IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2798

XIAOXING XI, QI LI, and JOYCE XI,
Appellants

v.

UNITED STATES OF AMERICA et al.,
Appellees

REPLY BRIEF FOR APPELLANTS

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Professor Xiaoxing Xi was subjected to a baseless criminal prosecution by the United States and its agents, one built on patently false allegations about his scientific work—with devastating consequences for Professor Xi and his family. Despite the detailed and precise allegations in the operative complaint that amply support valid claims for relief, Defendants-Appellees argue that the Xis have no legal remedy for damages.

Defendants have failed to provide grounds for dismissal of the Xis' claims under Fed. R. Civ. P. 12 because (1) plaintiffs have plausibly alleged constitutional violations, and thus the discretionary function defense does not shield the United States from Federal Tort Claims Act ("FTCA") liability; (2) there is no qualified immunity defense to FTCA claims, and in any event the violations alleged were all clearly established at the time of the defendants' actions; and (3) plaintiffs may pursue remedies from defendant Haugen for his constitutional violations under the *Bivens* doctrine. Defendants' arguments are wrong on the facts and the law, and this Court should reverse the order of the district court and remand the case for further pre-trial proceedings.

ARGUMENT

I. The United States Is Liable Under the FTCA.

As plaintiffs' opening brief explains, the district court misapplied bedrock pleading standards when it held that plaintiffs had failed to allege clearly established constitutional violations and, therefore, that the discretionary function exception barred plaintiffs' FTCA claims. *See* 28 U.S.C. § 2680(a); Pls.' Br. 20-36. Notably, the district court did not question the longstanding doctrine in this Circuit that government agents have no discretion to violate the Constitution. App. 61 n.29. However, the court ruled that plaintiffs had failed to properly allege constitutional violations—and even if they had, that qualified immunity protected the United States from liability.

Defendants' attempt to salvage the district court's plausibility analysis simply by labeling the complaint's allegations "conclusory" is fruitless. The fundamental flaw in defendants' arguments is their total disregard of plaintiffs' detailed factual allegations, an error compounded by the key inferences they repeatedly draw in Haugen's favor. In addition to inverting the proper legal standard for analyzing the sufficiency of a complaint's allegations, defendants ignore the multiple cases cited by plaintiffs in which courts have sustained legal claims on far less detailed and specific pleading than what plaintiffs have provided in this case. *See* Pls.' Br. 27 (citing *Black v. Montgomery Cty.*, 835 F.3d 358, 362

(3d Cir. 2016); *Mills v. Barnard*, 869 F.3d 473, 484-85 (6th Cir. 2017); *Brown v. Miller*, 519 F.3d 231, 237-38 (5th Cir. 2008); *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004)).

Ultimately, defendants fall back on a sweeping legal argument, contending that this Court's prior rulings allow the government to raise a discretionary function defense *notwithstanding* plausibly alleged constitutional violations. That claim is wrong as well. Plaintiffs' well-pled constitutional violations foreclose the discretionary function defense at this stage of the case.

A. Plaintiffs plausibly allege constitutional violations.

The Second Amended Complaint ("SAC") plausibly alleges violations of the Fourth and Fifth Amendments sufficient to establish claims against defendant Haugen and to foreclose the discretionary function defense. With respect to Professor Xi's malicious prosecution, fabrication of evidence, and unlawful search claims, the SAC makes clear that Haugen received fully exculpatory information regarding Professor Xi's email communications with counterparts in China *before* Haugen transmitted to the prosecutor his allegations that Professor Xi was engaged in criminal conduct, and *before* the indictment was returned.[1] Pls.' Br. 22-23.

[1] Knowingly and intentionally ignoring conclusively exculpatory information cannot be excused a matter of "allocation of investigative and prosecutorial resources," Defs.' Br. 46, and cases on that distinct issue are inapposite here.

Defendants dismiss Professor Xi's allegations about what Haugen knew and when as "conclusory," Defs.' Br. 36, but that assertion is belied by the specific and detailed facts in the SAC. In particular, defendants contend that plaintiffs fail to allege facts showing that Haugen ever knew or should have known that Professor Xi's actions were entirely legal, *id*. at 36-38, that the SAC does not allege what "particular information was communicated to Haugen," *id.* at 37, that Haugen merely misunderstood "highly technical" information, *id.*, and that plaintiffs did not detail "when or in what manner" Haugen received certain information, *id.* But defendants' contentions are all refuted by a straightforward reading of the allegations in the SAC, including:

- Haugen was told by an inventor of the STI pocket heater that the diagrams of the SINAP tubular heating device that were in the emails referenced in the indictment were invented by Professor Xi and were not related to the STI pocket heater, SAC ¶ 55(a);
- Haugen was informed that the STI pocket heater was not protected under any intellectual property doctrine or considered a trade secret and was not a "'revolutionary device,'" SAC ¶ 55(b);
- Haugen was informed that Professor Xi did not share any "samples" produced by the STI pocket heater with entities in China, SAC ¶ 55(g);

- Haugen was informed that the STI pocket heater technology was publicly available and there would be no reason for Professor Xi to "orchestrate a scheme" to illegally obtain the STI pocket heater technology, SAC ¶ 55(c); and
- Haugen was informed that Professor Xi purchased his pocket heater not from STI, but rather from a different company, Shoreline Technologies and had no intent to defraud STI, SAC ¶ 55(d).

On a motion to dismiss, these allegations must be accepted as true—a principle that both the district court and the defendants ignore. When viewed in this proper context, each allegation is independently sufficient to plausibly establish Haugen's deliberate, knowing, and reckless actions in providing false information to prosecutors that directly led to indictment. In combination, they present a thorough and detailed account of an agent who received conclusive information contradicting the allegations of criminal conduct that he would later make.[2]

[2] Full discovery is particularly important in this case because there were documents provided in the criminal prosecution, including discovery disclosed to Professor Xi and his criminal defense attorneys, that remain subject to the district court's protective order and therefore not before the Court at this juncture. *See United States v. Xi*, No. 2:15-cr-00204, ECF Nos. 32, 44, 45 (E.D. Pa. 2016) (protective order and subsequent modifications granting civil rights counsel access to certain discovery materials). This information will provide further evidence of Haugen's intentional, knowing, and reckless false allegations—including evidence that Haugen knew or should have known, prior to the indictment, that the

Defendants' argument that, at worst, Haugen's misrepresentations were the result of the "complexity" of the subject matter of the investigation and that he was no more than negligent for getting 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," Defs.' Br. 37, is entirely wrong on the facts. Several of Haugen's falsehoods concerned simple factual matters. For example, as the SAC alleges, Haugen falsely claimed that Professor Xi shared details about the STI pocket heater, and that Haugen did so after he learned from the person who *invented* the STI pocket heater that this was not true. SAC ¶ 55(a). Indeed, even if Haugen could credibly argue that he made a "mistake" at some point in his investigation, that mistake became a knowing and intentional misstatement of the facts from the moment he received authoritative information to the contrary.

Moreover, the argument that the supposed "complexity" of the facts absolves Haugen from liability rests on the flawed proposition that where a criminal investigation involves matters of scientific complexity, a common

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information in Professor Xi's emails and attachments related not to the pocket heater, but to other technologies. Accordingly, plaintiffs will seek modification of the protective order to allow for use of that evidence at both the summary judgment and trial stages. If this Court dismisses the claims for lack of sufficient plausible facts, it should do so without prejudice to allow for the filing of a motion to vacate the protective order and an amended complaint.

ethnicity among cooperating scientists, and generalized concerns about economic espionage, a law enforcement agent is somehow permitted to provide reckless or false information to obtain an indictment. Defendants are free to argue that Haugen was "mistaken" at summary judgment (following discovery) and thereafter to the fact finder. But at the motion to dismiss stage, where reasonable inferences support the view that Haugen, at a minimum, recklessly disregarded the truth, there are no grounds for dismissal. In short, whether defendant Haugen acted with the requisite culpability to establish liability for malicious prosecution, fabricating evidence, and securing search warrants based on false information and without probable cause,[3] are classic questions for the finder of fact. Pls.' Br. 26-29; *see also Halsey v. Pfeiffer,* 750 F.3d 273, 300 (3d Cir. 2014) (at summary judgment stage, court should not dismiss malicious prosecution claim against officer "if there are underlying factual disputes bearing on the issue or if 'reasonable minds could differ' on whether he had probable cause for the institution of the criminal proceedings based on the information available to him" (quoting *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir. 1984)).

[3] Defendants devote a single paragraph to the unlawful search claims, Defs.' Br. 40, and rest on the same argument they proffer regarding plaintiffs' malicious prosecution claim: that plaintiffs' allegations fail to establish the absence of probable cause. That argument is faulty for the same reasons discussed above.

Plaintiffs also plausibly allege violations of the Fifth Amendment for the denial of equal protection based on racial and ethnic bias in Haugen's investigatory acts. Haugen argues that there are insufficient facts to show that the malicious prosecution, falsification of evidence, and searches based on warrants without probable cause were motivated by racial or ethnic bias, casting plaintiffs' assertions as "conclusory." Defs.' Br. at 41-42. Once again, Haugen fails to credit well pleaded facts and inferences regarding his conduct. Having been directly advised that there was no factual basis for the charges at the heart of the indictment, and having no affirmative proof of criminal wrongdoing, the natural question that follows is what motivated Haugen to ignore the lack of probable cause and falsify information.

Based on these facts, a jury could determine that the motivation was one of racial or ethnic bias. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *Pitts v. Delaware*, 646 F.3d 151, 153-58 (3d Cir. 2011) (emphasizing reliance on circumstantial evidence to support finding of discriminatory intent). The facts alleged in the SAC support a reasonable inference that Haugen's actions were motivated in substantial part by his bias against Professor Xi as a Chinese American.

B. The discretionary function exception does not shield the United States when a plaintiff has plausibly alleged constitutional violations.

Defendants argue that even if plaintiffs have properly alleged constitutional violations, the law was not sufficiently mandatory or clear to deprive the United States of a discretionary function defense and to deprive defendant Haugen of qualified immunity. Defs.' Br. at 40-44; *id.* at 32-34. These arguments, which conflate the discretionary function and qualified immunity tests, do not defeat plaintiffs' FTCA claims. This Court has made clear that the discretionary function exception does not shield the United States from liability for constitutional violations. The new test the government proposes is vague and unmanageable, and would bar remedies under the FTCA for numerous torts involving unconstitutional conduct.

It has long been settled in this Circuit that "conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation" as "[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes." *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1998); *see also Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986), *abrogated on other grounds by Milbrook v. United States*, 569 U.S. 50 (2013). These cases are fully supported by the Supreme Court's rulings in *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v Gaubert,* 499 U.S. 315

(1991), that where federal law *requires or prohibits* certain action, there is no discretion to do otherwise.[4]

Further, the ruling in *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019), did not call into question this precedent; rather, on the unique facts of that case where the new constitutional rule for border searches was set forth just a day before the conduct in question, this Court found no violation of the plaintiff's constitutional rights. Notably, both before and after this Court's decision in *Bryan*, the district courts in this Circuit have consistently followed the rule that a constitutional violation precludes application of the discretionary function defense. *See, e.g., Dalal v. Molinelli*, No. 20-cv-1434, 2021 WL 1208901, at *10 (D.N.J.

[4] Defendants attempt to shoehorn the conduct in this case into a line of decisions holding that an agency's *negligent* failure to investigate is discretionary. Defs.' Br. 45-46. But all the cited cases are distinguishable from the allegations here: that Haugen engaged in *intentional* misconduct, including the presentation of false evidence. *See Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013) (per curiam) (describing plaintiff's claim as concerning negligent "failure to investigate" and falling within "Congress's intent to shield regulatory agencies' discretionary use of specific investigative powers"); *Gray v. Bell*, 712 F.2d 490, 493-94, 516 (D.C. Cir. 1983) (describing FTCA claims as focusing on prosecutors' failure to investigate certain witnesses and concluding that "negligent investigatory acts" were discretionary); *Bernitsky v. United States*, 620 F.2d 948, 955-56 (3d Cir. 1980) (finding claim involving negligent choice as to which mine safety enforcement action to pursue a discretionary judgment). In *Pooler*, the Court did not allow intentional tort claims regarding a police investigator's knowing and reckless actions to proceed—but not due to the discretionary function exception. Instead, the Court ruled that the alleged conduct did not fit within the FTCA's waiver of sovereign immunity for intentional torts under 28 U.S.C. § 2680(h). 787 F.2d at 872. That ruling was later abrogated in *Milbrook*. 560 U.S. at 56-57.

Mar. 30, 2021) (citing *U.S. Fid. & Guar. Co.*, 837 F.2d at 120) ("Courts have nearly unanimously held that federal actors lack discretion to violate an individual's constitutional rights."); *United States v. Shaner*, No. 85-cv-1372, 1992 WL 154652, at *10 (E.D. Pa. June 15, 1992) (holding that discretionary function exception did not bar tort counterclaim against United States where claim was based on government's violation of relevant regulation). A majority of the circuit courts of appeals have ruled the same way. *See* Pls.' Br. 18 n.3.[5]

The government's attempt to import qualified immunity principles into the discretionary function analysis, Defs.' Br. 48, must be rejected as there is no qualified immunity defense under the FTCA—either as a general proposition or with respect to the discretionary function exception. *See* Pls.' Br. 32-36. Where federal agents violate constitutional rights, they cannot claim that they acted with "discretion" because the Constitution expressly prohibits that conduct. Moreover, for FTCA claims, this analysis is conducted without reference to the qualified immunity issue of "clearly established" law. *Id*.[6]

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[5] In any event, defendants concur with plaintiffs' argument that the ruling in *Bryan* does not stand for the proposition that qualified immunity has a role in deciding whether the United States is liable for a tort of its agent that violates the Constitution. *See* Defs.' Br. 50 n.7.

[6] The Seventh and Eleventh Circuits have recently ruled that the discretionary function exception remains available in some instances when the Constitution has been violated, but neither court imported a qualified immunity analysis. *Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021); *Linder v. United*

More fundamentally, defendants' argument ignores the rationale for the qualified immunity doctrine, which is to protect *individual* government officers from liability. The Supreme Court has ruled that there is no qualified immunity defense for a governmental entity. *Owen v. City of Independence*, 445 U.S. 622 (1980).[7] Indeed, *Wilson v. Layne*, 526 U.S. 603 (1999), Defs.' Br. 48, provided qualified immunity for a violation of the Fourth Amendment on the ground that individual officers (but not governmental entities) are shielded from liability for violations that had not previously been clearly established.

Seeking another way around this Court's settled precedent, defendants argue that plaintiffs "do not identify any sufficiently specific and mandatory constitutional directive" that overcomes the discretionary function exception. Defs.' Br. 47-48. Defendants' arguments fail at the start, as the concept of a "non-mandatory" constitutional rule is a fallacy. Even if defendants could identify some category of non-mandatory constitutional rules governing agents' conduct (which

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States, 937 F.3d 1087 (7th Cir. 2019). In any event, both decisions are wrongly decided—and contrary to this Court's controlling authority—because they ignore the principle that a federal agent may never permissibly choose to violate the Constitution. *U.S. Fid. & Guar. Co.*, 837 F.2d at 120.

[7] Defendants seek to distinguish *Owen*, Defs.' Br. 49 n. 6, on the ground that decisions interpreting 42 U.S.C. § 1983 are irrelevant to the construction of the FTCA. But their argument rests on the ruling in *Shivers*, 1 F.4th 924, that is misplaced and contrary to controlling Third Circuit law. *See supra* note 6; Pls.' Br. 18-19, 32-34.

they cannot), there is no manageable way for courts to draw lines between these two hypothetical categories of rules. Further, the constitutional rules at issue in this case are, in fact, "specific" and "mandatory." As discussed below and in plaintiffs' opening brief, the Constitution plainly prohibits agents from recklessly or intentionally making misrepresentations and fabricating evidence in support of arrest and search warrants, and, likewise, it plainly prohibits prosecutorial decisions based on discriminatory motive. *See* Section I.C *infra*; Pls.' Br. 36-39.

Contrary to defendants' assertion, Defs.' Br. 48-49, plaintiffs make no claim that the FTCA creates liability for federal constitutional violations in the absence of a state-law tort violation. Rather, the significance of the constitutional violation is its direct *proscription* of the conduct in question. Although defendants complain that state-law malicious prosecution claims can too easily be "recast as Fourth Amendment claims," Defs.' Br. 49, that is beside the point. What matters is that the Fourth Amendment plainly proscribes the conduct in *this case*. *See, e.g.*, *Thompson v. Clark*, 124 S. Ct. 1332 (2022); *Black*, 835 F.3d at 372. Here, the acts of defendant Haugen were prohibited by the Constitution, and thus there is no discretionary function defense.

C. The constitutional violations were clearly established.

Even if the government could invoke the discretionary function defense where the federal constitutional rule was not sufficiently "clear" or "specific" at

the time, plaintiffs still prevail. The constitutional rules at issue here are longstanding and mandatory: they prohibit federal agents from recklessly or intentionally misrepresenting facts in support of arrest and search warrant applications, from fabricating evidence, and from pursuing criminal investigations and prosecutions on the basis of race, ethnicity, or national origin. *See* Pls.' Br. 36-39. Defendants' arguments that the law was not "clearly established" fail to acknowledge a core principle of this Court's qualified immunity analysis: that officials can be on notice that their conduct violates clearly established law even in novel factual circumstances. *See* Pls.' Br. 38.

Defendants also err in attempting to recast the SAC as resting on the claim that there is a "clearly established right to expert validation of the technical or scientific evidence that was the basis of a probable cause determination," Defs.' Br. 40. Plaintiffs do not seek liability on that theory. The SAC explains that when defendant Haugen consulted with experts in the field, he was directly advised that his understandings of the science and the email communications were entirely erroneous; that Professor Xi had communicated with respect to his own inventions, which had no relationship to the pocket heater; and that Haugen had no other evidence of criminality. *See* Section I.A *supra*. Nowhere do plaintiffs contend that there is a constitutional duty to secure "expert validation," nor is this case one of "conflicting inferences." Defs.' Br. 37. Rather, Haugen's knowing decision to

disregard conclusive information demonstrating the absence of criminal culpability is the basis for liability.[8]

Accordingly, even if the Court were to import the standards from qualified immunity doctrine into its discretionary function analysis, plaintiffs' claims against the United States should proceed. For the same reasons, defendant Haugen is not entitled to qualified immunity here.

II. The Supreme Court's *Bivens* Cases Authorize Professor Xi's Fourth and Fifth Amendment Claims.

In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court reaffirmed "the continued force . . . [and] necessity[] of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 1856. Professor Xi presents *Bivens* claims arising in the same search-and-seizure context, and no special factors counsel against allowing those claims to proceed. Defendant Haugen seizes upon minor factual distinctions between *Bivens* and this case to argue that the searches and seizures at issue here present a "new context." He further argues that special factors—including the false national security claims that tainted the original prosecution of

[8] To the extent plaintiffs' complaints that preceded the SAC can be read to have said anything to the contrary, such allegations are not relevant to the Court's review of the SAC. *See W. Run Student Hous. Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 171 (3d Cir. 2013) (amending pleading "supersedes the original and renders it of no legal effect") (citation and quotation omitted). Accordingly, defendants' reliance on prior pleadings, Defs.' Br. 37-38, is entirely beside the point.

Professor Xi—should now shield him against a *Bivens* remedy in this case. For the reasons described below, none of these arguments has merit, and Professor Xi's *Bivens* claims should proceed.

A. Professor Xi's claims do not arise in a new *Bivens* context.

1. The *Abbasi* factors favor Professor Xi.

Abbasi highlights six factors that play an important role in evaluating whether a *Bivens* claim presents a new context. 137 S. Ct. at 1860; *see* Pls.' Br. 44. Defendant Haugen does not address the first five of these factors, effectively conceding that they do not apply to Professor Xi's malicious prosecution, fabrication of evidence, and unlawful search claims. *Compare* Pls.' Br. 45-46, *with* Defs.' Br. 17-18.

Haugen's arguments on the sixth *Abbasi* factor, "the risk of disruptive intrusion by the Judiciary into the functioning of other branches," 137 S. Ct. at 1860, are unavailing.

First, contrary to Haugen's assertions, the "risk of disruptive intrusion" in this case is no different from that present in *Bivens*. Haugen contends that the federal narcotics agents in *Bivens* were investigating "local conduct," while the investigation of Professor Xi was conducted pursuant to "an executive branch, multi-agency effort" implicating national security. Defs.' Br. 20 (quoting App. 41). But the investigation in *Bivens* was also an executive branch, multi-agency

effort—to combat drug trafficking. *See* Pls.' Br. 46; *The Early Years*, Drug Enforcement Administration, 23-25 (last visited May 23, 2022), https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf (discussing the 1962 President's Advisory Commission on Narcotic and Drug Abuse, which led to the creation of the Bureau of Drug Abuse Control in 1965). The federal government's anti-narcotics efforts in the 1960s were far from "local," as they spanned the globe, *see id.*, and the U.S. government has for decades regarded drug trafficking as a national security matter. *See* Keith B. Richburg, *Reagan Order Defines Drug Trade as Security Threat, Widens Military Role*, Wash. Post (June 8, 1986), https://www.washingtonpost.com/archive/politics/1986/06/08/reagan-order-defines-drug-trade-as-security-threat-widens-military-role/309fdc6f-e5b8-4a64-8249-7b51182b3db1. Yet these long running features of the "war on drugs" did not dissuade the Court from recognizing an implied cause of action in *Bivens*, and have not since eliminated the availability of *Bivens* in the law enforcement context in which that case arose. Here, the fact that federal agencies have jointly decided to target international economic espionage does not present separation-of-powers issues any different from those in *Bivens*.

Second, Haugen is wrong in arguing that Professor's Xi's *Bivens* claims challenge an executive policy. Defs.' Br. 12, 20. The Xis' surveillance claim in

Count X of the SAC is not a *Bivens* claim and is not at issue in this appeal. Count X does not seek invalidation of any government policy; instead, it requests expungement as a remedy for the unlawful surveillance of plaintiffs' communications. The two sets of claims present distinct legal challenges against different defendants, as the district court recognized in certifying this appeal without addressing Count X.

2. The factors invoked by Haugen do not establish a new context.

Because none of the six *Abbasi* factors apply to Professor Xi's claims, Haugen turns to two new, highly amorphous factors: "the conduct at issue" and "the mechanism of injury." Defs.' Br. 18-21. Haugen's factors are so broadly drawn that they encourage courts to focus on minor factual distinctions from *Bivens*, contrary to the Supreme Court's command in *Abbasi*. 137 S. Ct. at 1859-60 (explaining that only "meaningful" factual distinctions create "new contexts" for *Bivens* purposes). Of course, every case involving a search and seizure within a home will feature some facts that differ from *Bivens*, but courts have nevertheless continued to recognize a *Bivens* remedy in this context despite myriad variations. *See Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019); *Brunoehler v. Tarwater*, 743 F. App'x 740, 744 (9th Cir. 2018). That is because these searches implicate the "settled law of *Bivens* in th[e] common and recurrent sphere of law enforcement," *Abbasi*, 137 S. Ct. at 1857, and minor factual distinctions are not sufficiently

"meaningful" under *Abbasi*, *id.* at 1859-60; *see also, e.g.*, *Jacobs*, 915 F.3d at 1038 (warning that *Abbasi* should not be treated as a "silver bullet" in cases involving ordinary law-enforcement misconduct).

The cases Haugen cites ignore this carefully calibrated guidance from the Supreme Court in *Abbasi*. *See* Defs.' Br. 18-21 (citing *Annappareddy v. Pascale*, 996 F.3d 120, 135-36 (4th Cir. 2021); *Farah v. Weyker*, 926 F.3d 492 (8th Cir. 2019); and *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019)). *Abbasi* acknowledged "the undoubted reliance upon *Bivens* as a fixed principle in the law" in the search-and-seizure context, 137 S. Ct. at 1857, and nothing in the Supreme Court's decision overturned the decades of lower-court decisions applying *Bivens* to malicious prosecution and fabrication of evidence claims in that familiar context.[9] Thus, even though the conduct challenged in *Jacobs* and *Brunoehler* included fabrication of evidence and malicious prosecution—claims not present in

[9] Haugen's analysis is contrary to pre-*Abbasi* circuit court cases that have recognized *Bivens* claims for malicious prosecution and fabrication of evidence that were not abrogated by *Abbasi*, and thus remain good law today. *See*, *e.g.*, *Gallo v. City of Philadelphia*, 161 F.3d 217, 225 (3d Cir. 1998), *as amended* (Dec. 7, 1998) ("[A] claim of malicious prosecution brought under section 1983 or *Bivens* alleges the abuse of the judicial process by government agents."); *Bethea v. Reid*, 445 F.2d 1163, 1165 (3d Cir. 1971) (recognizing *Bivens* cause of action for "conspiracy to induce perjured testimony"); *Hernandez–Cuevas v. Taylor*, 836 F.3d 116, 118 (1st Cir. 2016); *Cooper v. McFadden*, 649 F. App'x 523 (9th Cir. 2016); *Webb v. United States*, 789 F.3d 647, 659-60, 666-72 (6th Cir. 2015); *Boyd v. Driver*, 579 F.3d 513, 515 (5th Cir. 2009); *Zahrey v. Coffey*, 221 F.3d 342, 357 (2d Cir. 2000).

Bivens—the Sixth and Ninth Circuits concluded that ordinary law enforcement misconduct involving an unlawful search and seizure did not present a new *Bivens* context. *Jacobs*, 915 F.3d at 1028; *Brunoehler*, 743 F. App'x at 744. This Court should do the same.

Like the defendants in *Jacobs*, Haugen "make[s] much out of factual differences" between his conduct and the conduct at issue in *Bivens*, but fails to "articulate why this case 'differ[s] in a meaningful way.'" 915 F.3d at 1038 (quoting *Abbasi*, 137 S. Ct. at 1862)). Here, the misconduct closely resembles *Bivens*: Professor Xi seeks redress for an unlawful search and seizure that was conducted without probable cause, and resulted in a traumatic home raid and unjustified arrest. Indeed, several of Xi's core factual claims—officers entering his home with weapons drawn, holding the plaintiff and his family at gunpoint, and later subjecting the plaintiff to a strip search—precisely match the facts in *Bivens*. Furthermore, as *Brunoehler* held, a search and arrest based on a fraudulently obtained warrant is not meaningfully different from a warrantless search and arrest, because both are based on the same wrong: a lack of probable cause. 743 F. App'x at 742-43.

Defendant Haugen also argues that the "mechanism" or cause of the illegal search and seizure in Professor Xi's case is not identical to that in *Bivens*, pointing to the indictment here. *See* Defs.' Br. 19. But the mechanism need not be identical.

Neither *Hernández v. Mesa*, 140 S. Ct. 735, 739 (2020), nor *Abbasi* identifies the "mechanism of injury" as a relevant factor in the *Bivens* analysis.[10] Instead, *Abbasi* emphasized the continued applicability of *Bivens* to claims involving the law enforcement "search-and-seizure context." *Id.* at 1856. Haugen tries to whittle down this "context" and deflect responsibility by pointing to the grand jury and prosecutors, Defs.' Br. 20, but Haugen was the source of the false representations and omissions that directly caused both the indictment and the illegal search and seizure of Professor Xi. That other agents were involved in bringing that illegal search and seizure to fruition does not meaningfully distinguish this case from *Bivens* when the resulting injury is the same.

Finally, Haugen's assertions that Professor Xi's equal protection claim and the ruling in *Davis v. Passman*, 442 U.S. 228 (1979), "could not be more different," and that "plaintiffs do not dispute [this] on appeal," are not correct. Defs.' Br. 22-23. Professor Xi's Fifth Amendment claim shares *Davis*'s central feature of intentional discrimination based on membership in a protected class. *Davis*, 442 U.S. 235-36. While the *setting* for this discrimination is different from that in *Davis*, it directly maps onto the search-and-seizure context of *Bivens*. As described in the SAC, a key reason that Haugen pursued the search and seizure of

[10] It is especially notable that *Abbasi* does not include "mechanism of injury" as a factor because the court below had relied on it. *See* 137 S. Ct. at 1859.

Professor Xi—notwithstanding the manifest lack of probable cause as described in the complaint—was impermissible bias based on Professor Xi's protected characteristics. Professor Xi seeks a remedy for that discrimination. A cause of action that combines factual elements from *Bivens* and *Davis* is not a "new context," as it does not meaningfully extend the *Bivens* doctrine.

B. Even if this case presented a new *Bivens* context, no special factors counsel against allowing Professor Xi's claims to proceed.

1. The claims do not raise special national security, counterintelligence, or foreign policy concerns.

Haugen argues that Professor Xi's claims raise national security, counterintelligence, and foreign policy concerns because "Haugen's alleged misconduct occurred during his work as an FBI special agent assigned to Chinese counterintelligence." Defs.' Br. 25 (quoting App. 45). This formalistic focus on Haugen's job title ignores the specific misconduct at issue and is a transparent attempt to use that title as a stand-in for generalized national security concerns where none of the facts here support that claim.

Haugen caused Professor Xi to be charged with ordinary wire fraud and the *only* asserted connection to national security, counterintelligence, or foreign policy arose *from Haugen's false claims* that Professor Xi communicated confidential information to his Chinese colleagues. It cannot be the case that where an agent's knowing falsehoods are the sole nexus to national security, that false nexus can

later serve as a talisman against *Bivens* liability. *See Abbasi*, 137 S. Ct. at 1862 ("[N]ational-security concerns must not become a talisman used to ward off inconvenient claims[.]"). An agent's title or job description does not provide absolute immunity against *Bivens* liability where the agent has no evidence that a suspect has committed any wrongdoing that implicates national security concerns—let alone where, as here, the agent fabricates such evidence. *Cf. Hoffman v. Preston*, 26 F.4th 1059, 1072 (9th Cir. 2022) (rejecting defendant's argument that the existence of prison disciplinary proceedings was a special factor counseling hesitation because "[b]y [defendant's] logic, any time a corrections officer initiated a disciplinary matter, no matter how unfounded or retaliatory, a *Bivens* claim would be precluded").

Haugen's contention that adjudicating Professor Xi's *Bivens* claims would "almost certainly require an intrusive inquiry" into "counterintelligence policy, methods, and authority," Defs.' Br. 26 (quoting App. 46), is incorrect. The question of whether Haugen knowingly or recklessly misrepresented evidence about Professor Xi and the STI pocket heater simply requires an assessment of what facts Haugen knew about the STI pocket heater and when. *See* Pls.' Br. 8-9 (describing falsehoods known to Haugen before the grand jury issued the indictment). Plaintiffs have identified key misrepresentations and omissions about the STI pocket heater that caused the search and arrest of Professor Xi, and the

district court's inquiry will be focused on Haugen's actions in relation to these specific elements of the criminal prosecution. That inquiry is entirely distinct from questions of counterintelligence policy, methods, and authority.

Haugen goes on to claim this case "*may* require evaluating classified information." Defs.' Br. 27 (emphasis added). This vague and hypothetical scenario is not a basis for barring a civil rights remedy. If classified information becomes relevant (which the government effectively concedes may never come to pass), there are a number of tools to protect sensitive information. *See* Pls.' Br. 54-55.

Moreover, the national security and foreign policy cases that Haugen primarily relies on—*Hernández* and *Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017)—are inapposite. In *Hernández*, the Court's concern was driven by the fact that "[a] cross-border shooting is by definition an international incident." 140 S. Ct. at 744. In *Vanderklok*, the misconduct took place during Transportation Security Administration ("TSA") airport security screening. As this Court recognized, TSA agents are tasked with a specific law enforcement function—"securing our nation's airports and air traffic"—which it deemed a uniquely "critical aspect of national security." 868 F.3d at 206. By contrast, the FBI has a mandate to investigate a wide range of criminal offenses, and the mere fact that its

baseless wire fraud charges involved international scientific research does not establish a legitimate nexus to national security concerns here.

Professor Xi's case has more in common with *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018), than either *Hernández* or *Vanderklok*. In *Lanuza*, the court rejected the defendant's argument that national security concerns counseled hesitation simply because the violations occurred in an immigration setting. Haugen argues that *Lanuza* did not raise national security concerns because it implicated "specific extraordinary factual allegations," including "that a government lawyer 'intentionally forged and submitted an ostensible government document.'" Defs.' Br. 32 (quoting *Lanuza*, 899 F.3d at 1021). But that point is a similarity, not a difference, between *Lanuza* and this case. Professor Xi makes equally specific allegations that Haugen fabricated grounds for the indictment and the arrest and search warrants here.

2. The facts relevant to Professor Xi's malicious prosecution and fabrication of evidence claims do not create a special factor.

Haugen argues for the first time on appeal that *Bivens* does not permit litigation of Professor Xi's malicious prosecution and fabrication of evidence claims because "adjudicating such a claim may require a wide-ranging, intrusive piercing of the veil of secrecy protecting grand jury proceedings." Defs.' Br. 26. But that evidentiary and procedural point is irrelevant to the *Bivens* analysis. The

Federal Rules of Criminal Procedure explicitly allow for piercing the grand jury veil where appropriate, Fed. R. Crim. P. 6(e)(3)(E)(i), and the mere fact that a grand jury was at one point involved in the matter does not establish a special factor counseling hesitation to hear a Fourth Amendment claim. Nor does Haugen's contention that this case involves "difficult" jury questions—such as the "evaluation of . . . probable cause"—constitute a special factor. Defs.' Br. 26. Core civil rights claims, including those at issue in *Bivens* and *Davis*, often require a jury to assess difficult questions and disputed facts.

3. Professor Xi's *Bivens* claims do not challenge government policy.

Haugen claims that Professor Xi is challenging a government "policy" because he describes a pattern of unfounded prosecutions against Chinese Americans. Defs.' Br. 27-28. However, referencing this broader context is not the same as suing to stop a policy. Here, the pattern sheds light on Haugen's specific conduct in this case, reinforcing Plaintiffs' evidence that his misrepresentations were reckless or intentional. At the same time, that broader context highlights the need for accountability in this case, given the history and continued prevalence of discrimination against Chinese Americans. *See generally* Asian Americans Advancing Justice–AAJC Amicus Br. In short, the fact that Haugen's own egregious misconduct in this case arises within a broader context of government abuse only makes the need for remedies under *Bivens* stronger.

Haugen also argues that "the determination of which crimes to investigate and prosecute by its very nature involves the exercise of discretion informed by policy considerations." Defs.' Br. 28. Yet this argument sweeps too broadly. Every law enforcement investigation, including the underlying investigation in *Bivens*, involves some level of discretion informed by policy priorities. *See* Section II.A.1 *supra*. Nonetheless, Professor Xi's *Bivens* claims challenge a "single rogue officer['s]" discriminatory decision to fabricate evidence and maliciously prosecute an innocent person—not an agency-wide policy directing agents to bring baseless criminal charges. *See Hoffman*, 26 F.4th at 1074.

4. No alternative remedy is available to Professor Xi.

Haugen argues that the Hyde Amendment and 28 U.S.C. § 1495 are "alternative means" of redress available to Professor Xi that obviate the need for a *Bivens* remedy.[11] Defs.' Br. 29. But these limited statutory remedies are no substitute for the redress that Professor Xi seeks through his *Bivens* claims. As the district court recognized, these statutes "offer little or no practical redress to Xi." App. 47; *see also Bistrian v. Levi*, 912 F.3d 79, 92 (3d Cir. 2018) (rejecting the government's proffered alternative relief "because it does not redress [the plaintiff's] harm, which could only be remedied by money damages").

[11] Haugen did not even raise this argument below. The district court considered the argument sua sponte and rejected it. App. 47.

* * *

In sum, Haugen's arguments urging this Court to bar a civil rights remedy for run-of-the-mill law enforcement misconduct are unavailing. Professor Xi should be permitted to proceed on his *Bivens* claims.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATIONS OF COUNSEL

Undersigned counsel certifies as follows:

1. This Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,478 words.

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

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

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

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