No. 21-2798

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

XIAOXING XI; JOYCE XI; and QI LI,

Plaintiffs-Appellants,

v.

ANDREW HAUGEN; UNITED STATES OF AMERICA; MERRICK B. GARLAND, ATTORNEY GENERAL, in his official capacity; CHRISTOPHER A. WRAY, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, in his official capacity; and PAUL M. NAKASONE, NATIONAL SECURITY AGENCY DIRECTOR/CENTRAL SECURITY SERVICE CHIEF, in his official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Eastern District of Pennsylvania

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Prior Proceedings 5

SUMMARY OF ARGUMENT 12

STANDARD OF REVIEW 14

ARGUMENT 15

I. The District Court Properly Dismissed Plaintiffs' Individual-Capacity Damages Claims Against Haugen. 15

A. This Court Should Decline To Extend A *Bivens* Remedy To This New Context. 15

1. The Supreme Court Has Emphasized That Expansion of *Bivens* Is Disfavored. 15

2. Xi's Claims Arise in a New *Bivens* Context. 17

3. Special Factors Counsel against Extending *Bivens* to Xi's Claims. 23

B. Haugen Is Entitled To Qualified Immunity. 32

1. Xi Has Not Alleged a Violation of His Clearly Established Fourth Amendment Rights. 34

2. Xi Has Not Alleged a Violation of His Clearly Established Fifth Amendment Rights. 41

II. The District Court Properly Concluded That Plaintiffs' Claims Against The United States Are Barred By The FTCA's Discretionary-Function Exception. 44

A. The Discretionary-Function Exception Bars Plaintiffs' FTCA Claims. 44

B. Plaintiffs' Assertion That Haugen's Actions Were Unconstitutional Does Not Salvage Their FTCA Claims. 47

CONCLUSION 52

COMBINED CERTIFICATIONS

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ahmed v. Weyker,
984 F.3d 564 (8th Cir. 2020) 19, 20, 26

Annapparedy v. Pascale,
996 F.3d 120 (4th Cir. 2021) 19, 20, 26, 30

Arar v. Ashcroft,
585 F.3d 559 (2d Cir. 2009) 27, 31

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 33

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 15, 34, 36, 38, 39, 41, 42, 43

Baer v. United States,
722 F.3d 168 (3d Cir. 2013) 46

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 34, 43

Berkovitz v. United States,
486 U.S. 531 (1988) 45, 46, 47

Bernitsky v. United States,
620 F.2d 948 (3d Cir. 1980) 45

Bistrian v. Levi,
912 F.3d 79 (3d Cir. 2018) 16, 28

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 5, 12, 15

Black v. Montgomery County,
835 F.3d 358 (3d Cir. 2016) 39

Bond v. United States,
572 U.S. 844 (2014) 46

Brosseau v. Haugen,
543 U.S. 194 (2004) 33

Brunoehler v. Tarwater,
743 F. App'x 740 (9th Cir. 2018) 22

Bryan v. United States,
913 F.3d 356 (3d Cir. 2019) 50

Cantú v. Moody,
933 F.3d 414 (5th Cir. 2019) 19, 21

Carlson v. Green,
446 U.S. 14 (1980) 12, 15, 23, 30

Christopher v. Harbury,
536 U.S. 403 (2002) 24-25

Correctional Servs. Corp. v. Malesko,
534 U.S. 61 (2001) 15, 27

Curry v. Yachera,
835 F.3d 373 (3d Cir. 2016) 49

Davis v. Passman,
442 U.S. 228 (1979) 7, 15

Davis v. Samuels,
962 F.3d 105 (3d Cir. 2020) 14

Day v. Ibison,
530 F. App'x 130 (3d Cir. 2013) 41

DeLade v. Cargan,
972 F.3d 207 (3d Cir. 2020) 34

Dempsey v. Bucknell Univ.,
834 F.3d 457 (3d Cir. 2016) 35, 37

Dennis v. City of Philadelphia,
19 F.4th 279 (3d Cir. 2021) 39

Department of Navy v. Egan,
484 U.S. 518 (1988) 25

Dique v. New Jersey State Police,
603 F.3d 181 (3d Cir. 2010) 41, 44

District of Columbia v. Wesby,
138 S. Ct. 577 (2018) 33, 35

Doe v. Rumsfeld,
683 F.3d 390 (D.C. Cir. 2012) 31

Dongarra v. Smith,
27 F.4th 174 (3d Cir. 2022) 16

Farah v. Weyker,
926 F.3d 492 (8th Cir. 2019) 7, 18, 19, 20, 26, 29, 30

FDIC v. Meyer,
510 U.S. 471 (1994) 48

Franklin Sav. Corp. v. United States,
180 F.3d 1124 (10th Cir. 1999) 49

Franks v. Delaware,
438 U.S. 154 (1978) 38

George v. Rehiel,
738 F.3d 562 (3d Cir. 2013) 32, 33

Gray v. Bell,
712 F.2d 490 (D.C. Cir. 1983) 45, 46

Haig v. Agee,
453 U.S. 280 (1981) 25

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 32-33, 48

Hernández v. Mesa,
140 S. Ct. 735 (2020) 16, 17, 18, 21, 23, 25, 29, 30

Herring v. United States,
555 U.S. 135 (2009) 38

Hill v. City of Scranton,
411 F.3d 118 (3d Cir. 2005) 41

Jacobs v. Alam,
915 F.3d 1028 (6th Cir. 2019) 22

Karkalas v. Marks,
845 F. App'x 114 (3d Cir.), *cert. denied*,
142 S. Ct. 464 (2021) 50

Kelley v. General Teamsters, Chauffeurs & Helpers, Local Union 249,
518 Pa. 517, 544 A.2d 940 (Pa. 1988) 49

Kelly v. United States,
924 F.2d 355 (1st Cir. 1991) 47

Lanuza v. Love,
899 F.3d 1019 (9th Cir. 2018) 32

Lebron v. Rumsfeld,
670 F.3d 540 (4th Cir. 2012) 27

Limone v. United States,
579 F.3d 79 (1st Cir. 2009) 51

Linder v. United States,
937 F.3d 1087 (7th Cir. 2019), *cert. denied*,
141 S. Ct. 159 (2020) 51

Loumiet v. United States,
828 F.3d 935 (D.C. Cir. 2016) 51, 52

Mack v. Yost,
968 F.3d 311 (3d Cir. 2020) 16, 17, 23, 26

Manuel v. City of Joliet,
137 S. Ct. 911 (2017) 34

Millbrook v. United States,
569 U.S. 50 (2013) 45

Mills v. Barnard,
869 F.3d 473 (6th Cir. 2017) 39

Molchatsky v. United States,
713 F.3d 159 (2d Cir. 2013) 45

Nurse v. United States,
226 F.3d 996 (9th Cir. 2000) 51

Owen v. City of Independence,
445 U.S. 622 (1980) 49

PG Publ'g Co. v. Aichele,
705 F.3d 91 (3d Cir. 2013) 43

Pitts v. Delaware,
646 F.3d 151 (3d Cir. 2011) 43, 44

Pooler v. United States,
787 F.2d 868 (3d Cir. 1986) 45, 51

Rose v. Bartle,
871 F.2d 331 (3d Cir. 1989) 35

Seeds of Peace Collective v. City of Pittsburgh,
453 F. App'x 211 (3d Cir. 2011) 38

Sherwood v. Mulvihill,
113 F.3d 396 (3d Cir. 1997) 9-10, 35, 40

Shivers v. United States,
1 F.4th 924 (11th Cir. 2021), *cert. denied*,
No. 21-682, 2022 WL 827862 (U.S. Mar. 21, 2022) 49, 50

Snowden v. Hughes,
321 U.S. 1 (1944) 43

Tun-Cos v. Perrotte,
922 F.3d 514 (4th Cir. 2019) 24

United States v. Armstrong,
517 U.S. 456 (1996) 44

United States v. Gaubert,
499 U.S. 315 (1991) 47

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),
467 U.S. 797 (1984) 48

United States v. Sells Eng'g, Inc.,
463 U.S. 418 (1983) 26

United States v. Yusuf,
461 F.3d 374 (3d Cir. 2006) 35, 38

Vanderklok v. United States,
868 F.3d 189 (3d Cir. 2017) 16, 24, 25, 27, 30, 31

Wayte v. United States,
470 U.S. 598 (1985) 46

Williams v. Keller,
No. 21-4022, 2021 WL 4486392 (10th Cir. Oct. 1, 2021) 30

Wilson v. Layne,
526 U.S. 603 (1999) 48

Wilson v. Russo,
212 F.3d 781 (3d Cir. 2000) 35

Winfrey v. Rogers,
901 F.3d 483 (5th Cir. 2018) 39

Woodyard v. County of Essex,
514 F. App'x 177 (3d Cir. 2013) 9

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017) ..... *passim*

Zimmerman v. Corbett,
873 F.3d 414 (3d Cir. 2017) 35

Statutes:

Hyde Amendment,
Pub. L. No. 105-119, tit. VI, § 617, 111 Stat. 2440, 2519 (1997)
(codified at 18 U.S.C. § 3006A note) 29

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1346(b)(1) 1, 44

28 U.S.C. § 1495 29

28 U.S.C. § 2513 29

28 U.S.C. § 2674 44

28 U.S.C. § 2680(a) 11, 44

42 U.S.C. § 1983 49

Rule:

Fed. R. Civ. P. 54(b) 1

Other Authority:

U.S. Dep't of Justice, *Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats* (Feb. 23, 2022), https://go.usa.gov/xzh7G 13, 28

STATEMENT OF JURISDICTION

Plaintiffs-appellants invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1346(b)(1). On March 31, 2021, the district court issued a memorandum opinion and order dismissing nine of plaintiffs' ten claims with prejudice. 1 App. 4-62. On September 17, 2021, the district court entered final judgment as to these claims pursuant to Fed. R. Civ. P. 54(b). 1 App. 3. Plaintiffs filed a notice of appeal on September 24, 2021. *Id.* at 1-2. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Xiaoxing Xi was indicted by a grand jury on four counts of wire fraud. The U.S. Attorney's Office subsequently dismissed that indictment prior to trial. Together with his wife and elder daughter, Xi brought this suit against the United States and Andrew Haugen, a Federal Bureau of Investigation (FBI) special agent involved with his prosecution. Plaintiffs assert that a *Bivens* remedy is available against Haugen for allegedly violating Xi's Fourth and Fifth Amendment rights by taking steps in the investigation leading to his prosecution and the search of his home, property, and person allegedly without probable cause and with improper motives. Plaintiffs also assert that the United States is liable for malicious prosecution and other torts under the Federal Tort Claims Act (FTCA). The district court dismissed these claims. The questions presented are:

1. Whether the court properly dismissed Xi's claims against Haugen because:

a. The implied damages remedy provided by *Bivens* cannot properly be extended to Xi's constitutional claims; and

b. The claims are independently barred by qualified immunity.

2. Whether the court properly dismissed plaintiffs' FTCA claims against the United States because the claims are barred by the discretionary-function exception.

STATEMENT OF THE CASE

A. Factual Background

The operative complaint in this case alleges that plaintiff Xiaoxing Xi is a physics professor at Temple University and an expert in the field of thin film superconducting technology. 2 App. 72, 77 (Second Amended Complaint). Xi and his wife, Qi Li, are naturalized U.S. citizens who have lived in the United States since emigrating from China in 1989. *Id.* at 75. During the time relevant to this lawsuit, Xi and Li lived in Pennsylvania with their two daughters, including plaintiff Joyce Xi. *Id.*

Plaintiffs allege that a grand jury indicted Xi based on false allegations that Xi shared with entities in China protected information concerning a superconducting thin film technology—specifically, a "pocket heater"—developed by an American company, Superconductor Technologies Inc., that Xi had leased subject to a nondisclosure agreement. 2 App. 72, 77-78. The grand jury indicted Xi on four counts of wire fraud, based on four separate emails Xi had sent to individuals in China. *Id.* at 77. Effectively, according to the complaint, the indictment accused Xi of "being a technological spy for China." *Id.* at 72. Xi was subsequently arrested, his

house was searched pursuant to a warrant, and he was taken to an FBI field office for questioning before being transferred to the custody of the U.S. Marshals Service. *Id.* at 78-79. After his initial court appearance, he was released on bond, subject to travel and other restrictions. *Id.* at 79.

According to the complaint, Xi's defense counsel highlighted certain alleged errors in the indictment. 2 App. 83. Xi's communications with individuals and entities in China allegedly did not involve the pocket heater technology that he had leased. *Id.* at 80. The complaint alleges that the emails underlying the indictment in fact related to a separate device and "Hybrid Physical Chemical Vapor Deposition" (HPCVD) process that Xi had invented and the creation of a lab for research on a distinct form of thin films (oxide thin films, rather than the magnesium diboride thin films created by the pocket heater and the HPCVD process). *Id.* at 81-82. And it asserts that Xi's communications "were entirely legal, and were normal, scientific interactions no different from thousands of similar international collaborations among scientists." *Id.* at 82. The U.S. Attorney's Office later dismissed the indictment. *Id.* at 83.

The complaint asserts that Xi was indicted based on a "[f]aulty [i]nvestigation" conducted by Andrew Haugen, an FBI special agent assigned to Chinese counterintelligence. 2 App. 76, 83. It claims that Haugen "intentionally, knowingly and/or recklessly made or caused to be made false statements and representations" to federal prosecutors, *id.* at 83, including that (i) Xi's communications concerned the

pocket heater rather than a distinct device related to the HPCVD process, (ii) Xi had shared schematics, photographs, or samples related to the pocket heater rather than to distinct technologies, (iii) the pocket heater technology was "revolutionary," and (iv) Xi had purchased the technology with fraudulent intent to violate a nondisclosure agreement, *id.* at 83-86. The complaint asserts that Haugen "had no scientific or other basis to allege" that Xi's communications with entities in China were "illegal or involved the illegal transmission of protected technologies." *Id.* at 86. The complaint also alleges that Haugen caused the warrantless surveillance of Xi's communications under Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA) and Executive Order 12,333, and subsequently caused the issuance of FISA orders targeting Xi. 2 App. 87-90.

The complaint asserts that Haugen's actions in allegedly providing false information and failing to provide exculpatory evidence to federal prosecutors "were done with the intent and purpose of initiating a malicious prosecution of Professor Xi." 2 App. 86-87. And it asserts that, "[a]s a Special Agent employed by the FBI working on Chinese counterintelligence," Haugen's investigation of Xi "was predicated at least in part on the fact that Professor Xi is racially and ethnically Chinese," and was, prior to his naturalization, a Chinese national, and that Haugen considered Xi's race and ethnicity in allegedly providing false information and withholding exculpatory evidence. *Id.* at 90.

B. Prior Proceedings

1. Xi first filed a complaint against Haugen alone, asserting five claims against him under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The claims included asserted violations of Xi's Fourth Amendment rights arising from his prosecution, arrest, and alleged surveillance and the asserted violation of Xi's Fifth Amendment equal-protection and due-process rights. *See* 1 App. 14 n.9. An amended complaint added six FTCA claims against the United States, brought by all three plaintiffs.[1] *Id.* at 14-15.

After defendants filed motions to dismiss, plaintiffs amended their complaint again. In the operative complaint, plaintiffs dropped the Fourth Amendment claims against Haugen specifically relating to Xi's alleged surveillance and added a new count against three official-capacity defendants seeking an injunction requiring return and expungement of information unlawfully searched and seized, including allegedly intercepted communications.[2] *See* 1 App. 15.

The operative complaint now asserts three *Bivens* claims against Haugen, asserting violations of Xi's Fourth and Fifth Amendment rights for allegedly initiating

[1] The complaints also assert claims against certain John Doe defendants, including supervisors and other officials, alleged to have "participated in the investigation and prosecution of Professor Xi." 1 App. 14; 2 App. 76.

[2] The operative complaint also altered the characterization of Haugen's state of mind. *See* 1 App. 56 n.27 (noting that the original complaint had faulted Haugen for "not hav[ing] a basic understanding of the science involved in Professor Xi's research" and "fail[ing] to consult with qualified scientists").

the prosecution of Xi without probable cause and with improper motives, violation of Xi's Fifth Amendment equal-protection and due-process rights for allegedly basing the investigation and initiation of prosecution of Xi on "impermissible racial and ethnic factors," and violation of Xi's Fourth Amendment rights for allegedly causing Xi's home and belongings to be searched without probable cause. 2 App. 97-99. It continues to allege six FTCA claims against the United States, for malicious prosecution and other torts. *Id.* at 99-102.

2. Haugen and the United States again moved to dismiss plaintiffs' *Bivens* and FTCA claims. The district court granted both motions, dismissing these claims with prejudice.[3] 1 App. 4.

a. The district court concluded that Xi's *Bivens* claims all arise in new contexts and implicate special factors precluding extension of the *Bivens* remedy. The district court recognized that Xi's Fourth Amendment malicious-prosecution, fabrication-of-evidence, and unlawful-search claims differ from the claim presented in *Bivens* in several ways. 1 App. 35-38. First, Xi's claims do not involve a warrantless search and seizure, but rather an arrest and search effected pursuant to warrants after a grand jury indictment. Xi's assertion that Haugen maliciously initiated this prosecution through false statements to prosecutors consequently seeks to challenge "information-

[3] The official-capacity defendants separately moved to dismiss plaintiffs' injunctive-relief claim. The district court did not resolve that motion in the order under review, and it remains pending in the district court. *See* 1 App. 3.

gathering and case-building activities" that "are a different part of police work than the apprehension, detention, and physical searches at issue in *Bivens*." *Id.* at 38 (quoting *Farah v. Weyker*, 926 F.3d 492, 499 (8th Cir. 2019)). Second, the "mechanism of injury is different," for Xi's asserted injuries were not, as in *Bivens*, directly caused by the alleged wrongdoing but rather are alleged to have occurred "through a series of intervening steps . . . involv[ing] decisions by independent legal actors." *Id.* at 38-39 (alterations in original) (quoting *Farah*, 926 F.3d at 499). Third, Xi's claims pose a distinct risk of "disruptive intrusion by the Judiciary into the functioning of other branches," *id.* at 39 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017)), where "'[p]robing the causal chain' in a case like this 'would involve delving into the evidence before numerous decisionmakers,' including prosecutors and the grand jury," *id.* (quoting *Farah*, 926 F.3d at 499). Xi's claims, moreover, implicate an investigation that allegedly included both warrantless and court-ordered foreign intelligence surveillance and the arrest and prosecution of an individual for allegedly conducting economic espionage for a foreign power. *Id.* at 39-41.

The district court concluded that Xi's Fifth Amendment equal-protection claim similarly arises in a new *Bivens* context. 1 App. 42. While the Supreme Court had in *Davis v. Passman*, 442 U.S. 228 (1979), implied a damages remedy for a Fifth Amendment equal-protection violation involving gender discrimination in congressional-staff employment, the district court noted that Xi's claim, by contrast, "alleges racial and ethnic discrimination against an investigative target by a federal law

enforcement officer specifically assigned to Chinese counterintelligence." 1 App. 42. The claim consequently would plainly extend *Bivens* and *Davis* to a new context and new category of defendants, while again involving a different, indirect mechanism of injury. *Id.* at 42-43. The district court reasoned that this claim also raises distinct concerns of disruptive judicial intrusion, where it "essentially challenges executive branch policies regarding the detection and prevention of economic espionage by China" and involves no allegations that Haugen harbored any personal animus, instead focusing on his employment as an FBI special agent working on Chinese counterintelligence. *Id.* at 43.

The district court further concluded that special factors counsel against extending *Bivens* to Xi's claims. First, Xi's claims "implicate national security, counterintelligence, and foreign policy concerns," as all of Haugen's alleged misconduct occurred in the course of his work as an FBI special agent assigned to counterintelligence. 1 App. 45. The court reasoned that evaluating Xi's claims would thus require "an intrusive inquiry into the counterintelligence policy, methods, and authority relied upon by the executive branch to combat Chinese economic espionage, and by Haugen specifically in Xi's case" and could implicate classified information, raising "at least some risk of exposing—and hampering the effectiveness of—the government's counterintelligence strategies and methods." *Id.* at 46. Second, the district court recognized that "a *Bivens* action is not a proper vehicle for altering an entity's policy." *Id.* at 47 (quoting *Abbasi*, 137 S. Ct. at 1860) (quotation marks

omitted). The court reiterated that, while Xi characterized his claims as challenging only Haugen's alleged individual misconduct, his claims in fact "implicate and effectively challenge executive branch investigative and surveillance policies related to Chinese counterintelligence." *Id.* As a result, the *Bivens* remedy could not be extended, notwithstanding the district court's conclusion that a "comparable alternative remedy to vindicate Xi's constitutional rights" appeared to be absent. *Id.*

b. As an alternative basis for dismissing Xi's constitutional claims, the district court concluded that Haugen is entitled to qualified immunity. With respect to allegations that Haugen maliciously initiated Xi's prosecution and caused a search and seizure without probable cause, the court concluded that plaintiffs had failed to plausibly allege that the "arguably deficient investigation and prosecution" allegedly conducted by Haugen violated Xi's clearly established Fourth Amendment rights. 1 App. 51. The court noted that it was undisputed that Xi was prosecuted based on a grand jury indictment and that the challenged search and arrest were effected pursuant to duly issued warrants. *Id.* Both the grand jury indictment and the warrants create a presumption of probable cause that can only be overcome by showing "that the presentment was procured by fraud, perjury or other corrupt means" or that the affiant "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions" in applying for the warrant and those falsehoods were material to the probable cause finding, respectively. *Id.* at 52 (quoting *Woodyard v. County of Essex*, 514 F. App'x 177, 183 (3d Cir. 2013) (per curiam), and *Sherwood v.*

Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997)). An affiant's "alleged negligence or innocent mistakes" are insufficient in this regard. *Id.*

While plaintiffs asserted that Haugen knew or recklessly disregarded the allegedly innocent nature of Xi's communications, the court recognized that the complaint "fundamentally relies on conclusory allegations" regarding "what Haugen purportedly knew and understood about the highly technical field of thin film superconducting science." 1 App. 53. As a result, the complaint only supports an inference that Haugen and other officials erroneously concluded that Xi's email exchanges were connected to illegal conduct. *Id.* at 54. In particular, the court noted that the complaint contains no facts "suggesting when or how Haugen knew or should have known that the information in Xi's emails and attachments related not to the pocket heater, but to other technologies," or "that Haugen knew of the allegedly innocent nature of Xi's communications with Chinese scientists" at any point prior to Xi's indictment. *Id.* at 55.

The court also reasoned that, if Haugen had received conflicting information at some point, that does not support a plausible inference that Haugen made corruptly, knowingly, or recklessly false statements, particularly given the complex technological subject matter at issue. 1 App. 55. Rather, consistent with the characterization of Haugen's actions in plaintiffs' original and first amended complaint, the allegations suggest only that Haugen may have misunderstood the technology involved and the nature of Xi's communications and arguably should have sought scientific evaluation

of the evidence. *Id.* at 55-56. Finally, the court noted that plaintiffs had not cited nor had the court found any Supreme Court or other precedent demonstrating that an individual in Xi's situation "had a clearly established right to expert validation of the technical or scientific evidence that was the basis of a probable cause determination in an investigation or prosecution." *Id.* at 57.

The court similarly concluded that the complaint's allegations relating to Xi's equal-protection claim do not support an inference that Haugen violated Xi's clearly established Fifth Amendment rights. It noted that plaintiffs do not allege that Haugen's investigation was motivated by any personal animus, but instead seeks to ground the constitutional claim in allegations regarding executive branch counterintelligence policy directed at countering economic espionage by China. 1 App. 58. It concluded that such allegations do not provide a basis for holding Haugen personally liable for any misconduct. *Id.* at 59.

c. The district court held that the plaintiffs' FTCA claims were precluded by the FTCA's discretionary-function exception, 1 App. 59, which bars claims based on "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). The court concluded that plaintiffs' FTCA claims were all grounded in "judgments and decisions made by Haugen and other government officials regarding whether and how to investigate and prosecute Xi" falling squarely within the scope of this exception. 1

App. 61. And while the court recognized precedent reflecting that conduct cannot be discretionary if it violates the Constitution, the court noted that it had already held that plaintiffs had failed to allege a violation of any clearly established constitutional right. *Id.* at 61 n.29.

SUMMARY OF ARGUMENT

I.A. The district court correctly held that it could not properly extend the implied damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Where, as here, a plaintiff seeks to extend *Bivens* to a new context, a court must consider whether there are any "special factors counselling hesitation." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)). Several factors weigh against extending *Bivens* here.

First, Xi's claims seek monetary damages from an individual FBI agent in connection with the investigation, prosecution, and alleged surveillance of an individual accused of being a technological spy for China. Evaluating those allegations would necessarily require an intrusive inquiry into the government's counterintelligence and investigative efforts, raising national-security and foreign-policy concerns utterly absent in *Bivens*.

Second, the Supreme Court has emphasized that a *Bivens* action is not a proper vehicle to alter an entity's policy. *See Abbasi*, 137 S. Ct. at 1860. But Xi's suit effectively challenges a government counterintelligence program, including the FBI's alleged surveillance of foreign entities and efforts to investigate and prosecute

suspected transfers of sensitive technologies. It does so based on concerns similar to those raised in connection with the "China Initiative"—a policy that postdates Xi's prosecution by several years—and which the government has worked to address through several recent policy revisions, including by discontinuing the China Initiative and issuing new guidance to federal funding agencies. *See* U.S. Dep't of Justice, *Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats* (Feb. 23, 2022), https://go.usa.gov/xzh7G.

Third, Congress has created alternative avenues for wrongfully prosecuted individuals to seek redress. Even if plaintiffs may not themselves be entitled to the remedies Congress provided, extending the *Bivens* remedy for damages would upset the remedial structure Congress created.

B. Xi's claims against Haugen are also barred by qualified immunity.

The conclusory allegations in plaintiffs' complaint provide no basis to conclude that Haugen made any allegedly false statements intentionally, knowingly, or recklessly, rather than at most as an innocent mistake in assessing the technical communications at issue. And to the extent that plaintiffs suggest Haugen should have conducted additional investigation before concluding that probable cause existed in this case, that does not establish a Fourth Amendment violation, much less a clearly established one.

The allegations are also insufficient to plead a clearly established Fifth Amendment equal-protection violation, where the complaint's conclusory assertions do not plausibly allege any discriminatory purpose on Haugen's part.

II. Plaintiffs' claims against the United States are barred by the FTCA's discretionary-function exception. Decisions about which crimes to investigate and prosecute are quintessentially discretionary and reflect policy considerations. Plaintiffs argue that the discretionary-function exception does not protect conduct that violates the Constitution. The Constitution, like a statute or regulation, may in some circumstances provide a clear directive depriving a federal official of relevant discretion. But Haugen violated no such clear constitutional command, and plaintiffs cannot circumvent the discretionary-function exception by styling their state-law tort claims in constitutional terms.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss. *Davis v. Samuels*, 962 F.3d 105, 111 n.2 (3d Cir. 2020).

ARGUMENT

I. The District Court Properly Dismissed Plaintiffs' Individual-Capacity Damages Claims Against Haugen.

A. This Court Should Decline To Extend A *Bivens* Remedy To This New Context.

1. The Supreme Court Has Emphasized That Expansion of *Bivens* Is Disfavored.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)). *Bivens* held that, despite the absence of a statutory cause of action, federal law-enforcement officials could be sued for money damages for conducting a warrantless search and arrest in violation of the Fourth Amendment. *Bivens*, 403 U.S. at 389. The Court has approved of an implied damages remedy under the Constitution only two other times, in *Davis v. Passman*, 442 U.S. 228 (1979), for an equal-protection violation involving sex discrimination in congressional-staff employment, and in *Carlson v. Green*, 446 U.S. 14 (1980), for an Eighth Amendment violation involving the failure to treat an inmate's asthma, resulting in his death.

Bivens, *Davis*, and *Carlson* were issued at a time when, "as a routine matter," the Court "would imply causes of action not explicit in [a statute's] text" on the assumption that courts could properly "provide such remedies as [were] necessary to

make effective" the statute's purpose. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quotation marks omitted). In the four decades since *Bivens*, "arguments for recognizing implied causes of action for damages began to lose their force," *id.*, and the legal landscape has shifted away from creating implied causes of action in both the statutory and constitutional contexts. The Supreme Court has "adopted a far more cautious course" to assess whether an implied cause of action exists, *id.*, and has "consistently rebuffed requests to add to the claims allowed under *Bivens*" for over 40 years, *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020). Indeed, "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856.

Abbasi thus makes clear that the continued expansion of Bivens to "any new context or new category of defendants" is a "'disfavored' judicial activity." 137 S. Ct. at 1857. "The critical question is 'who should decide' whether to provide for a damages remedy, Congress or the courts," and "[m]ost often, the answer is Congress." *Vanderklok v. United States*, 868 F.3d 189, 206 (3d Cir. 2017) (quoting *Abbasi*, 137 S. Ct. at 1857). This Court has thus refused to create a *Bivens* remedy in a new context four times since *Abbasi*. *See Dongarra v. Smith*, 27 F.4th 174, 180-81 (3d Cir. 2022); *Mack v. Yost*, 968 F.3d 311 (3d Cir. 2020); *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018); *Vanderklok*, 868 F.3d 189.

The reluctance to extend *Bivens* is rooted in constitutional concerns. "[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Abbasi*, 137 S. Ct. at 1856. Each extension of *Bivens* against federal officials in their individual capacities "create[s] substantial costs" for the government and imposes significant "time and administrative costs attendant upon intrusions resulting from the discovery and trial process." *Id.* Congress is "better position[ed]" than the judiciary "to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1857 (quotation marks omitted). In light of these separation-of-powers concerns, there is a high bar for creating a new *Bivens* remedy: "[i]f 'there are any special factors that counsel hesitation,' courts must 'reject the request' to expand *Bivens*." *Mack*, 968 F.3d at 317 (quoting *Hernández*, 140 S. Ct. 743).

2. Xi's Claims Arise in a New *Bivens* Context.

Abbasi thus set forth stringent criteria under which a court may extend *Bivens*. At the threshold, courts must determine if the asserted cause of action arises in a new context. A context is "new" when "the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1859. The *Abbasi* Court offered a non-exhaustive list of meaningful differences, including the rank of officers involved; the constitutional right at issue; the level of risk of disruptive intrusion by the Judiciary into the functioning of other branches; or "the

presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 1859-60. The Court's "understanding of a 'new context' is broad," *Hernandez*, 140 S. Ct. at 743, and it is a threshold that is "easily satisfied," *Abbasi*, 137 S. Ct. at 1865.

Applying *Abbasi*'s framework as elaborated by this Court, the district court concluded that Xi's Fourth and Fifth Amendment claims are meaningfully different from any previous *Bivens* claim the Supreme Court has recognized and thus arise in a new context. Plaintiffs' arguments to the contrary are just as unpersuasive on appeal.

a. Xi's Fourth or Fifth Amendment malicious-prosecution, fabrication-of-evidence, and unlawful-search claims bear no resemblance to the Fifth Amendment gender-discrimination claim in *Davis* or the Eighth Amendment claim in *Carlson*. As the district court recognized, *see* 1 App. 36-37, they bear a marginally closer resemblance to the warrantless search of an apartment conducted with excessive force by federal narcotics agents in *Bivens* itself, in that they assert a violation of the Fourth Amendment in the course of law-enforcement operations. But a claim "may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernández*, 140 S. Ct. at 743. Here, numerous factors differentiate this case from *Bivens*.

First, the conduct at issue—a criminal investigation allegedly leading to prosecution without probable cause—is quite different from the warrantless arrest and search in *Bivens*. The Eighth Circuit recognized as much in *Farah v. Weyker*, 926 F.3d 492 (8th Cir. 2019), where the plaintiffs accused the defendant police officer of

inducing a wrongful prosecution by "exaggerating and inventing facts in reports, hiding evidence that would have exonerated them, and pressuring and manipulating the alleged victims into lying." *Id.* at 496. As with the alleged conduct here, those "information-gathering and case-building activities are a different part of police work than the apprehension, detention, and physical searches at issue in *Bivens*." 1 App. 38 (quoting *Farah*, 926 F.3d at 499); *see also Annappareddy v. Pascale*, 996 F.3d 120, 135-36 (4th Cir. 2021) (same with respect to Fourth Amendment claims alleging federal investigators submitted false evidence in support of warrants and indictment).

Second, as the district court also recognized, "the mechanism of injury" in *Bivens* differs significantly from that alleged here. 1 App. 38 (quoting *Farah*, 926 F.3d at 499). In *Bivens*, the plaintiff's injuries "were directly caused by the officers' conduct." *Farah*, 926 F.3d at 499. Here, Haugen is not alleged to have been present or had any direct role in Xi's arrest and the search of his home; rather, as in *Farah*, Haugen is alleged to have caused injury only "'through a series of intervening steps . . . involv[ing] decisions by independent legal actors'—here, the prosecutors who chose to pursue charges against Xi, the grand jury that indicted him, and the judicial authorities who approved the searches and seizures at issue." 1 App. 38-39 (alterations in original) (quoting *Farah*, 926 F.3d at 499); *see also Ahmed v. Weyker*, 984 F.3d 564, 569 (8th Cir. 2020) (similar where officer alleged to have provided false information leading to plaintiffs' warrantless arrest by another officer); *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019) (claim that FBI agents had "induced prosecutors to

charge [the plaintiff] without any basis" arose in new context where claim "involves intellectual leaps that a textbook forcible seizure never does").

Third, recognizing an implied cause of action here would pose a greater risk of "disruptive intrusion by the Judiciary into the functioning of other branches." 1 App. 39 (quoting *Abbasi*, 137 S. Ct. at 1860). "'Probing the causal chain' in a case like this 'would involve delving into the evidence before numerous decisionmakers,' including prosecutors and the grand jury." *Id.* (quoting *Farah*, 926 F.3d at 499); *see also Annapparedy*, 996 F.3d at 136 (similar); *Ahmed*, 984 F.3d at 569 (same). And the risk of disruptive intrusion is especially pressing here, where Xi seeks to bring *Bivens* claims against an FBI special agent assigned to Chinese counterintelligence and the allegations "implicate the investigation (which allegedly included both warrantless and court-ordered foreign intelligence surveillance), arrest, and prosecution of a scientist for allegedly spying on behalf of a foreign power by transferring to it sensitive United States technologies." 1 App. 39 (quotation marks omitted). Indeed, one count of the operative complaint specifically challenges the government's alleged interception and retention of Xi's communications, and numerous allegations relate to the government's alleged surveillance practices and Haugen's asserted role. *See id.* at 39-41. This "investigation conducted pursuant to an executive branch, multi-agency effort to prevent international economic espionage" bears little resemblance to the "investigation into seemingly local conduct" at issue in *Bivens*. *Id.* at 41 (quoting

Cantú, 933 F.3d at 424). For the same reason, it "implicates an element of national security" not present in *Bivens*. *Hernández*, 140 S. Ct. at 746.

Plaintiffs argue that because both *Bivens* and this case involved the alleged search of a home without probable cause, they can sweep aside the numerous differences between the two cases as "minor factual or doctrinal distinctions." Br. 42. But that could not be farther from the approach the Supreme Court has emphasized governs, where "even a modest extension is still an extension." *Abbasi*, 137 S. Ct. at 1864. And plaintiffs do not meaningfully distinguish *Farah* and *Cantú* by citing (Br. 49 n.14) aspects of the search allegedly conducted here—Haugen is not alleged to have participated in the search of Xi's home or his detention, and the conduct in which he is alleged to have engaged is not meaningfully different from that at issue in *Farah* or *Cantú*, or that addressed by the Fourth Circuit in *Annappareddy*.

Plaintiffs also argue that this case "do[es] not challenge the actions of a high-ranking or supervisory official." Br. 45. But in *Hernández*, the Court found it "glaringly obvious" that a claim against a Border Patrol officer for the use of force in a cross-border shooting arose in a new context, 140 S. Ct. at 743, even though it involved an individual law-enforcement officer and, in part, a Fourth Amendment claim, *see id.* at 740. And while plaintiffs seek to disclaim any challenge to government policy in this appeal—notwithstanding their efforts to bolster their claims by citing other prosecutions with which Haugen had no alleged involvement—they do nothing

to dispel the district court's conclusion that the nature of the challenged investigation here raises separation-of-powers concerns that were utterly absent in *Bivens*.

Finally, plaintiffs argue that other courts have continued to apply *Bivens* to "basic violations of the Fourth and Fifth Amendments by law enforcement." Br. 43. But they identify no post-*Abbasi* case that has allowed a claim to go forward on remotely similar allegations. In *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019), for example, decided before the Supreme Court's most recent *Bivens* decision in *Hernández*, the plaintiff alleged that Special Deputy United States Marshals entered and searched his home while he was gone; that the plaintiff was shot by one of the deputies upon entering his house; and that the same deputies effected a false arrest by arresting him without probable cause immediately thereafter. *Id.* at 1033-34, 1042-43. And *Brunoehler v. Tarwater*, 743 F. App'x 740 (9th Cir. 2018), involved allegations that the defendants themselves conducted a search of the plaintiff without probable cause, pursuant to a warrant that they had allegedly improperly obtained. *Id.* at 743. By contrast, plaintiffs make no allegation that Haugen entered Xi's home or otherwise participated in the challenged searches, and neither *Jacobs* nor *Brunoehler* contains any discussion of the distinctions that arise in this situation, discussed above.

b. Xi's Fifth Amendment equal-protection claim is even further outside any context in which the Supreme Court has recognized a *Bivens* claim. *Davis* also involved a Fifth Amendment claim, but, as the district court recognized, *see* 1 App. 42, and plaintiffs do not dispute on appeal, an allegedly improperly motivated

investigation by an FBI agent assigned to Chinese counterintelligence could not be more different from the "alleged sex discrimination on Capitol Hill" at issue in *Davis*. *Hernández*, 140 S. Ct. at 744 (describing *Davis*).

On appeal, plaintiffs now suggest in a footnote that, if Xi's malicious-prosecution and unlawful-search claims do not arise in a new context, the separate claim that the same conduct was motivated by racial or ethnic animus may go forward as well. Br. 43 n.12. As discussed *supra*, the malicious-prosecution and unlawful-search claims do arise in new contexts. And a claim based on a distinct constitutional provision alleging a distinct violation would plainly arise in a new context regardless. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1864 (noting claim alleging deliberate indifference to prisoner abuse arose in distinct context relative to *Carlson* because, *inter alia*, "[t]he constitutional right is different"). Plaintiffs identify no post-*Abbasi* court of appeals decision allowing a remotely similar Fifth Amendment claim to go forward.

3. Special Factors Counsel against Extending *Bivens* to Xi's Claims.

a. Because plaintiffs seek to extend *Bivens* to a new context, the Court must determine whether the claims present "special factors counseling hesitation." *Abbasi*, 137 S. Ct. at 1857 (quoting *Carlson*, 446 U.S. at 18); *Mack*, 968 F.3d at 320. The focus of the special-factors inquiry 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." *Abbasi*, 137 S. Ct. at 1858. As this Court has

explained, that question involves "a host of considerations that must be weighed and appraised, [and] it should be committed to those who write the laws rather than those who interpret them." *See Vanderklok*, 868 F.3d at 206 (quoting *Abbasi*, 137 S. Ct. at 1857). *Bivens* should not be extended if "there are sound reasons to think Congress *might* doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Abbasi*, 137 S. Ct. at 1858 (emphasis added).

Abbasi provided some examples of the types of special factors counseling hesitation, including the effect of an implied remedy on the separation of powers, whether a claim "would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch"; whether discovery and litigation would implicate Executive policy; whether a claim "requir[es] an inquiry into sensitive issues of national security," and whether an alternative remedial structure is present. *See* 137 S. Ct. at 1858, 1860-61. Multiple special factors, including factors demonstrating that Xi's claims arise in a new context, counsel against expanding *Bivens* to Xi's claims here. *Cf. Tun-Cos v. Perrotte*, 922 F.3d 514, 524-26 (4th Cir. 2019) (factors that established a new context also demonstrated need for hesitation).

i. Xi's *Bivens* claims implicate national-security, counterintelligence, and foreign-policy concerns. "Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" *Abbasi*, 137 S. Ct. at 1861 (quoting *Christopher v. Harbury*, 536 U.S.

403, 417 (2002)). As a result, "'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs' unless 'Congress specifically has provided otherwise.'" *Id.* (quoting *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988)). In addition, matters relating to the conduct of foreign relations "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Hernández*, 140 S. Ct. at 744 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)). Courts "must therefore be especially wary before allowing a *Bivens* remedy that impinges on this arena" as well. *Id.*

In *Vanderklok*, this Court thus dismissed First Amendment claims against a Transportation Security Administration (TSA) agent in part because TSA agents "are tasked with assisting in a critical aspect of national security." 868 F.3d at 207. The Court observed that "'national-security policy is the prerogative of the Congress and the President,' and imposing damages liability would likely interfere with that prerogative by 'causing an official to second-guess difficult but necessary decisions concerning national-security policy.'" *Id.* (brackets omitted) (quoting *Abbasi*, 137 S. Ct. at 1861).

As the district court here recognized, these national-security and foreign-policy concerns "are not [merely] talismanic in this case." 1 App. 45. In particular, "[a]ll of Haugen's alleged misconduct occurred during his work as an FBI special agent assigned to Chinese counterintelligence," in connection with an investigation and

prosecution that accused Xi of being, in essence, "a technological spy for China." *Id.* (quotation marks omitted). Evaluating plaintiffs' allegations that Haugen knowingly or recklessly falsified or misrepresented evidence would thus "almost certainly require an intrusive inquiry into the counterintelligence policy, methods, and authority relied upon by the executive branch to combat Chinese economic espionage, and by Haugen specifically in Xi's case." *Id.* at 46.

Even in the ordinary case in which a plaintiff alleges malicious prosecution or fabrication of evidence in obtaining a grand jury indictment, adjudicating such a claim may require a wide-ranging, intrusive piercing of the veil of secrecy protecting grand jury proceedings that itself counsels against extending *Bivens*. *See Farah*, 926 F.3d at 499-501; *Annappareddy*, 996 F.3d at 137-38; *see also, e.g.*, *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983) (noting that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings" (quotation marks omitted). As the Eighth Circuit has explained in declining to create a *Bivens* remedy against an officer who allegedly falsified facts in a criminal complaint, allowing such a remedy would also require proving before a jury what an officer knew and did not know and the officer's state of mind. *Ahmed*, 984 F.3d at 569-70; *cf. Mack*, 968 F.3d at 322 (declining to recognize *Bivens* remedy where retaliation claims would require intrusive inquiries into the "reasoning, motivations, or actions of prison officials" (quotation marks omitted)). And it requires evaluation of a probable cause standard whose "inherent uncertainty," this Court has recognized, "is itself a factor counseling

hesitation." *Vanderklok*, 868 F.3d at 209. Those general concerns are all the starker here given Haugen's work and the allegations concerning Xi's prosecution.

Indeed, as the district court also recognized, *see* 1 App. 46, the inquiry demanded by Xi's claims may require evaluating classified information, further heightening interference with sensitive Executive Branch functions. *See Arar v. Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (discussing need to examine classified information as a special factor counseling hesitation); *see also, e.g.*, *Lebron v. Rumsfeld*, 670 F.3d 540, 554 (4th Cir. 2012) (noting as special factor "practical concerns about obtaining information necessary for the judiciary to assess the challenged policies" where relevant information remains classified). Plaintiffs allege that Haugen conducted surveillance of Xi under FISA without probable cause. 2 App. 87, 89. Assuming the truth of that assertion at this stage, adjudicating that allegation thus potentially renders classified information relevant to both the claim itself and the defense.

ii. Second, "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Yet Xi's suit effectively challenges the FBI's alleged surveillance of foreign entities and efforts to prosecute—and thereby deter—the suspected transfer of sensitive United States technologies to foreign entities and countries. Xi's complaint refers to other dismissed prosecutions in attempting to buttress his claim, *see* 2 App. 90, and his opening brief acknowledges that he relies on an alleged "pattern

of unfounded prosecutions of Chinese American scientists" in this regard, Br. 47. He asserts that he does not allege that Haugen was "acting pursuant to an official policy," *id.*, but that is not the standard. The determination of which crimes to investigate and prosecute by its very nature involves the exercise of discretion informed by policy considerations, and Xi's claims "call[] in question broad policies pertaining to the reasoning, manner, and extent of," *Bistrian*, 912 F.3d at 94, the executive branch's counterintelligence activities and efforts to investigate and prosecute economic espionage.[4]

iii. Finally, alternative avenues for redress provide a further special factor counseling hesitation. One factor recognized in *Abbasi* is whether "Congress has created 'any alternative, existing process for protecting the injured party's interest.'" 137 S. Ct. at 1858 (brackets and quotation marks omitted). At the same time,

[4] Amicus briefs filed on plaintiffs' behalf further cite the launch several years after Xi's prosecution of a "China Initiative" to respond to economic espionage and other challenges posed by the Chinese government. *See, e.g.*, American Physical Soc'y Br. 4-5, 7; AAJC Br. 16-23. The Department of Justice has recently replaced the initiative with a "Strategy for Countering Nation-State Threats," determining that the "China Initiative" rubric contributes to harmful perceptions. *See* U.S. Dep't of Justice, *Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats* (Feb. 23, 2022), https://go.usa.gov/xzh7G. This subsequent history—as well as several related policy changes that the government has undertaken to address concerns similar to those raised by amici, *see id.*—only underscores that the policy considerations underlying prosecutorial and investigative decisionmaking in this area are appropriately addressed by the executive branch, and are not properly the subject of judicially implied damages remedies.

"Congress's decision not to provide a judicial remedy does not compel [the courts] to step into its shoes." *Hernández*, 140 S. Ct. at 750.

As *Farah* observed, Congress has created two alternative means for wrongfully prosecuted individuals to seek redress. 926 F.3d at 501-02. One provision, the Hyde Amendment, allows district courts to award "a reasonable attorney's fee and other litigation expenses" to acquitted defendants who retained counsel "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, tit. VI, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A note). Another provision gives the Court of Federal Claims "jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned." 28 U.S.C. § 1495; *see id.* § 2513 (specifying grounds for recovery and damages).

While unnecessary to reach given the numerous other special factors, the district court erred in concluding that these alternative avenues do not further counsel against extending *Bivens*. As the district court acknowledged, "'even remedies that provide no compensation for victims and little deterrence for violators, such as injunctions and writs of habeas corpus, trigger the general rule that, "when alternative methods of relief are available, a *Bivens* remedy usually is not."'" 1 App. 48 (quoting *Farah*, 926 F.3d at 502 (quoting *Abbasi*, 137 S. Ct. at 1863)); *see also Abbasi*, 137 S. Ct. at 1862-63 (citing potential availability of habeas relief as factor counseling against extending *Bivens*). That "Congress has expressly provided" certain remedies for

certain plaintiffs who claim to have been harmed in the manner at issue here, "but not for others," "suggests that [Congress] considered the issue and made a deliberate choice" to limit remedies. *Farah*, 926 F.3d at 502. Implying a *Bivens* remedy thus "would upset the . . . 'remedial structure'" Congress created, "a 'convincing reason' not to imply a . . . 'freestanding remedy in damages.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1858); *see also Annappareddy*, 996 F.3d at 137 (similar).

Finally, although the FTCA, standing alone, might not counsel judicial hesitation, *see Carlson*, 446 U.S. at 19-23, it is relevant to the scope of remedial alternatives that may, in total, preclude extension of *Bivens*. The FTCA and state tort law may offer an array of remedial possibilities. *Cf. Vanderklok*, 868 F.3d at 200-04 (discussing FTCA and state tort law). And to the extent, as explained *infra*, an FTCA exception bars plaintiffs' claims, the limited scope of the FTCA's waiver of sovereign immunity weighs against expanding *Bivens*. *See Williams v. Keller*, No. 21-4022, 2021 WL 4486392, at *4 (10th Cir. Oct. 1, 2021) (unpublished).

b. Plaintiffs' contrary arguments are meritless.

First, plaintiffs ignore the standard governing the "rigorous inquiry" required to extend *Bivens*. *Vanderklok*, 868 F.3d at 200. As the Supreme Court has repeatedly noted (but plaintiffs never acknowledge), expansion of the *Bivens* remedy has long been a "'disfavored' judicial activity." *Hernández*, 140 S. Ct. at 742 (quoting *Abbasi*, 137 S. Ct. at 1857). "The critical question is 'who should decide' whether to provide

for a damages remedy, Congress or the courts," and "[m]ost often, the answer is Congress." *Vanderklok*, 868 F.3d at 206.

Thus, while plaintiffs offer their view (Br. 55) that tools exist for managing any sensitive evidence required to evaluate their claims, that is a question for Congress to consider. Although "the problems posed by the need to consider classified material are unavoidable in some criminal prosecutions" where Congress has obligated courts to exercise jurisdiction, a *Bivens* claim—where the plaintiff asks the court to infer a cause of action on its own—"is not such a circumstance or such a case." *Arar*, 585 F.3d at 577. Similarly, while plaintiffs argue (Br. 56) that, in their view, the benefits of implying a damages remedy outweigh the costs, it is sufficient not to extend *Bivens* that "there are sound reasons to think Congress *might* doubt the efficacy or necessity of a damages remedy," *Abbasi,* 137 S. Ct. at 1858 (emphasis added). Ample such reasons exist here.

Plaintiffs additionally suggest (Br. 53) that the national-security and foreign-relations concerns raised by Xi's claims are not identical to those raised in *Abbasi* and *Vanderklok*. But *Abbasi* is not narrowly confined to its specific facts involving persons detained after September 11. Nor did this Court in *Vanderklok* limit its reasoning to that context, instead recognizing that the "role of the TSA in securing public safety" more generally weighed against the extension of the *Bivens* remedy that the plaintiff sought. 868 F.3d at 209; *see also id.* at 206 (noting that "[t]he Supreme Court has *never* implied a *Bivens* remedy in a case involving the military, national security, or

intelligence" (emphasis added) (quoting *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012)).

Finally, plaintiffs place heavy reliance on the Ninth Circuit's decision in *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018). That case, decided prior to *Hernández*, concerned a claim that the Ninth Circuit determined "relate[d] only to routine immigration proceedings" and was "unrelated to any other national security decision or interest." *Id.* at 1030. The holding was based on the "specific facts" alleged, *id.* at 1027-28—facts that supported affirmative prosecution by the United States and a guilty plea by the individual defendant, *see id.* at 1022—that a government lawyer "intentionally forged and submitted an ostensible government document in an immigration proceeding," preventing the plaintiff from receiving an immigration status to which he was otherwise legally entitled, *id.* at 1021. This case involves neither the "routine immigration" context nor the specific and extraordinary factual allegations *Lanuza* addressed, and that decision provides no support for extending *Bivens* here.

B. Haugen Is Entitled To Qualified Immunity.

Xi's constitutional claims are independently barred by qualified immunity.

"Qualified immunity shields government officials from personal liability for civil damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *George v. Rehiel*, 738 F.3d 562, 571-72 (3d Cir. 2013) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800,

818 (1982)). To overcome a defense of qualified immunity at the pleadings stage, a plaintiff must allege facts showing that a defendant's conduct "(1) 'violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'" *Id.* at 572 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

To be clearly established, existing precedent "must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply," and "the rule's contours must be so well defined that it is clear to a reasonable" person in the defendant's position "that his conduct was unlawful in the situation he confronted." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotation marks omitted). Thus, "[p]roperly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.'" *George*, 738 F.3d at 572 (quoting *al-Kidd*, 563 U.S. at 743). "Determining whether a right alleged to have been violated is so clearly established that any reasonable officer would have known of it 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)).

In determining whether a plaintiff has stated a claim generally, this Court "must accept plaintiff's allegations as true and draw all inferences in plaintiff's favor." *George*, 738 F.3d at 581. But a pleading may not simply "offer[] labels and conclusions or a formulaic recitation of the elements of a cause of action" nor "tender[] naked assertions devoid of further factual enhancement." *Id.* (brackets and quotation marks

omitted). Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

1. Xi Has Not Alleged a Violation of His Clearly Established Fourth Amendment Rights.

Plaintiffs fail to allege that Haugen violated Xi's clearly established Fourth Amendment rights with regards to Xi's malicious-prosecution, fabrication-of-evidence, or unlawful-search claims.[5]

a. As the district court noted, 1 App. 51, it is undisputed that Xi was indicted by a grand jury and that the subsequent challenged searches and arrest were effected

[5] Plaintiffs assert (Br. 28 n.6) that the district court erred by considering Xi's fabrication-of-evidence claim under the Fourth Amendment, rather than under both the Fourth and Fifth Amendments. But the district court correctly applied the Supreme Court's decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) to conclude that where, as here, "the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment." 1 App. 35-36 (quoting *Manuel*, 137 S. Ct. at 919). Plaintiffs appear to suggest (Br. 28 n.6) that that conclusion extends only to a party's initial court appearance, but *Manuel* involved a plaintiff held until trial based on a judge's probable cause determination based on allegedly fabricated evidence. *See* 137 S. Ct. at 915; *see also DeLade v. Cargan*, 972 F.3d 207, 212 n.4 (3d Cir. 2020) (recognizing that "claims of unlawful pretrial detention may concern restraint *after* a criminal detainee's initial appearance before a court"). In any event, plaintiffs do not explain how their recharacterizing this claim changes the analysis.

pursuant to duly issued warrants. A grand jury indictment "constitutes prima facie evidence of probable cause to prosecute." *Rose v. Bartle*, 871 F.2d 331, 353 (3d Cir. 1989). Similarly, a search warrant is entitled to a "general presumption that an affidavit of probable cause supporting a search warrant is valid." *United States v. Yusuf*, 461 F.3d 374, 383 (3d Cir. 2006). To rebut these presumptions, a plaintiff must show that an indictment was "procured by fraud, perjury or other corrupt means," *Rose*, 871 F.2d at 353 (quotation marks omitted), or, for a warrant, "(1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary, to the finding of probable cause," *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997).

Probable cause exists, moreover, "'if there is a "fair probability" that the person committed the crime at issue.'" *Dempsey v. Bucknell Univ.*, 834 F.3d 457, 467 (3d Cir. 2016) (quoting *Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000)). The standard "does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt," *Zimmerman v. Corbett*, 873 F.3d 414, 418 (3d Cir. 2017) (quotation marks omitted), nor does it "require that officers correctly resolve conflicting evidence," *Dempsey*, 834 F.3d at 467 (quotation marks omitted), or "rule out a suspect's innocent explanation for suspicious facts," *Wesby*, 138 S. Ct. at 588.

Xi alleges no facts that if proven would meet the standard of either *Rose* or *Sherwood*. The complaint reflects that Xi participated in the email exchanges

underlying the charges in his indictment and had entered into a nondisclosure agreement covering the particular technology that the indictment alleged was misappropriated, 2 App. 78, and it is undisputed that both the emails at issue and the investigation of Xi more generally involved "the highly complex field of super-conducting thin-film technology," 1 App. 54. Against that backdrop, plaintiffs offer conclusory allegations regarding Haugen's alleged wrongdoing that are precisely the sort that this Court must ignore under *Iqbal*. *See* 556 U.S. at 678. Indeed, Xi's assertion that Haugen "intentionally, knowingly, and/or recklessly provided federal prosecutors with false scientific opinions and conclusions" regarding Xi's interactions with individuals and entities in China, 2 App. 86, simply rephrases the standards announced in *Rose* and *Sherwood*, without any factual allegations supporting the conclusory assertions regarding Haugen's alleged scienter.

The thrust of plaintiffs' complaint is that Haugen knew or recklessly disregarded the allegedly innocent nature of Xi's technical exchanges with colleagues in China prior to Xi's indictment. But as the district court concluded, the complaint is "devoid of any facts suggesting when or how Haugen knew or should have known that the information in Xi's emails and attachments related" not to the pocket heater technology subject to a nondisclosure agreement but rather to other distinct technologies and projects. 1 App. 55.

Plaintiffs argue that the district court's conclusion was premised "on the *sole* ground that plaintiffs failed to allege the *specific time* when Haugen became aware of

the falsity of the relevant statements." Br. 22. Plaintiffs' allegations, however, largely do assert not that any particular information was communicated to Haugen at any time but rather that, because Haugen had Xi's emails and the highly technical attachments, Haugen "knew or recklessly disregarded" the allegedly innocent nature of the communications. *See* 1 App. 83-86. And for the few allegations where there is a vague assertion that some information was provided to Haugen, as the district court recognized, the complaint's allegations do not provide any detail on, for example, when or in what manner Haugen was "told by an inventor of the STI pocket heater that the diagrams of the SINAP tubular heating device were not related to the STI pocket heater" or "informed that the STI pocket heater was not protected or considered a trade secret." 1 App. 54. These passing references to information communicated are themselves inconclusive, moreover, and address facts that would likely be disputed in a criminal case involving complex subject matter. To the extent that Haugen received conflicting information of this sort prior to Xi's indictment, his failure to resolve conflicting inferences correctly does not obviate probable cause, *see Dempsey*, 834 F.3d at 467, much less plausibly allege that Haugen acted intentionally, knowingly, or recklessly in not concluding that Xi's communications were innocent.

At most, plaintiffs' allegations thus suggest that Haugen got the science wrong in confusing the pocket heater technology with the thin film superconducting projects that plaintiffs allege were the actual subjects of Xi's communications. As the district court recognized, plaintiffs' first two complaints in this case said as much, faulting

Haugen for "not hav[ing] a basic understanding of the science involved in Professor Xi's research" and "fail[ing] to consult with qualified scientists who would have informed him of his false scientific interpretations" regarding the communications at issue. 1 App. 56 n.27. In replacing the legal labels attached to Haugen's alleged actions in the operative complaint, plaintiffs did not allege additional factual matter providing a basis to think that any false statement by Haugen was made knowingly or recklessly, rather than as an innocent mistake. And an innocent mistake or even negligence is insufficient to give rise to a Fourth Amendment violation. *See Herring v. United States*, 555 U.S. 135, 145 (2009) ("In [*Franks v. Delaware*, 438 U.S. 154 (1978)], we held that police negligence in obtaining a warrant did not even rise to the level of a Fourth Amendment violation[.]"); *see also Seeds of Peace Collective v. City of Pittsburgh*, 453 F. App'x 211, 216 (3d Cir. 2011) (concluding complaint failed to state claim on this basis); *Yusuf*, 461 F.3d at 383 (noting "negligence or innocent mistake is insufficient" to invalidate a warrant (quotation marks and alteration omitted)).

Plaintiffs also argue (Br. 23) that the district court applied the wrong standard by concluding that the complaint failed to state a claim where plaintiffs' allegations plausibly supported only an inference that Haugen "simply erroneously concluded that the emails were connected to illegal conduct." 1 App. 54. But under the relevant pleading standard—which plaintiffs nowhere mention—it is plaintiffs' obligation to allege sufficient factual matter to state "more than a sheer possibility that a defendant has acted unlawfully," *Iqbal*, 556 U.S. at 678; pleading facts "that are 'merely

consistent with' a defendant's liability" is insufficient, *id.* The district court correctly concluded that plaintiffs' complaint failed to meet that standard.

Plaintiffs point (Br. 24, 27) to various cases where a malicious-prosecution or fabrication-of-evidence claim was allowed to proceed. But the glaring errors in those cases—which raised plausible inferences that the officers acted in bad faith—underscore the insufficiency of the allegations here. In *Mills v. Barnard*, 869 F.3d 473 (6th Cir. 2017), for example, the Sixth Circuit concluded that the plaintiff had sufficiently alleged that the defendant acted knowingly or recklessly where the plaintiff alleged that the defendant had conducted a DNA analysis that would have clearly exonerated the plaintiff, but reported to prosecutors that the analysis was consistent with guilt. *See id.* at 478, 482-83. Other cited cases address facts equally divorced from the allegations here. *See, e.g.*, *Dennis v. City of Philadelphia*, 19 F.4th 279, 284 (3d Cir. 2021) (involving officers alleged to have falsely claimed to have found certain clothing items at plaintiff's residence and coerced witness to present false testimony at trial); *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018) (involving evidence that officer omitted from affidavit supporting arrest warrant facts undermining credibility of jailhouse informant and error in analysis used to connect plaintiff to crime scene); *Black v. Montgomery County*, 835 F.3d 358, 362-63 (3d Cir. 2016) (involving officers who misrepresented condition of wire in electrical outlet to support arson indictment and omitted obvious investigative steps).

Finally, plaintiffs fault (Br. 28) the district court for failing to address their unlawful-search claim. But the district court recognized that, to rebut the presumption that probable cause supported a duly issued warrant, a plaintiff must prove that an affiant "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant." 1 App. 52 (quoting *Sherwood*, 113 F.3d at 399). And it analyzed at length plaintiffs' failure to include allegations in their complaint raising any such inference. *Id.* at 52-57. That conclusion is equally fatal to plaintiffs' unlawful-search claim.

b. Even if plaintiffs' allegations might be thought to state a violation of the Fourth Amendment, they do not state a clearly established violation.

At most, the allegations suggest that Haugen should have conducted additional investigation and scientific consultation before concluding that there was probable cause to think that Xi's communications violated federal law. But as the district court noted, plaintiffs have not identified any Supreme Court or other precedent "establishing *beyond debate* that an individual in Xi's circumstance had a clearly established right to expert validation of the technical or scientific evidence that was the basis of a probable cause determination in an investigation or prosecution." 1 App. 57. Plaintiffs suggest that FBI agents should have a "duty to inform themselves on issues beyond their own expertise" before making allegedly incorrect representations regarding "scientific" evidence, Br. 25, but identify no precedent

clearly establishing such a duty in this context or otherwise suggesting that any reasonable officer in Haugen's position would know that his conduct was unlawful.

2. Xi Has Not Alleged a Violation of His Clearly Established Fifth Amendment Rights.

The conclusory and implausible allegations of racial and ethnic animus in plaintiffs' complaint also fail to state a violation of Xi's rights under the equal-protection component of the Fifth Amendment, much less a clearly established one.

To establish an equal-protection selective-enforcement claim, a plaintiff "must demonstrate (1) that he was treated differently from other similarly situated individuals, and (2) 'that this selective treatment was based on an "unjustifiable standard, such as race, or religion, or some other arbitrary factor, or to prevent the exercise of a fundamental right."'" *Dique v. New Jersey State Police*, 603 F.3d 181, 184 n.5 (3d Cir. 2010) (ellipsis omitted) (quoting *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005)); *see also, e.g.*, *Day v. Ibison*, 530 F. App'x 130, 134 (3d Cir. 2013) (per curiam) (plaintiff failed to state Fifth Amendment equal-protection complaint where he did not allege "that he was treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus."). Establishing animus for purposes of the second prong requires pleading sufficient factual matter to demonstrate that the defendant took the challenged action "not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Iqbal*, 556 U.S. at 677.

Plaintiffs' allegations fail to meet that standard. The complaint's allegations of racial and ethnic animus are conclusory and not supported by any factual assertions rendering them plausible. Thus, the complaint's claims that Haugen's "investigation of Professor Xi was predicated at least in part on the fact that Professor Xi is racially and ethnically Chinese," 2 App. 90, and that Haugen "considered Professor Xi's race and ethnicity in providing false information" with the "intent to secure false charges," *id.* at 91, are "bare assertions" that are not entitled to be assumed true given their conclusory nature, *Iqbal*, 556 U.S. at 681.

The complaint provides, moreover, no basis for any plausible inference that Haugen was motivated by racial or ethnic animus. The only nonconclusory factual allegation in this portion of the complaint, beyond that Haugen was "a Special Agent employed by the FBI working on Chinese counterintelligence," is a reference to indictments of three other Chinese-American scientists that plaintiffs allege were dismissed prior to trial. 2 App. 90. But there is no allegation that Haugen was involved in any of those prosecutions, such that they cannot be said to give rise to any inference regarding Haugen's purported discriminatory purpose, and only Haugen's conduct is relevant, for "a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others." *Abbasi*, 137 S. Ct. at 1860; *see also Iqbal*, 556 U.S. at 677 (similar).

Plaintiffs' allegation regarding other dismissed prosecutions do not raise any inference regarding unconstitutional conduct in any event. To survive a motion to

dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Yet this allegation presents no detail regarding the basis for the other prosecutions or their dismissal and simply asks the Court to speculate without any supporting factual allegations that they were the product of a broader discriminatory animus that Haugen somehow shared. *Cf. PG Publ'g Co. v. Aichele*, 705 F.3d 91, 115 (3d Cir. 2013) (concluding plaintiffs failed to allege equal protection claim where allegations show "no sign of 'clear and intentional discrimination'" (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)).

Plaintiffs do not remedy this problem by asserting in their brief on appeal that Haugen "was primed to see criminal conduct in Professor Xi's actions because of his ethnicity and national origin." Br. 30. They point to no factual allegations supporting any such inference, and simply repeating the complaint's assertion does not render it any less conclusory. Indeed, by arguing that Haugen's alleged misconduct "is entirely consistent with discriminatory intent," *id.*, plaintiffs effectively concede that they have alleged only facts "that are 'merely consistent with' a defendant's liability." *Iqbal*, 556 U.S. at 678. But that is precisely what *Iqbal* concluded was insufficient to give rise to a plausible claim that actions were motivated by discriminatory animus. *See id.* at 681.

Plaintiffs' reliance (Br. 30) on *Pitts v. Delaware*, 646 F.3d 151 (3d Cir. 2011), similarly only highlights the insufficiency of the complaint's allegations. In *Pitts*, the record contained facts demonstrating that the defendant had treated the black plaintiff differently from a white individual with whom the plaintiff had had an altercation. *See*

id. at 157-58. Xi, by contrast, fails to allege Haugen treated him differently from any other similarly situated individual or any other basis to infer discriminatory intent. For similar reasons, even if plaintiffs do not need to make the particular showing required to obtain pretrial discovery in a criminal case on a selective-prosecution claim, *see* Br. 31 (citing *United States v. Armstrong*, 517 U.S. 456 (1996)), the failure to allege that Xi was "treated differently from other similarly situated individuals," *Dique*, 603 F.3d at 184 n.5, still precludes a selective-enforcement claim.

II. The District Court Properly Concluded That Plaintiffs' Claims Against The United States Are Barred By The FTCA's Discretionary-Function Exception.

A. The Discretionary-Function Exception Bars Plaintiffs' FTCA Claims.

The FTCA effects a limited waiver of sovereign immunity and creates a cause of action for certain tort claims against the United States "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *see id.* § 2674.

Several exceptions limit the FTCA's sovereign immunity waiver. One such exception, the discretionary-function exception, bars suit for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

"'Prosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception.'" *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986) (quoting *Gray v. Bell*, 712 F.2d 490, 513 (D.C. Cir. 1983)), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013). The same is true of allegedly improper investigative conduct that—as here—is "too intertwined with purely discretionary decisions of the prosecutors to be sufficiently separated from the . . . decision to prosecute." *Gray*, 712 F.2d at 515-516; *see also Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013) (per curiam) (similar); *Bernitsky v. United States*, 620 F.2d 948, 955 (3d Cir. 1980) ("Decision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments.").

That conclusion comports with the general two-step analysis that the Supreme Court has prescribed for applying the discretionary-function exemption. *See Berkovitz v. United States*, 486 U.S. 531 (1988). The first question under *Berkovitz* is "whether the action" at issue "involves an element of judgment or choice"—or, conversely, whether "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* at 536. Here, there can be no doubt that Haugen's conduct reflected "judgment or choice" rather than following a "specifically prescribe[d]" course. *Id.* The complaint alleges that Haugen provided prosecutors

with "false scientific opinions and conclusions regarding Professor Xi's communications with entities in China" and "falsely informed federal prosecutors that Professor Xi's normal academic collaborations in China were for a nefarious purpose." 2 App. 86. Those actions reflect judgment; they were not "specifically prescribe[d]" by "a federal statute, regulation, or policy," *Berkovitz*, 486 U.S. at 536; *cf. Gray*, 712 F.2d at 516 (noting complaint focused on "alleged causal links between the negligent investigation, the presentation of false and misleading evidence, and [the plaintiff's] ultimate prosecution" fell within discretionary-function exception).

If "the challenged conduct involves an element of judgment," a court must next "determine whether that judgment is of the kind that the discretionary function exception was designed to shield"—i.e., a judgment "based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37. That prong is equally satisfied here. Policy considerations often affect the Executive's allocation of investigative and prosecutorial resources. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 865 (2014) ("[p]rosecutorial discretion" considers "the public policy of the State"); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (prosecutorial discretion considers "the Government's enforcement priorities"); *Baer v. United States*, 722 F.3d 168, 175 (3d Cir. 2013) ("Whether to pursue a lead, to request a document, or to assign additional examiners to an investigation . . . all . . . necessarily involve considerations of, among other things, resource allocation and opportunity costs."); *Kelly v. United States*, 924 F.2d 355, 362 (1st Cir. 1991) ("decisions to investigate, or not," are "policy-rooted"). The focus

is not on Haugen's subjective motivations but rather "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

B. Plaintiffs' Assertion That Haugen's Actions Were Unconstitutional Does Not Salvage Their FTCA Claims.

Plaintiffs do not dispute that the challenged investigative actions generally fall within the discretionary-function exception. They argue, however, that the exemption is inapplicable because "government agents have no discretion to violate the Constitution." Br. 18. That argument does not save their FTCA claims.

Plaintiffs cannot avoid the discretionary-function exception merely by asserting a violation of the Constitution generally. To be sure, the exception does not apply when a federal law or policy—including a constitutional directive—specifically requires a particular government action. *See, e.g.*, *Berkovitz*, 486 U.S. at 544 ("When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply."). But where federal law does not include such a clear and unequivocal directive, there is no mandatory duty, and the discretionary-function exception applies.

The district court here correctly concluded that plaintiffs' general and conclusory assertions about claimed constitutional violations were not the kind of "specific mandatory directive" that *Berkovitz* held would suffice to overcome the discretionary-function exception. Plaintiffs do not identify any sufficiently specific

and mandatory constitutional directive that might satisfy this standard. Rather, they fault (Br. 19) the district court for echoing the language of its qualified-immunity holding in concluding that that standard was not met where plaintiffs had failed to allege any "clearly established" constitutional violations. But the Supreme Court has long recognized that conduct may be "discretionary" absent a clear statutory or constitutional directive and has referred to the need for government officials to exercise discretion in articulating qualified immunity principles. *See Harlow*, 457 U.S. at 818 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *see also Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (using "discretionary functions" formulation and holding officers were entitled to immunity because constitutional violation was not clearly established with sufficient specificity). In enacting the FTCA, Congress did not set aside recognized principles of official immunity, but to the contrary included an explicit discretionary-function exception "to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984).

Moreover, Congress enacted the FTCA (as its title suggests) to address violations of state tort law committed by federal employees—not to address constitutional violations. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 477 (1994)

(recognizing FTCA "does not provide a cause of action" for a "constitutional tort claim"). It is therefore incongruous to read the discretionary-function exception as plaintiffs would to include an unwritten carve-out whenever a plaintiff alleges constitutional violations. *Cf. Shivers v. United States*, 1 F.4th 924, 930 (11th Cir. 2021) (concluding that "Congress left no room for the extra-textual 'constitutional-claims exclusion' for which [the plaintiff] advocates"), *cert. denied*, No. 21-682, 2022 WL 827862 (U.S. Mar. 21, 2022). That is perhaps particularly true in the malicious-prosecution context, where plaintiffs' approach risks eviscerating the precedent from this Court and others that such claims fall within the discretionary-function exception, given the ease with which state-law malicious-prosecution claims can be recast as Fourth Amendment claims. *Compare, e.g.*, *Kelley v. General Teamsters, Chauffeurs & Helpers, Local Union 249*, 518 Pa. 517, 520-21, 544 A.2d 940 (Pa. 1988) (elements of Pennsylvania malicious-prosecution tort), *with Curry v. Yachera*, 835 F.3d 373, 379 (3d Cir. 2016) (elements of Fourth Amendment malicious-prosecution claim).[6]

Instead, that alleged conduct is asserted to violate the Constitution is relevant only to the extent the Constitution creates the specific mandatory directive required by *Berkovitz*. Plaintiffs can make no such showing here. Indeed, as discussed *supra*

[6] Plaintiffs argue (Br. 33-34) that their view is supported by the Supreme Court's decision in *Owen v. City of Independence*, 445 U.S. 622 (1980). But as the Eleventh Circuit recognized, that decision interpreting 42 U.S.C. § 1983 has no bearing on the interpretation of the broad discretionary-function exception expressly included by Congress in the FTCA. *See Shivers*, 1 F.4th at 934 n.8; *see also Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1138 n.18 (10th Cir. 1999) (similar).

part I.B, they fail even to state a constitutional violation. *See Karkalas v. Marks*, 845 F. App'x 114, 122 (3d Cir. 2021) (declining to evaluate similar argument where plaintiff did not allege plausible constitutional violations), *cert. denied*, 142 S. Ct. 464 (2021). And they certainly provide no basis to conclude that any case law identified creates a directive to perform or not perform any action with the clarity and specificity required to preclude application of the discretionary-function exception. Thus, as in *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019), the failure to identify any "clearly established" violation providing such a directive dooms their FTCA claims.[7] *See id.* at 364.

And while plaintiffs assert on appeal that "no circuit court has adopted the district court's position," Br. 33 n.8, that is belied by decisions from the Eleventh Circuit and the Seventh Circuit that plaintiffs relegate to a footnote. *See* Br. 18 n.3. In *Shivers*, for example, the Eleventh Circuit concluded that the FTCA barred the plaintiff's challenges to certain inmate classification and housing decisions, notwithstanding the assertion that the challenged actions violated the Eighth Amendment, where the plaintiff could not point to any specific mandatory directive satisfying the first prong of the discretionary-function analysis. *See* 1 F.4th at 931. And in *Linder v. United States*, 937 F.3d 1087 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 159

[7] Plaintiffs argue (Br. 34-36) that this question was not squarely presented in *Bryan* given the parties' agreement that a clearly established violation was required for the FTCA claims to proceed, but, as noted, the approach adopted flows from *Berkovitz*'s first prong.

(2020), the Seventh Circuit rejected an argument analogous to plaintiffs', reasoning that the principle that "no one has discretion to violate the Constitution" has "nothing to do with the [FTCA], which does not apply to constitutional violations." *Id.* at 1090.

Here too, moreover, plaintiffs cite no case from this Court or another court of appeals allowing any analogous claims to go forward in the face of the discretionary-function exception. To the extent cited statements are not simply dicta, *see, e.g.*, *Pooler*, 787 F.2d at 871, several cases simply state as a general matter that some constitutional violations could render the discretionary-function exception inapplicable, without deciding the specificity or clearly established nature of the constitutional mandate that must be alleged to have been violated. *See Nurse v. United States*, 226 F.3d 996, 1002 & n.2 (9th Cir. 2000) (declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor"); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (noting that the court had previously concluded that plaintiffs' allegations "stated a clear violation of due process," which they subsequently proved at trial). Similarly, in *Loumiet v. United States*, 828 F.3d 935 (D.C. Cir. 2016), the D.C. Circuit merely held that the district court erred in taking a "broad-brush approach" to state as a general matter that the discretionary-function exception applies to constitutionally defective actions. *Id.* at 946. *Loumiet* left "for another day" the question whether the exception applies to violations of constitutional rights "that are not already clear." *Id.* *Berkovitz* resolves

that question, making clear that, absent a specific mandatory directive, the discretionary-function applies.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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April 2022

COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,981 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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s/ Leif Overvold
Leif Overvold

ADDENDUM

TABLE OF CONTENTS

18 U.S.C. § 3006A note A1

28 U.S.C. § 1495 .....A2

28 U.S.C. § 2513 .....A3

28 U.S.C. § 2680 .....A4

18 U.S.C. § 3006A note

Attorney's Fees and Litigation Expenses to Defense

Pub. L. 105–119, title VI, § 617, Nov. 26, 1997, 111 Stat. 2519, provided that: "During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision."

28 U.S.C. § 1495

§ 1495. Damages for unjust conviction and imprisonment; claim against United States

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

28 U.S.C. § 2513

§ 2513. Unjust conviction and imprisonment

(a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed $100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $50,000 for each 12-month period of incarceration for any other plaintiff.

28 U.S.C. § 2680

§ 2680. Exceptions

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

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *