Case No. 21-5932

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH J. MYNATT,

Plaintiff – Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants – Appellees.

On Appeal from the United States District Court for the
Middle District of Tennessee
Case No: 3:20-cv-00151

REPLY BRIEF OF PLAINTIFF-APPELLANT KENNETH J. MYNATT

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III. INTRODUCTION

By enacting 28 U.S.C. § 2680(h)'s law enforcement proviso, Congress vested federal courts with subject matter jurisdiction to adjudicate specified intentional tort claims brought against the United States. As relevant here, § 2680(h) enables federal courts to adjudicate "malicious prosecution" claims arising from "acts or omissions of investigative or law enforcement officers of the United States Government[.]" *See id.* Thus, because the Plaintiff asserted a qualifying malicious prosecution claim against the United States, the district court had a "duty to take . . . jurisdiction" and adjudicate Mr. Mynatt's claim on its merits. *See Willcox v. Consol. Gas Co. of N.Y.*, 212 U.S. 19, 40 (1909) (citing *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)).

Given that the district court had subject matter jurisdiction to adjudicate Mr. Mynatt's malicious prosecution claim under § 2680(h)'s law enforcement proviso, "there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event." *See Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009). Consequently, no further inquiry regarding the district court's subject matter jurisdiction is necessary, and the district court's judgment should be reversed on that ground alone. *See id.*

If this Court were inclined to address whether Mr. Mynatt's claim *also*

clears § 2680(a)'s discretionary function bar, though, reversal would still be warranted. In his Complaint, Mr. Mynatt alleged that agents of the United States presented "false testimony and forged documents" to state prosecutors in order to procure his indictment and arrest without probable cause. Compl., R. 1, PageID #5, ¶ 9(e). *See also id.* ("The subsequent arrest of PLAINTIFF was the result of a grand jury indictment obtained by KEMP by knowingly using false testimony and altered documents."); *id.* at PageID #13, ¶ 10 ("the United States government never obtained any actual evidence nor probable cause substantiating the criminal charges that they filed"). Thus, taking Mr. Mynatt's allegations as true, and drawing all reasonable inferences regarding them in his favor, the alleged unconstitutional and criminal misconduct underlying Mr. Mynatt's malicious claim was not and cannot be discretionary. *See infra* at 11–26. As a result, although "sovereign immunity is waived in any event[,]" *see Nguyen*, 556 F.3d at 1257, § 2680(a)'s discretionary function exception would not preclude subject matter jurisdiction regardless, and none of the Appellees' contrary arguments is persuasive.

IV. ARGUMENT

A. 28 U.S.C. § 2680(a)'S DISCRETIONARY FUNCTION EXCEPTION DOES NOT APPLY WHEN A PLAINTIFF'S CLAIMS ARE COGNIZABLE UNDER § 2680(h)'S LAW ENFORCEMENT PROVISO.

Based on elementary canons of construction and Congress's widely understood intent when it enacted § 2680(h)'s law enforcement proviso, multiple federal courts have correctly concluded that § 2680(a)'s discretionary function exception does not preclude subject matter jurisdiction when a plaintiff's claims are cognizable under § 2680(h). *See* Br. of Appellant at 15–28 (citing *Nguyen*, 556 F.3d at 1257; *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987); *Moher v. United States*, 875 F. Supp. 2d 739, 766 (W.D. Mich. 2012); *Garey v. Langley*, No. 2:17-cv-00117-LPR, 2021 WL 4150602, at *17 (E.D. Ark. Sept. 13, 2021)). In response, the Appellees do not contest that § 2680(h)'s law enforcement proviso is a more specific and more recent statute. Nor do the Appellees contest Congress's intent in enacting the proviso. Instead, the Appellees insist that various other considerations require this Court to rule that § 2680(a)'s discretionary function exception precludes subject matter jurisdiction. As detailed below, however, the Appellees' contrary arguments are unpersuasive.

First, the Appellees contend that "Plaintiff's reading of the law enforcement proviso would allow tort suits against the United States that

Congress plainly intended to bar[,]" because "[u]nder plaintiff's interpretation, a plaintiff alleging an intentional tort with respect to acts or omissions of law enforcement officers could bring an FTCA claim arising in a foreign country notwithstanding 28 U.S.C. § 2680(k), which prohibits all tort claims 'arising in a foreign country.'" *See* Br. of Appellees at 34. The Appellees are wrong, however. As the Supreme Court has explained, "the presumption against extraterritoriality" applies "in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010). The presumption against extraterritoriality also existed when Congress enacted section 2680(h)'s law enforcement proviso—and long before it. *See Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). Thus, a malicious prosecution claim arising from acts in a foreign country would remain barred under Mr. Mynatt's reading of § 2680(h), because any conflict between § 2680(h) and § 2680(k) would be controlled by an altogether different canon of construction. The presumption against extraterritoriality also has no application to the conflict between § 2680(h)'s law enforcement proviso and § 2680(a)'s discretionary function bar, which Congress specifically intended to displace with respect to certain specified intentional tort claims.

Second, relying on the Seventh Circuit's decision in *Linder v. United*

States, 937 F.3d 1087 (7th Cir. 2019), the Appellees insist that Mr. Mynatt's "reading of the law enforcement proviso would also eliminate a number of other FTCA provisions whenever a plaintiff alleged a tort covered by the proviso, including the FTCA's administrative-claim requirement and its statute of limitations provision[.]" *See* Br. of Appellees at 34. Thus, the Appellees insist, Mr. Mynatt's reading of § 2680(h) "'would make a hash of the statute.'" *Id.* (quoting *Linder*, 937 F.3d at 1089).

For the straightforward reasons recently detailed by the Eastern District of Arkansas in *Garey v. Langley,* 2021 WL 4150602, at *18, however, "[t]his objection is not a winner." Indeed, the objection fails based on a canon of construction that the Appellees' own brief recognizes but misapplies. *See* Br. of Appellees at 36 (noting the rule that "[t]he 'implied repeal' of an earlier-enacted statute by a later-enacted one requires 'that there be an irreconcilable conflict between the two federal statutes at issue'") (cleaned up). *See also Garey*, 2021 WL 4150602, at *18 (observing that "the resolution-of-conflicting-statutes principles might play out differently" when interpreting § 2680(h) against other portions of the FTCA).

In particular, there is no conflict—let alone an irreconcilable one—between § 2680(h)'s law enforcement proviso and the FTCA's administrative-claim or statutes of limitations requirements, all of which can

be applied harmoniously "without damage to their sense and purpose." *See Muller v. Lujan*, 928 F.2d 207, 211 (6th Cir. 1991) ("[W]hen two statutes conflict to some degree they should be read together to give effect to each if that can be done without damage to their sense and purpose." (citing *Watt v. Alaska*, 451 U.S. 259, 269 (1981))). By contrast, under circumstances where § 2680(h)—which specifically authorizes a claim—and § 2680(a) (which generally prohibits the same claim) collide, the resulting conflict cannot be reconciled, so "the more specific statutory language in § 2680(h) takes precedence over and trumps the general language in the discretionary function exception." *Moher*, 875 F. Supp. 2d at 766. Thus, "[t]o the extent that there is any overlap and conflict between these two statutory provisions, the proviso in § 2680(h) wins[,]" because that outcome "is consistent with the plain language of the proviso in § 2680(h), canons of statutory construction, and the clear purpose of Congress in enacting the proviso in § 2680(h)." *Id.* (citing *Nguyen*, 556 F.3d at 1250–60).

The legislative history of § 2680(h) also makes quick work of the Appellees' contrary analysis. Simply put: By enacting § 2680(h), no one has suggested that Congress's goal was to eliminate the FTCA's administrative-claim requirement or its statute of limitations. By contrast, there is overwhelming reason to believe that Congress's goal in enacting § 2680(h)

was to enable injured plaintiffs to recover for specified intentional torts committed by federal law enforcement agents. Thus, as the Eleventh Circuit observed in *Nguyen v. United States*, 556 F.3d at 1256:

> [T]he Committee Report meant when it said: "The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process."

The clarity of § 2680(h)'s legislative history notwithstanding, though, the Appellees boldly insist that *even where a qualifying tort claim is alleged*, "Congress's intent in passing the law enforcement proviso strongly militates against the supposition that it intended to negate the discretionary function exception." *See* Br. of Appellees at 35. As support for this claim, the Appellees assert that

> as in the case of the Collinsville raids, law enforcement officers may well commit intentional torts that involve violating specific Constitutional, statutory, or regulatory proscriptions. In such a circumstance, the discretionary function exception would not shield the officer's conduct, and the law enforcement proviso may enable a plaintiff to bring an FTCA suit notwithstanding the intentional torts exception.

Id. at 34.

The remarkable breadth of what Appellees posit is "discretionary" betrays the ruse, however. In this very case, for instance, the Appellees insist

that furnishing false testimony and forged evidence to procure an indictment without probable cause qualifies as discretionary. *See id.* at 12. Indeed, the Appellees go so far as to suggest that a malicious prosecution claim that is premised upon law enforcement agents procuring a baseless indictment can *never* be cognizable given the wide scope of § 2680(a)'s discretionary function bar. *See id.* at 12–13 (arguing that: "Given the intensely discretionary inquiry required for an investigative agent to determine whether probable cause exists in any particular case, it is unclear that this claim could ever specifically and unambiguously prescribe any specific course of conduct in circumstances like those presented here.").

Tellingly, the same is true of the way that the Appellees analyze the Collinsville raids themselves—misconduct that all agree § 2680(h) was enacted to remedy. Specifically, the Appellees state:

> In the "notorious" Collinsville raids, law enforcement officers entered "two houses without warrants in violation of the Federal 'no-knock' statute" and then proceeded to terrorize the occupants until the officers realized that they had entered the wrong houses. S. Rep. No. 93-588, at 2 (1973). Because a federal statute (and possibly the Constitution) clearly prohibited the officers' conduct, that conduct would not have been covered by the discretionary function exception.

Id. at 33.

At least under the Appellees' characterization of § 2680(a)'s discretionary function bar and their view of the interaction between

§§ 2680(a) and (h), though, if those events were repeated, the referenced no-knock statute would be the only law "clearly" violated. *Id.* Thus, while the victims could perhaps recover nominal damages for agents' *failure to knock*, the Appellees would insist that because there is no federal "policy specifically prescrib[ing] a course of action for an employee to follow" while assaulting occupants of a home, *see id.* at 2, § 2680(a)'s discretionary function bar precludes further recovery—even though assault claims are expressly authorized under § 2680(h). Nor would the unconstitutional nature of the agents' conduct change the outcome, according to the Appellees. Instead, in the Appellees' view, because assaulting occupants of a home would only "possibly" be prohibited by the Constitution, *see id.* at 33, the Appellees would insist that the United States is "entitled to immunity" by analogy to qualified immunity principles, *see id.* at 35—notwithstanding that § 2680(h) expressly provides that plaintiffs may vindicate claims for assault by law enforcement.

Such a tortured reading of § 2680(h) is not the law, and it mangles the text of an affirmative proviso that is not ambiguous. Nor is it an honest effort to vindicate Congressional intent. As the Fifth Circuit has noted—and as the Appellees' extraordinarily broad reading of § 2680(a)'s discretionary function bar in this case confirms—"[b]oth the *Collinsville* raids and *Bivens*

arose out of activities that were within the agents[’] discretion” within the meaning of § 2680(a). *See Sutton*, 819 F.2d at 1297 n.17. Thereafter, “Congress expressly stated the purpose of the law enforcement proviso was to provide a remedy for victims of situations like Bivens and Collinsville.” *Id.* Thus, when § 2680(h) and § 2680(a) conflict, the more recent, more specific proviso “takes precedence.” *See Moher*, 875 F. Supp. 2d at 766 (“When the discretionary function exception in § 2680(a) and the proviso in § 2680(h) both apply to a tort claim, the more specific statutory language in § 2680(h) takes precedence over and trumps the general language in the discretionary function exception.”).

Given this context, the only reading of § 2680(h) that is faithful to Congress’s intent is one that permits claims authorized by § 2680(h) to be adjudicated even if they would otherwise be barred by § 2680(a). Put another way: “To hold in this case that the discretionary function exception in subsection (a) trumps the specific proviso in subsection (h) would defeat what we know to be the clear purpose of the 1974 amendment[,]” and courts are not permitted to “rewrite, revise, modify, or amend statutory language in the guise of interpreting it, . . . especially when doing so would defeat the clear purpose behind the provision.” *Nguyen*, 556 F.3d at 1257 (cleaned up). Thus, this Court should “give effect to the plain meaning and clear purpose

of the statutory language by concluding that sovereign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Id.*

B. FEDERAL AGENTS LACK DISCRETION TO VIOLATE THE CONSTITUTION AND COMMIT CRIMES BY FURNISHING FALSE TESTIMONY AND FORGED EVIDENCE TO PROCURE AN INDIVIDUAL'S INDICTMENT WITHOUT PROBABLE CAUSE.

Because the district court had subject matter jurisdiction to adjudicate Mr. Mynatt's malicious prosecution claim under § 2680(h)'s law enforcement proviso, "there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event." *See id.* Even if this Court concludes that Mr. Mynatt's claim must also clear § 2680(a)'s discretionary function bar, though, reversal would still be warranted, because law enforcement agents lack discretion to violate the Constitution and commit crimes by furnishing false testimony and forged evidence in an effort to procure an individual's indictment without probable cause.

1. Mr. Mynatt's Complaint alleges facts that establish a constitutional violation.

"[C]onduct cannot be discretionary if it violates the Constitution[.]" *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988). *See also Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009) ("It is

elementary that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statute or regulation. Nor does it shield conduct that transgresses the Constitution.") (collecting cases); *Myers & Myers, Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("[W]e begin with the principle that '[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes.'"); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nieves Martinez v. United States*, 997 F.3d 867, 877 (9th Cir. 2021) ("Even if the agents' actions involved elements of discretion, agents do not have discretion to violate the Constitution.") (citation omitted); *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) ("We hold that the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription.").

There is also a straightforward reason why this must be the rule. In particular, "the discretionary function exception applies only to conduct that involves the ***permissible*** exercise of policy judgment[,]" *see Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 539 (1988) (emphasis added), and no government official has discretion to violate the nation's highest law, *see Owen v. City of Indep.*, 445 U.S. 622, 649 (1980) ("[A] municipality has

no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."). Thus, notwithstanding the Appellees' claim to the contrary, the discretionary function exception "does not shield decisions that exceed constitutional bounds, even if such decisions are imbued with policy considerations." *See Hill v. Le*, No. 3:17-CV-250-SI, 2021 WL 4391706, at *8 (D. Or. Sept. 24, 2021) (citing *Medina*, 259 F.3d at 225). *See also Woodruff v. United States* No. CV 16-1884 (RDM), 2020 WL 3297233, at *8 (D.D.C. June 18, 2020) (holding that "[b]ecause this claim plausibly states a violation of the Eighth Amendment, the government cannot rely on the discretionary function exception at this early stage of the proceeding[,]" and declining to dismiss the inmate's FTCA claim as a result).

Here, Mr. Mynatt alleged that employees of the United States presented "false testimony and forged documents" to state prosecutors in order to procure his indictment, Compl., R. 1, PageID #5, ¶ 9(e), resulting in his arrest without probable cause. *See id.* ("The subsequent arrest of PLAINTIFF was the result of a grand jury indictment obtained by KEMP by knowingly using false testimony and altered documents."); *id.* at PageID #13, ¶ 10 ("the United States government never obtained any actual evidence nor probable cause substantiating the criminal charges that they filed"). Such misconduct violates the Constitution. *See generally Laskar v. Hurd,* 972

F.3d 1278 (11th Cir. 2020); *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). *See also Limone v. United States*, 271 F. Supp. 2d 345, 356 (D. Mass. 2003) ("There can be no doubt that suborning perjury and fabricating evidence violate the constitution." (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942))), *aff'd in part, remanded in part sub nom. Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004). Accordingly, the allegations underlying Mr. Mynatt's Complaint cannot be discretionary. *See, e.g.*, *Dalal v. Molinelli,* No. CV 20-1434, 2021 WL 1208901, at *10 (D.N.J. Mar. 30, 2021) (rejecting United States' claim of discretionary function immunity in FTCA case premised upon an assertedly malicious prosecution, because "[t]his argument ignores the fact that Dalal contends that the Federal Defendants' allegedly tortious conduct resulted in constitutional violations").

In their Brief, the Appellees offer two contrary arguments. Each is unpersuasive.

The Appellees first insist that Mr. Mynatt forfeited any claim that unconstitutionally procuring his baseless indictment through falsified evidence and perjury was non-discretionary. *See* Br. of Appellees at 25. The claim was not forfeited, though, and the Appellees were fairly placed on notice of it. *See* Pl.'s Resp. to Defs.' Mot. to Dismiss, R. 29, PageID #116

("[I]n a last-ditch effort to have the Plaintiff indicted, the Agents knowingly presented the false information to the ADA in Davidson County and procured the Plaintiff's indictment. Clearly, this is not the type of conduct that the discretionary function exception was designed to shield.").

Further, even if Mr. Mynatt had not fairly raised the argument that the acts underlying his malicious prosecution claim were non-discretionary, in determining whether forfeiture should apply, courts look to whether "'an issue [was] not passed upon below[.]'" *See Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). *Cf. Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 182 n.1 (2015) (examining whether the issue was "pressed or passed on below[,]" even if a "clearer" claim could have been presented). Here, the district court "passed upon" whether Mr. Mynatt's malicious prosecution claim was premised upon discretionary acts, *id.*, as its Memorandum repeatedly reflects. *See* Memo. Op., R. 40, PageID ## 152, 158–60 (noting that it was "tak[ing] all factual allegations in the pleading as true" and holding thereafter that: (1) "the Court finds that the acts of the OLMS agents in this case were discretionary[,]" (2) "[t]he Court finds that this is the type of function that the exception is designed to shield[,]" and (3) "the Court finds that discretionary function

exception also applies to Plaintiff's claims against the TIGTA agents[.]"). Accordingly, this Court's review of the same matter is proper.

Further still, because the issue—whether the unconstitutional conduct alleged in Mr. Mynatt's Complaint was within federal agents' discretion—goes to the district court's subject matter jurisdiction, and because the allegations in Mr. Mynatt's Complaint support subject matter jurisdiction, Mr. Mynatt could not have divested the district court of subject matter jurisdiction through forfeiture even if he had wanted to. *See, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented. . . . Subject-matter jurisdiction can never be waived or forfeited."); *United States v. Hahn*, 359 F.3d 1315, 1322 (10th Cir. 2004) ("[W]e find that we have statutory subject matter jurisdiction under § 1291 over sentencing appeals even when the defendant has waived his right to appeal in an enforceable plea agreement."). Instead, where—as here—Mr. Mynatt's Complaint affirmatively supports subject matter jurisdiction, federal courts have a "duty to take such jurisdiction[,]" *see Willcox*, 212 U.S. at 40 ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction" (citing *Cohens*, 19 U.S. at 404)), and they must "exercise

the jurisdiction given them" by Congress. *See Colo. River Water Conserv. Dist. V. United States*, 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them") (collecting cases).

Under the circumstances presented here, forfeiture also would not be appropriate regardless. In particular, when a litigant has "presented legal issues requiring no further factual development with sufficient clarity" to resolve them, this Court has indicated that it "*should* address an issue" without regard to forfeiture considerations. *In re Morris*, 260 F.3d 654, 664 (6th Cir. 2001) (citing *Pinney Dock*, 838 F.2d at 1461). Whether federal agents have discretion to violate the Constitution by furnishing false testimony and forged evidence to procure an individual's indictment without probable cause qualifies as such a "legal issue[] requiring no further factual development" to resolve. *Id.* Accordingly, even if the question had been and could be forfeited, and even if the district court had not passed on it, this Court should address whether unconstitutional conduct can be discretionary within the meaning of § 2680(a) anyhow.

For all of these reasons, whether Mr. Mynatt's malicious prosecution claim is premised upon non-discretionary acts of law enforcement was not forfeited; the district court passed upon the question; Mr. Mynatt could not

have forfeited the district court's subject matter jurisdiction over his Complaint if he had wanted to; and it would not be appropriate to apply forfeiture to the legal question presented—which needs no further factual development to resolve—regardless. Consequently, the Appellees' forfeiture claim fails.

Alternatively, drawing from the judge-made doctrine of qualified immunity, the Appellees insist that "conduct may be discretionary even if it is later determined to have violated the Constitution." *See* Br. Of Appellees at 25. *See also id.* (asserting that "[t]he common law doctrine of official immunity applies to the exercise of 'discretionary functions' even when conduct violates the Constitution, as long as the constitutional right is not defined with sufficient specificity that the official should have known that his or her act was prohibited.") (citation omitted). Qualified immunity is not a part of the FTCA, though, and it has no application to it.

Nor *should* qualified immunity have any role in FTCA cases. When the Supreme Court invented qualified immunity, it did so based on expressly stated policy concerns about "cost . . . to the defendant officials," "the expenses of litigation" imposed on those officials, "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office[,]" and "the danger that fear of being sued will

dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (cleaned up). None of these concerns is implicated by FTCA claims, though, which may be asserted against "[t]he United States" alone, rather than maintained against individual defendants. *See* 28 U.S.C. § 1346(b)(1).

Accordingly, the Appellees' insistence that this Court should borrow from qualified immunity law to afford the United States additional immunity that finds no textual support within the FTCA should be rejected. That qualified immunity, as a doctrine, lacks historical or textual justifications, *see Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017) (Thomas, J., concurring), "lacks legal justification," William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018), and "is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law[,]" *see* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1836 (2018), provide separate reasons to reject the United States' invitation to graft "the kudzu-like creep of the modern [qualified] immunity regime" onto FTCA law, *see Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir.

2018) (Willett, J., concurring), *withdrawn on rehearing Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019).

For all of these reasons, because Mr. Mynatt's allegations support a violation of the Constitution, and because "conduct cannot be discretionary if it violates the Constitution," *see U.S. Fid. & Guar. Co.*, 837 F.2d at 120, § 2680(a)'s discretionary function bar does not preclude subject matter jurisdiction over Mr. Mynatt's Complaint.

2. Mr. Mynatt's Complaint alleges facts that establish violations of criminal statutes and Tennessee malicious prosecution law.

Mr. Mynatt's Complaint is premised upon allegations that agents of the United States presented "false testimony and forged documents" to state prosecutors in order to procure his indictment. *See* Compl., R. 1, PageID #5, ¶ 9(e). *See also id.* ("The subsequent arrest of PLAINTIFF was the result of a grand jury indictment obtained by KEMP by knowingly using false testimony and altered documents."). These allegations defeat any claim of discretionary function immunity. *See Paret-Ruiz v. United States*, 943 F. Supp. 2d 285, 291 (D.P.R. 2013) ("The DEA agents did not have discretion as to whether they should commit perjury. Therefore, the first element of the *Gaubert* test is not satisfied."). *See also Reynolds v. United States*, 549 F.3d 1108, 1113 (7th Cir. 2008) ("Reynolds alleges that Lambert and Fullerton fueled her prosecution with knowingly false information. And how can that

be a *discretionary* decision when it is proscribed by Indiana law?" (citing Ind. Code §§ 35-44-2-1(a)(1), 35-44-2-2(d)(1))). Indeed, federal courts have reliably held as much for decades. *See, e.g.*, *Chandler v. United States*, 875 F. Supp. 1250, 1265–66 (N.D. Tex. 1994) ("[W]ithout exception, courts have held that an investigative agent's giving of false testimony to a grand jury is not immune as a discretionary function.") (collecting cases); *Crow v. United States*, 634 F. Supp. 1085, 1089 (D. Kan. 1986) ("[T]o the extent plaintiff claims that the postal inspectors falsified their memoranda and reports and gave false testimony to bring about plaintiff's prosecution, we hold that these claims are not barred by the discretionary function exception."); *Heywood v. United States*, 585 F. Supp. 590, 592 (D. Mass. 1984) (In deciding whether the challenged activity "involve[s] the balancing of public policy factors . . . [t]he decision by the postal inspector to give false testimony obviously involves no such balancing.").

Insisting otherwise, the Appellees assert that Mr. Mynatt's claim that law enforcement agents lacked discretion to commit perjury and supply forged documents to procure his indictment "fails at several levels." *See* Br. of Appellees at 19. As detailed below, however, the Appellees' responses are uniformly meritless.

First, the Appellees insist once more that "plaintiff has forfeited any

reliance on [perjury and evidence fabrication] statutes by relying on them for the first time on appeal." *See id.* Again, though, the Appellees were fairly placed on notice of Mr. Mynatt's claim that knowingly presenting false testimony and forged evidence in order to procure his indictment is non-discretionary. *See* Pl.'s Resp. to Defs.' Mot. to Dismiss, R. 29, PageID #116. As detailed above, because the district court passed upon the question of whether the allegations in Mr. Mynatt's Complaint were within law enforcement's discretion; because Mr. Mynatt could not divest the district court of its existing subject matter jurisdiction through forfeiture even if he had wanted to; and because the question is a legal one requiring no further factual development, forfeiture also has no application to the question regardless. *See supra* at 11–20.

Second, the Appellees contend that "plaintiff has failed to plausibly allege that Kemp, or any other federal agent, knowingly presented false testimony or forged documents to the state grand jury." *See* Br. of Appellees at 19. The district court never adjudicated—let alone credited—the plausibility argument raised by Appellees' Rule 12(b)(6) motion, though. That argument also presents a *merits* question, rather than a defect of subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a

valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case."). Accordingly, the argument is properly addressed by the district court upon remand, because this Court cannot reach the claim unless it first determines that subject matter jurisdiction exists and then adjudicates the Appellees' 12(b)(6) challenge in the first instance. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990) ("[W]e are bound to consider the 12(b)(1) motion first, since the Rule 12(b)(6) challenge becomes moot if this court lacks subject matter jurisdiction." (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946))).

Third, the Appellees intimate that agents of the United States have discretion to violate *state* criminal statutes, because "'states can't waive the federal government's immunity'" and a contrary conclusion "would improperly permit states to define the limits of the federal government's immunity waiver." *See* Br. of Appellees at 21 (quoting *Sydnes v. United States*, 523 F.3d 1179, 1184 (10th Cir. 2008)). The Appellees are wrong. *See Reynolds*, 549 F.3d at 1113 ("Reynolds alleges that Lambert and Fullerton fueled her prosecution with knowingly false information. And how can that be a *discretionary* decision when it is proscribed by Indiana law? (citing Ind. Code §§ 35-44-2-1(a)(1), 35-44-2-2(d)(1))). The Appellees' position that

violating state perjury statutes or state statutes forbidding the presentation of falsified evidence is within the discretion of federal agents also fails to comport with "the second element of the *Gaubert* test," because "there can be no argument that perjury is the sort of 'legislative or administrative decision grounded in social, economic, and political policy' that Congress sought to shield from 'second-guessing.'" *Paret-Ruiz*, 943 F. Supp. 2d at 291 (cleaned up).[1]

Significantly, the lone case that the Appellees cite to support the (remarkable) proposition that federal law enforcement agents enjoy discretion to violate state perjury and state evidence fabrication statutes because they are *state*—rather than federal—criminal offenses also does not stand for the proposition cited. Instead, the Appellees have misleadingly omitted a material portion of the holding involved, which actually addresses "state *tort* law as a limit on the federal government's discretion at the

[1] The Appellees seek to avoid this result by characterizing the agents' misbehavior in the most general terms possible—"how best to conduct their investigation and report the results"—which they insist are susceptible to policy analysis. *See* Br. of Appellees at 22. Of course, Mr. Mynatt has not sued over investigative best practices. Instead, he has sued over agents' knowing presentation of "false testimony and forged documents" to state prosecutors in order to procure his baseless indictment, *see* Compl., R. 1, PageID #5, ¶ 9(e); *see also id.* ("The subsequent arrest of PLAINTIFF was the result of a grand jury indictment obtained by KEMP by knowingly using false testimony and altered documents."), which decidedly do not involve policy-rooted decision-making.

jurisdictional stage . . . ." *Sydnes*, 523 F.3d at 1184 (emphasis added). That case also expressly acknowledges that a plaintiff may prevail "by pointing to a *federal* policy incorporating state tort law as a limit on the discretion of federal employees with [sic] the meaning of the FTCA." *Id.*

Here, pointing to such a federal policy is a simple matter. For one thing, the clearly established *federal* policy against law enforcement perjury in criminal cases is unaffected by whether the underlying forum is state or federal. *See Limone*, 271 F. Supp. 2d at 356 ("There can be no doubt that suborning perjury and fabricating evidence violate the constitution." (citing *Mooney*, 294 U.S. at 112; *Pyle*, 317 U.S. at 216)). For another, the issue is neatly resolved by the fact that the FTCA itself incorporates—and abrogates sovereign immunity regarding—*state* "malicious prosecution" claims. *See* 28 U.S.C. § 2680(h); 28 U.S.C. § 1346(b)(1) (permitting plaintiffs to maintain tort claims against the United States "under circumstances 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"). Thus, because Tennessee's malicious prosecution law supports liability for a "person who knowingly provides false information to a public official" in order to procure criminal charges, *see Gordon v. Tractor Supply Co.*, No. M2015-01049-COA-R3-CV, 2016 WL 3349024, at *6 (Tenn. Ct. App. June 8, 2016), *no app.*

filed, the allegations underlying Mr. Mynatt's Complaint do not support discretionary function immunity.[2]

C. THE APPELLEES MAY PURSUE THEIR AS-YET-UNADJUDICATED RULE 12(b)(6) CLAIMS UPON REMAND.

Perhaps recognizing that the district court erred by refusing to exercise subject matter jurisdiction over Mr. Mynatt's malicious prosecution claim, the United States devotes substantial portions of its briefing to insisting—*on the merits*—that Mr. Mynatt's malicious prosecution claim is implausible. *See, e.g.*, Br. of Appellees at 8 (insisting that "plaintiff's complaint does not contain any facts to support the plausibility of that assertion"); *id.* at 13 (insisting that "[Plaintiff] has failed to plausibly allege that Kemp knowingly provided any false testimony"); *id.* at 19 (insisting that "plaintiff has failed to plausibly allege that Kemp, or any other federal agent, knowingly presented false testimony or forged documents"); *id.* at 30 ("plaintiff has not, as is explained above, presented sufficient factual allegations to plausibly

[2] For the same reason, the Appellees' claim that "Plaintiff underscores his error in contending that the discretionary function exception is inapplicable because he has alleged a violation of Tennessee state tort law" carries no purchase. *See* Br. of Appellees at 21. The issue is not that the agents violated state tort law *in the abstract*; it is that they violated state tort law that Congress expressly made "actionable against the Government via the FTCA." *In re: Orthopedic Bone Screw Prods. Liab. Litig.*, No. 1014, 1999 WL 33740509, at *11 (E.D. Pa. Jan. 11, 1999) (citing *Kock v. United States*, 814 F. Supp. 1221, 1228 (M.D. Pa. 1993) (in turn citing *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 543 (1988))).

establish any such thing"); *id.* at 31 ("plaintiff has failed to plausibly establish that there was in fact no probable cause"); *id.* ("he has failed to plausibly allege any clear violation of his Fourth Amendment rights"). As noted above, though, the district court did not adjudicate the plausibility of Mr. Mynatt's malicious prosecution claim. *See* Memo. Op., R. 40, PageID ##150–60; Order, Aug. 31, 2021, R. 41, PageID #161. Given the district court's conclusion that it lacked subject matter jurisdiction, the district court also *could not* have done so. *See Moir*, 895 F.2d at 269. Accordingly, this Court should "decline to address the [Appellees'] alternative arguments, which are underdeveloped here, and [] leave them for the district court's consideration in the first instance." *See Online Merchants Guild v. Cameron*, 995 F.3d 540, 560 (6th Cir. 2021) (citation omitted).

Remanding for consideration of the Appellees' plausibility arguments is also particularly appropriate under the circumstances presented here, because the Appellees' claims rely upon materially mischaracterizing the factual record. In their briefing, the Appellees assert that Mr. Mynatt "does not grapple with the fact that Kemp 'was only one of eight witnesses who presented testimony to the grand jury.'" *See* Br. of Appellees at 8 (quoting Defs.' Memo. in Supp. of Mot. to Dismiss, R. 22, Page ID # 77–78). Indeed, the Appellees emphasize that "fact" twice. *See id.* at 31 (noting the testimony

of eight witnesses and "the apparent presentation of evidence from a variety of sources to the grand jury"). The representation is materially false, though. In truth, Mr. Mynatt's indictment reflects that although eight witnesses *were subpoenaed*, the lone witness who "appeared," was "duly sworn," and "gave testimony before the Grand Jury" was "Scott Kemp." *See* Indictment, R. 21, PageID #60.

Even more importantly, a judgment that the district court *had* subject matter jurisdiction to adjudicate Mr. Mynatt's malicious prosecution claim—but that the claim should be dismissed *on its merits* under Rule 12(b)(6)—would conflict with the district court's judgment dismissing Mr. Mynatt's Complaint "without prejudice, for lack of subject-matter jurisdiction." *See* Order, Aug. 31, 2021, R. 41, PageID #161. *Cf. Steel Co.*, 523 U.S. at 89. The district court's order dismissing Mr. Mynatt's claim without prejudice for lack of subject matter jurisdiction is the judgment that the Appellees assert "should be affirmed" by this Court, though. *See* Br. of Appellees at 38. The Appellees also have not sought alternative relief. *But see* Fed. R. App. P. 28(a)(9), (b) (requiring an appellee to specify "the precise relief sought").

Upon remand, of course, it is perfectly appropriate for the district court to adjudicate the Appellees' as-yet-unadjudicated Rule 12(b)(6) claims, given that "the district court did not address any of them." *VanderKodde v. Mary*

Jane M. Elliott, P.C., 951 F.3d 397, 404 (6th Cir. 2020). "Because this is 'a court of review, not of first view,'" however, *see id.* (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), this Court should reverse the district court's judgment regarding subject matter jurisdiction and "'remand the case to the district court to resolve" the Appellees' merits arguments in the first instance, because the district court both did not and could not consider those arguments previously. *Id.* (quoting *Cavin v. Mich. Dep't of Corr.*, 927 F.3d 455, 459 (6th Cir. 2019)). *See also Byrd v. Haas*, 17 F.4th 692, 700 (6th Cir. 2021) ("The defendants might still prevail on qualified immunity. But we are 'a court of review, not of first view.' So we reverse the judgment and remand for the district court to reconsider its analysis." (quoting *Cutter*, 544 U.S. 709, 718 n.7 (2005))).

V. CONCLUSION

For the foregoing reasons, the district court's judgment dismissing Mr. Mynatt's Complaint for lack of subject matter jurisdiction should be **REVERSED**, and this Court should remand with instructions to consider Defendants' merits arguments in the first instance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,499 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word 2016 in 14-point Georgia font.

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I hereby certify that on this 14th day of March, 2022, a copy of the foregoing was filed electronically through the appellate CM/ECF system and sent via CM/ECF to the following:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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