55(a). Yet, rather than change course, Haugen chose to pursue ordinary wire fraud charges that lacked any basis.

Second, the specific misconduct at issue—related to Haugen's role in procuring the criminal search warrant and criminal prosecution—falls squarely within his ordinary law enforcement responsibilities. It cannot be the case that "all actions taken by [counterintelligence agents] in the course of their duties—even criminal acts—are necessarily intertwined with the execution of [national security] policy." *Lanuza*, 899 F.3d at 1029 (discussing this logic in the immigration enforcement context). Any contrary conclusion would grant federal agents whose work may in some cases touch on national security or foreign affairs a blanket exemption from liability in their investigations—a proposition that *Abbasi* expressly rejected. *Abbasi*, 137 S. Ct. at 1861-62; *Lanuza*, 899 F.3d at 1029; *see also Graber v. Dales*, No. CV 18-3168, 2019 WL 4805241, at *4 (E.D. Pa. Sept.

30, 2019) (rejecting the defendant's argument that the Secret Service's national security role was a special factor counseling hesitation in *Bivens* claim challenging arrest).

The post-9/11 terrorism-related policies that informed the special-factors analysis in *Abbasi* and *Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017), have no analogue in this case. *Abbasi* "involved Congressional and Executive Branch policy decisions in response to the biggest terrorist attack in our nation's history." *Lanuza*, 899 F.3d at 1030. The conduct challenged in *Vanderklok* "could be seen as implicating 'the Government's whole response to the September 11 attacks." 868 F.3d at 189.[16] By contrast, Professor Xi's *Bivens* claims do not present any challenge to national security or counterintelligence policy—he challenges only the actions of a federal line agent in an ordinary criminal prosecution. Whatever the government's broader concerns about economic espionage, the criminal indictment and search warrant made no claim that Professor Xi acted as a foreign agent or was engaged in espionage. The fact that Professor Xi's emails related to *international* scientific collaboration, as is

[16] *Vanderklok* is further distinguishable because it involved a new constitutional claim (First Amendment retaliation) and a new category of defendants (airport security screeners).

common and routinely encouraged in research science, does not create a special factor that shields Agent Haugen from *Bivens* liability.[17]

3. Professor Xi's *Bivens* claims do not implicate classified information.

The district court's assertion that "at least some aspects of this inquiry could implicate classified information," App. 46, is pure conjecture at this stage and far too speculative to be a special factor counseling against a *Bivens* claim. Professor Xi's *Bivens* claims can be resolved by relying on publicly available information in the criminal indictment and search warrant and by using familiar civil discovery procedures.

Moreover, even if the claims might, at some point in the future, implicate classified information, that would not constitute a special factor counseling against allowing the claims here to proceed. First, neither individual defendants nor the government should be permitted to thwart *Bivens* liability by invoking the specter of classified information, especially before any discovery has taken place, as that

[17] This case also does not present the type of national security and foreign affairs implications that were at play in *Hernandez*. The cross-border shooting there raised concerns regarding border integrity, foreign relations, and extraterritoriality, none of which is present in this case. *Hernandez*, 140 S. Ct. at 739.

would only encourage invocations of "classified information" to escape accountability.

Just as importantly, courts have multiple tools for managing sensitive evidence, including the use of protective orders and in camera review. *See, e.g.*, Federal Judicial Center, National Security Case Studies: Special Case Management Challenges (2013); *see also Webster v. Doe*, 486 U.S. 592, 604 (1988) (stating that courts should control discovery "so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"). These tools are specific to the discovery and fact-finding process and allow courts to make fine-grained decisions about how to manage the various types of evidence in a case. Given these well-established evidentiary tools, Haugen's untested assertion that the case could implicate sensitive information is not a basis for dismissing Professor Xi's constitutional claims outright, especially at the pleading stage. The district court can readily address any such issue if and when it arises.

4. Courts are well equipped to oversee *Bivens* claims for law enforcement misconduct like those presented here.

"The most important question" in the special factors analysis is "'whether the Judiciary is well suited, absent congressional action or instruction, to consider

and weigh the costs and benefits of allowing a damages action to proceed.'" *Lanuza*, 899 F.3d at 1028 (quoting *Abbasi*, 137 S. Ct. at 1958). With respect to quintessential Fourth and Fifth Amendment violations by law enforcement officers, the judiciary is "particularly well-equipped to weigh the costs of constitutional violations that threaten the credibility of our judicial system." *See id.* at 1032. When law enforcement agents abuse the legal process by obtaining indictments and search warrants based on misrepresentations or by fabricating evidence, it undermines the legitimacy of the courts. The judiciary has a stake in ensuring that malicious prosecutions and illegal searches do not go unchecked, and the courts have well-established standards for assessing such claims. Moreover, the harm to Professor Xi, his family, and society at large, as well as the need to deter further misconduct, strongly weigh in favor of allowing these claims to proceed. *See id.* at 1033 (considering "the magnitude of . . . societal injury" caused by the constitutional violation in deciding to allow a *Bivens* claim to proceed). Finally, the costs of recognizing Professor Xi's claims are low, given that courts have experience adjudicating similar claims against local law enforcement and the constitutional standards announced in those cases govern the conduct of federal law enforcement officers as well. *See id.* These interests overwhelmingly favor allowing Professor Xi to vindicate his constitutional rights through a *Bivens* action.

CONCLUSION

For the foregoing reasons, plaintiffs Xiaoxing Xi, Qi Li, and Joyce Xi respectfully request that the Court reverse the district court's decision dismissing Counts I through IX of the Second Amended Complaint and remand to the district court to allow plaintiffs to conduct discovery on those claims.

Respectfully submitted,

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CERTIFICATIONS OF COUNSEL

Undersigned counsel certifies as follows:

1. Undersigned counsel is a member of the bar of the United States Court of Appeals for the Third Circuit. L.A.R. 28.3(d).

2. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,295 words.

3. This Brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

4. A copy of this brief was served on all counsel of record through the Court's Electronic Case Filing System.

5. The text of the electronic brief is identical to the text in the paper copies to be filed with the Court. L.A.R. 31.1(c).

6. A virus check was performed on the PDF file of this brief and no virus was found.

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