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

PRINCIPAL BRIEF OF PLAINTIFF-APPELLANT KENNETH J. MYNATT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, the Appellant hereby makes the following disclosures:

(1) Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

(2) Does a publicly owned corporation or its affiliate, not a party to the appeal, have a financial interest in the outcome? **No.**

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III. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary and will aid the Court in resolving the instant appeal. The central issue of law presented in this appeal has generated an extensive and unresolved circuit split. *See Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009) ("Although the Fifth Circuit agrees with our reconciliation of § 2680(a) with (h), five other circuits have taken a different approach about how the two subsections interact.") (citing *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987)). Based on the District Court's ruling below, there is now a divergence of authority among lower courts within the Sixth Circuit, too, regarding whether 28 U.S.C. § 2680(a)'s discretionary function exception can preclude Federal Tort Claims Act claims that are facially cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso. *Compare Moher v. United States*, 875 F. Supp. 2d 739, 766 (W.D. Mich. 2012), *with* Memo., R. 40, PageID ## 150-160.

This Court has previously noted the "disagreement among the circuits regarding the interaction between § 2680(a) and § 2680(h)." *Milligan v. United States*, 670 F.3d 686, 695 n.2 (6th Cir. 2012) (collecting cases). To date, however, it has not adjudicated the matter itself. *Id.* Given that there is now a divergence between the District Court below and the Western District of Michigan regarding the issue of law that has split other Circuits,

however, the issue needs resolution from this Court, and it is worthy of oral argument. Thus, the Appellant avers that oral argument is warranted.

IV. STATEMENT OF JURISDICTION

Because the United States has waived its sovereign immunity from qualifying state-law tort claims, the Plaintiff asserted—and maintains—that the District Court had subject matter jurisdiction over his qualifying tort claims pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, 28 U.S.C. § 1346(b)(1), and 28 U.S.C. § 2680(h)'s law enforcement proviso. However, the District Court determined that 28 U.S.C. § 2680(a)'s "discretionary function exception" applied to the Plaintiff's claims and thus preserved the United States' sovereign immunity regarding them.[1] Accordingly, on August 31, 2021, the District Court entered a final judgment dismissing the Plaintiff's claims "for lack of subject-matter jurisdiction" pursuant to Federal Rule of Civil Procedure 12(b)(1).[2] The Plaintiff thereafter filed a timely notice of appeal on September 29, 2021.[3] Accordingly, this Court has appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291, because the Appellant has appealed a final judgment of the District Court.

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[1] Memo., R. 40, PageID ## 150–160.

[2] Order, R. 41, PageID #161.

[3] Notice of Appeal, R. 43, PageID ## 164–65.

V. INTRODUCTION

28 U.S.C. § 1346(b)(1) generally permits 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." *Id.* Significantly, tort claims for "malicious prosecution" arising from "acts or omissions of investigative or law enforcement officers of the United States Government" are also expressly authorized by 28 U.S.C. § 2680(h), which has come to be "[k]nown as the 'law enforcement proviso[.]'" *Millbrook v. United States*, 569 U.S. 50, 52 (2013).

This case concerns a malicious prosecution claim against the United States that is authorized by 28 U.S.C. § 2680(h)'s law enforcement proviso. In particular, the Plaintiff alleged that a malicious prosecution was initiated against him "at the suggestion and instigation of special agents of the Office of Labor Management Standards of [the] United States Department of Labor" and "special agents of the Treasury Inspector General for Tax Administration[.]"[4] As a result, the Plaintiff's claims were and remain facially cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso, although the District Court never adjudicated that issue in the first instance.

[4] Compl., R. 1, PageID ## 2–3.

Significantly, there is also little doubt that the Plaintiff's allegations would, in fact, give rise to malicious prosecution liability against private persons under applicable Tennessee law, given that the Tennessee Court of Appeals recently held as much in a parallel state case involving the same plaintiff and the same essential allegations. *See Mynatt v. Nat'l Treasury Emps. Union, Chapter 39*, No. M2020-01285-COA-R3-CV, 2021 WL 4438752 (Tenn. Ct. App. Sept. 28, 2021).

There are, of course, exceptions to the United States' liability under the Federal Tort Claims Act. One of them is the discretionary function exception, which is set forth at 28 U.S.C. § 2680(a). Under circumstances where—as here—a plaintiff has pleaded claims that are facially cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso, though, there is "disagreement among the circuits regarding the interaction between § 2680(a) and § 2680(h)." *Milligan*, 670 F.3d at 695 n.2 (6th Cir. 2012) (collecting cases).

The Fifth Circuit reached the correct conclusion on the matter more than three decades ago. *See Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987) ("We conclude, therefore, that if the law enforcement proviso is to be more than an illusory—now you see it, now you don't—remedy, the discretionary function exception cannot be an absolute bar which one must clear to proceed under § 2680(h)."). More recently, after reviewing a number

of contrary rulings from other Circuits, the Eleventh Circuit affirmed its commitment to the same conclusion. *See Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009) ("if a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event."). Within the Sixth Circuit, the Western District of Michigan has correctly held that the discretionary function exception cannot preclude claims that are facially cognizable under § 2680(h)'s law enforcement proviso, too, explaining that:

> This Court rejects the argument of the United States which is based on the line of precedent in *Medina*, *Pooler*, and *Gray*. In the absence of a Sixth Circuit decision directly on point, this District Court adopts and follows the Eleventh Circuit's well reasoned opinion in *Nguyen v. United States*, 556 F.3d 1244 (11th Cir.2009). The cogent legal analysis in *Nguyen* is persuasive. 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. To the extent that there is any overlap and conflict between these two statutory provisions, the proviso in § 2680(h) wins. This 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). *Nguyen*, 556 F.3d at 1250–60.

Moher v. United States, 875 F. Supp. 2d 739, 766 (W.D. Mich. 2012).

Further, not even two weeks after the District Court issued its judgment below, the Eastern District of Arkansas reached the same

conclusion that the Fifth and Eleventh Circuit and the Western District of Michigan did. *See Garey v. Langley*, No. 2:17-cv-00117-LPR, 2021 WL 4150602, at *17 (E.D. Ark. Sept. 13, 2021) ("To the extent the 1974 law enforcement proviso and the 1946 discretionary function exception conflict, the 'earlier, general provisions' of the discretionary function exception must yield to the 'subsequent, more specific provisions' of the law enforcement proviso.")

By contrast, given the absence of "clear guidance" from this Court on the issue, the District Court found the line of authority that *precludes* federal courts from exercising subject matter jurisdiction over certain facially cognizable 28 U.S.C. § 2680(h) claims to be "more persuasive."[5] Consequently, the District Court dismissed Mr. Mynatt's claims for lack of subject matter jurisdiction based on 28 U.S.C. § 2680(a)'s discretionary function exception before considering—and without considering—whether they were cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso. As the Fifth Circuit, the Eleventh Circuit, the Western District of Michigan and the Eastern District of Arkansas have persuasively explained, though, the District Court's analysis of the interaction between 28 U.S.C. § 2680(a)

[5] Memo., R. 40, PageID #155 ("Absent clear guidance from the Sixth Circuit on this issue, the Court finds the latter body of law more persuasive.").

and 28 U.S.C. § 2680(h) constitutes reversible legal error. *See Sutton*, 819 F.2d at 1297; *Nguyen*, 556 F.3d at 1257; *Moher*, 875 F. Supp. 2d at 766; *Garey,* 2021 WL 4150602, at *17. Accordingly, the District Court's judgment should be reversed, and this action should be remanded to consider the United States' alternative arguments for dismissal in the first instance.

VI. STATEMENT OF THE ISSUES

I. Whether 28 U.S.C. § 2680(a)'s discretionary function exception precludes federal courts from exercising subject matter jurisdiction over Federal Tort Claims Act claims that are expressly authorized by 28 U.S.C. § 2680(h)'s law enforcement proviso.

II. Alternatively, whether the District Court erred by dismissing the Plaintiff's claims based on 28 U.S.C. § 2680(a)'s discretionary function exception.

VII. STATEMENT OF THE FACTS AND OF THE CASE

The Plaintiff, Mr. Kenneth Mynatt, filed his Complaint in this matter on February 21, 2020.[6] Based on the alleged actions of certain officers of the Office of Labor Management Standards of United States Department of Labor (OLMS) and the Treasury Inspector General for Tax Administration

[6] Compl., R. 1, PageID ## 1–18.

(TIGTA), Mr. Mynatt's Complaint asserted claims against the United States[7] for malicious prosecution and a civil conspiracy to commit a malicious prosecution.[8]

As the District Court characterized the matter, Mr. Mynatt "frames his complaint as a complex conspiracy involving members of the IRS in consort [sic] with agents of OLMS and TIGTA."[9] Somewhat more straightforwardly, though, Mr. Mynatt alleged that he "blew the whistle to a member of the United States Congress about a wasteful IRS manager conference in 2010, which became the subject of Congressional hearings."[10] Thereafter, Mr. Mynatt alleged that the Defendants subjected him to "fabricated allegations of misconduct"[11] and that specified non-parties "enlisted the assistance of

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[7] The Plaintiff also sued both OLMS and TIGTA. *See* R. 1, PageID ## 1–2. The undersigned—Plaintiff's appellate counsel—recognizes that this was improper, because the United States itself "is the only proper defendant" in this suit. *See Allgeier v. United States*, 909 F.2d 869, 871 (6th Cir. 1990). Given that the agency Defendants did not move for dismissal on that basis, though, the issue was not properly raised and was never adjudicated below. Even so, the Plaintiff's appellate counsel represents to the Court that the agency Defendants will be voluntarily dismissed from this action upon remand.

[8] Compl., R. 1, PageID ## 16–17.

[9] Memo., R. 40, PageID ## 150-160.

[10] Compl., R. 1, PageID #7, ¶ 10(a).

[11] Compl., R. 1, PageID #3, ¶ 9(a).

OLMS and TIGTA special agents[] to frame the Plaintiff for theft from" his union.[12] In particular, Mr. Mynatt alleged that OLMS and TIGTA agents conspired with specified non-parties "to create a false narrative and subsequent politically motivated investigation which resulted in the Plaintiff's indictment by a state grand jury in March 2014."[13]

Mr. Mynatt's claims were premised upon specific factual allegations. For example, Mr. Mynatt alleged that during an initial meeting between specified federal agents and state prosecutors, "false testimony and forged documents previously generated" by an IRS employee and an OLMS Special Agent were presented" to state prosecutors.[14] In order to secure the Plaintiff's baseless indictment, OLMS Special Agent "Scott Kemp"[15]—acting with "the blessing of his OLMS managers"[16]—then signed and secured "a grand jury indictment . . . by knowingly using false testimony and altered

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[12] Compl., R. 1, PageID #4, ¶ 9(b).

[13] *Id.*

[14] Compl., R. 1, PageID #5, ¶ 9(e).

[15] Compl., R. 1, PageID #3, ¶ 6.

[16] Compl., R. 1, PageID #5, ¶ 9(e).

documents[,]"[17] resulting in Mr. Mynatt's arrest.

"Before, and after [his] arrest," Mr. Mynatt's Complaint alleged, "the government's special agents falsely accused [Mr. Mynatt] of theft and misuse of a credit/debit card" and "failed to provide full discovery from April 2014 until the charges were dismissed" against him.[18] Further, following Mr. Mynatt's indictment and arrest, Mr. Mynatt alleged that Special Agent Kemp realized that "allowing full discovery to [Mr. Mynatt] would reveal the lack of probable cause for an indictment and the malicious intent of the prosecution[.]"[19] Accordingly, Mr. Mynatt alleged that Special Agent Kemp asked the prosecuting attorney "to drop all charges against [Mr. Mynatt] if he agreed to resign his position with the Federal government."[20] Mr. Mynatt additionally alleged that he "refused repeatedly based on the fact that he was innocent."[21] Finally, Mr. Mynatt alleged that: "Ultimately, all charges against [him]" were retired . . . and later dismissed in their entirety on November 28, 2016. The case was dismissed because [Mr. Mynatt] was innocent of the

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[17] Compl., R. 1, PageID #5, ¶ 9(e).

[18] Compl., R. 1, PageID #6, ¶ 9(g).

[19] Compl., R. 1, PageID #6, ¶ 9(h).

[20] *Id.*

[21] *Id.*

charges[.]"[22]

On September 11, 2020, the Defendants moved to dismiss the Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[23] In particular—and in order—the Defendants argued:

1. That the Plaintiff had failed to state a claim upon which relief could be granted;[24]

2. That the District Court lacked subject matter jurisdiction over the Plaintiff's claims because they were not cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso;[25] and

3. That the District Court lacked subject matter jurisdiction over the Plaintiff's claims due to 28 U.S.C. § 2680(a)'s discretionary function exception.[26]

Upon review, the District Court noted that "[t]he Circuits are divided" regarding whether FTCA claims that are cognizable under 28 U.S.C.

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[22] Compl., R. 1, PageID ## 6–7, ¶ 10.

[23] *See* Defs.' Mot. To Dismiss, R. 19, PageID ## 53–55; Defs.' Mem. In Supp. of Its Mot. To Dismiss, R. 22, PageID ## 63–85.

[24] *See* Defs.' Mem. In Supp. of Its Mot. To Dismiss, R. 22, PageID ## 75–81.

[25] *Id.* at PageID ## 81–82.

[26] *Id.* at PageID ## 82–84.

§ 2680(h)'s law enforcement proviso are nonetheless subject to dismissal under 28 U.S.C. § 2680(a) discretionary function exception.[27] In its August 31, 2021 Memorandum Opinion, though, the District Court determined "that it must evaluate the discretionary function exception as applied to Plaintiff's FTCA claim, even when that claim alleges an intentional tort that may fall within the law enforcement proviso."[28] Thereafter, the District Court ruled that "the discretionary function exception applies" to the Plaintiff's claims regarding the alleged malicious prosecution initiated against him by OLMS and TIGTA agents, and the District Court dismissed the Plaintiff's Complaint for lack of subject matter jurisdiction as a consequence.[29]

Given this context, the District Court did *not* determine whether the Plaintiff's claims were cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso. This matters, because 28 U.S.C. § 2680(h)'s law enforcement proviso expressly provides that "with regard to acts or omissions of investigative or law enforcement officers of the United States Government," a "malicious prosecution" claim may be maintained. *Id.*

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[27] Memo., R. 40, PageID # 154.

[28] *Id.* at PageID #155.

[29] *Id.* at PageID ## 156-160.

The District Court did not reach the Defendants' alternative claims that the Plaintiff had failed to state a claim upon which relief could be granted, either. Instead, the District Court determined only "that it must evaluate the discretionary function exception as applied to Plaintiff's FTCA claim, even when that claim alleges an intentional tort that may fall within the law enforcement proviso."[30]

In conducting that "evalu[ation],"[31] the District Court determined that its task was to "determine whether the investigations and recommendations of the respective agents are discretionary functions."[32] Mr. Mynatt's claims were not premised upon agents' mere "investigations and recommendations"[33] as the District Court suggested, though. Instead, they were expressly premised upon allegations 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. *See* Compl., R. 1, PageID #5, ¶ 9(e) (emphases added). *See also id.* ("The subsequent arrest of PLAINTIFF was the result of a grand jury indictment

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[30] *Id.* at PageID # 155.

[31] *Id.*

[32] *Id.* at PageID # 157.

[33] *Id.*

obtained by KEMP by ***knowingly using false testimony and altered documents***.") (emphasis added).

Nonetheless, after sanitizing the allegations in Mr. Mynatt's Complaint and construing them in the manner most favorable to *the Defendants*, the District Court ruled that conducting investigations and making recommendations are discretionary functions.[34] Accordingly, the District Court dismissed Mr. Mynatt's Complaint for lack of subject matter jurisdiction based on 28 U.S.C. § 2680(a)'s discretionary function bar.[35] This ruling obviated the need to address any alternative claim for dismissal that the Defendants presented, and as a result, the alternative grounds for dismissal that the Defendants raised were never adjudicated. Following the District Court's entry of a final judgment, Mr. Mynatt timely appealed.[36]

VIII. SUMMARY OF ARGUMENT

As the Fifth and Eleventh Circuits have correctly determined, and as the Western District of Michigan and as the Eastern District of Arkansas have additionally held, 28 U.S.C. § 2680(a)'s discretionary function exception does not apply where—as here—a plaintiff's claims are cognizable under 28

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[34] *Id.* at PageID ## 157–160.

[35] *Id.*

[36] Notice of Appeal, R. 43, PageID ## 164–65.

U.S.C. § 2680(h)'s law enforcement proviso. As a result, the District Court erred by applying the discretionary function exception to the Plaintiff's claims at all. Thus, the District Court's judgment should be reversed.

Alternatively, if 28 U.S.C. § 2680(a)'s discretionary function exception does apply under circumstances when a plaintiff's claims are cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso, the District Court still erred by dismissing the Plaintiff's claims. "[C]onduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation[,]" because "Federal officials do not possess discretion to violate constitutional rights or federal statutes." *See U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988). *See also Limone v. United States*, 497 F. Supp. 2d 143, 203 (D. Mass. 2007) ("[n]o government actor has 'discretion' to violate the Constitution, statutes, regulations or rules that bind them."), *aff'd on other grounds*, 579 F.3d 79 (1st Cir. 2009) (citing *Muniz–Rivera v. United States*, 326 F.3d 8, 15 (1st Cir.2003)). Knowingly presenting false testimony and forged evidence are crimes that federal agents lack discretion to commit. A malicious prosecution that results in an innocent litigant's arrest (or other seizure) also violates—at minimum—the Constitution. *See generally Laskar v. Hurd*, 972 F.3d 1278, 1294 (11th Cir. 2020). Accordingly, initiating a malicious prosecution based on fabricated

evidence and perjury—the crux of the Plaintiff's allegations in this case—is not plausibly something that any government actor has discretion to do, and the District Court's contrary ruling should be reversed accordingly.

For either (or both) of these reasons, the District Court's judgment should be reversed, and this action should be remanded with instructions to consider the Defendants' alternative arguments for dismissal in the first instance.

IX. ARGUMENT

"'Questions of subject matter jurisdiction are questions of law that are reviewed de novo.'" *United States v. Bahhur*, 200 F.3d 917, 922 (6th Cir. 2000) (quoting *United States v. Yannott*, 42 F.3d 999, 1003 (6th Cir. 1994)). For either or both of the reasons detailed below, the District Court's judgment dismissing the Plaintiff's Complaint for lack of subject matter jurisdiction must be reversed.

A. THE DISTRICT COURT ERRED BY DISMISSING MR. MYNATT'S CLAIMS BASED ON 28 U.S.C. § 2680(a)'S DISCRETIONARY FUNCTION EXCEPTION.

The District Court erred when it ruled that 28 U.S.C. § 2680(a)'s discretionary function exception precluded the District Court from exercising subject matter jurisdiction over the Plaintiff's claims. Two reasons support this conclusion. *First*, the discretionary function exception

does not apply at all under circumstances where—as here—a Plaintiff's claims are cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso. *Second*, and alternatively, even if the discretionary function exception does apply to claims governed by 28 U.S.C. § 2680(h)'s law enforcement proviso, malicious prosecutions and the presentation of forged documents and perjury are not within any federal employee's discretion. As a result, for either (or both) of these reasons, the District Court's judgment must be reversed.

1. As the Fifth and Eleventh Circuits have correctly determined, and as the Western District of Michigan and the Eastern District of Arkansas have additionally held, 28 U.S.C. § 2680(a)'s discretionary function exception does not apply when a plaintiff's claims are cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso.

There is a "disagreement among the circuits regarding the interaction between § 2680(a) and § 2680(h)." *Milligan*, 670 F.3d 686 at n.2 (collecting cases). The Fifth and Eleventh Circuits' view of the matter—that federal courts have subject matter jurisdiction to adjudicate claims that Congress expressly authorized when it enacted 28 U.S.C. § 2680(h)'s law enforcement proviso—is supported by multiple independent canons of statutory construction and widely recognized legislative history, though. By contrast, the opposing view adopted by the District Court—"that even claims listed in the proviso to § 2680(h) are barred if they are based on the performance of

discretionary functions within the meaning of § 2680(a)," *see Nguyen*, 556 F.3d at 1257—fails to address the fact that 28 U.S.C. § 2680(h)'s law enforcement proviso is a more specific and more recent statute. Such a reading also produces an absurdity and "would defeat what we know to be the clear purpose of the 1974 amendment." *Id.* (citing *Sutton*, 819 F.2d at 1297). Accordingly, as the Fifth and Eleventh Circuits have correctly determined, and as the Western District of Michigan and the Eastern District of Arkansas have additionally held, the discretionary function exception does not apply when a plaintiff's claims are cognizable under 28 U.S.C. § 2680(h)'s law enforcement proviso.

a. More specific, more recent statutes trump earlier, more general statutes.

"In 1974, Congress carved out an exception to § 2680(h)'s preservation of the United States' sovereign immunity for intentional torts by adding a proviso covering claims that arise out of the wrongful conduct of law enforcement officers." *Millbrook*, 569 U.S. at 52 (2013) (citing Act of Mar. 16, 1974, Pub. L. No. 93–253, § 2, 88 Stat. 50). This exception has come to be "[k]nown as the 'law enforcement proviso[.]'" *Id.* Given this context, elementary canons of statutory construction compel the conclusion that when a plaintiff's claims fall within § 2680(h)'s more specific, more recent, "add[ed]" proviso, *see id.*, § 2680(h)'s law enforcement proviso trumps §

2680(a)'s earlier, general preservation of sovereign immunity for discretionary functions. *Nguyen*, 556 F.3d at 1253 ("the § 2680(h) proviso was brought about through an amendment enacted in 1974, while the (a) subsection has been part of the statute since 1946. When subsections battle, the contest goes to the younger one; the canon is that a later enacted provision controls to the extent of any conflict with an earlier one.") (citing *ConArt, Inc. v. Hellmuth, Obata & Kassabaum, Inc.*, 504 F.3d 1208, 1210 (11th Cir. 2007) ("[W]here two statutory provisions would otherwise conflict, the earlier enacted one yields to the later one to the extent necessary to prevent the conflict.")).

On several occasions, the United States Supreme Court has explained that "a later, more specific statute will ordinarily trump the earlier, more general one." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 156 (2001) (citing *United States v. Estate of Romani*, 523 U.S., at 530–533 (1998)). This Court, for its part, has characterized the rule as "elementary." *Metro. Det. Area Hosp. Servs. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980) ("It is an elementary rule of statutory construction that a specific provision controls when the same subject matter is addressed by a more general provision.") (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("[I]t is familiar law that a specific statute controls over

a general one without regard to priority of enactment.”)). And while the priority of enactment is not *always* dispositive, *see, e.g., United States v. Hunter*, 12 F.4th 555, 567 (6th Cir. 2021), this Court is nonetheless properly “cognizant that ‘the meaning of one statute may be affected by other Acts, **particularly where Congress has spoken subsequently and more specifically to the topic at hand**.’” *Babcock v. Comm'r of Soc. Sec.*, 959 F.3d 210, 214 (6th Cir. 2020) (emphasis added), *cert. granted sub nom. Babcock v. Saul*, 141 S. Ct. 1463, 209 L. Ed. 2d 179 (2021) (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 133 (2000) (“The meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”)).

With these canons in mind, the Fifth and Eleventh Circuits resolved the conflict between § 2680(a) and § 2680(h) correctly, as did the Western District of Michigan, as did the Eastern District of Arkansas. As relevant here, Congress *amended* § 2680(h) to *add* a specific proviso that permits plaintiffs to maintain specified tort claims “with regard to acts or omissions of investigative or law enforcement officers of the United States Government[.]” *See* 28 U.S.C. § 2680(h); *Millbrook*, 569 U.S. at 52 (2013) (citing Act of Mar. 16, 1974, Pub. L. No. 93–253, § 2, 88 Stat. 50). *See also*

Nguyen, 556 F.3d at 1255 ("Congress added the proviso to § 2680(h) to ensure that future victims of these kinds of torts inflicted by federal law enforcement officers or agents would have a damages remedy against the United States."); *Sutton*, 819 F.2d at 1292 ("the law enforcement proviso . . . [is] a 1974 amendment to § 2680(h) constituting a limited waiver of sovereign immunity, which added to the original language that 'with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [that waive sovereign immunity] ... shall apply to any claim arising out of assault, battery, false arrest, abuse of process, or malicious prosecution.'"). Accordingly, § 2680(h)'s law enforcement proviso is "a later, more specific statute" that trumps § 2680(a)'s "earlier, more general" discretionary function exception. *See J.E.M. Ag Supply, Inc.*, 534 U.S. at 156.

As the Western District of Michigan has correctly determined, this canon controls the issue that has split the Circuits. *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."). Similarly, as the Eastern District of Arkansas cogently explained less than two weeks after the District

Court ruled below:

> The Supreme Court has given lower courts the tools to deal with dueling statutory provisions. "[S]pecific statutory language should control more general language when there is a conflict between the two." The law enforcement proviso is the more specific provision in this context. It is narrower than the discretionary function exception both in terms of scope (a limited number of specific, law enforcement-related intentional torts versus any action involving discretion) and in terms of target (a defined subset of federal law enforcement officers versus any type of federal employee). Just as important as the specific vs. general analysis, where a "later statute directly conflicts with an earlier statute, the later enactment governs." The original 1946 version of the FTCA had both the discretionary function exception and the intentional tort exception.150 In 1974, apparently responding to controversial "no-knock" raids by undercover federal drug enforcement agents, Congress added the proviso at issue here to the subsection dealing with intentional torts. **To the extent the 1974 law enforcement proviso and the 1946 discretionary function exception conflict, the "earlier, general provisions" of the discretionary function exception must yield to the "subsequent, more specific provisions" of the law enforcement proviso.**

Garey, 2021 WL 4150602, at *17 (emphasis added) (internal citations omitted).

Of note, just like the District Court below, none of the courts that has reached a contrary view of the interaction between § 2680(a) and § 2680(h) "applies the canons of statutory construction under which a more specific and more recently enacted provision trumps a more general and earlier one." *Nguyen*, 556 F.3d at 1257. This failure is fatal, because as noted above, that

"elementary rule of statutory construction" is outcome-determinative of the statutory conflict between § 2680(a)'s earlier, general preservation of sovereign immunity and § 2680(h)'s later, specific law enforcement proviso waiving it. *Metro. Det. Area Hosp. Servs.,* 634 F.2d at 334. Accordingly, the courts—including the District Court—that have reached a contrary view after failing to apply this canon are wrong, and the District Court's erroneous judgment must be reversed.

b. Congress did not enact a meaningless proviso, and this Court should not interpret § 2680(a) in a manner that renders § 2680(h) inconsistent, meaningless, or superfluous.

When interpreting the text of a statute, this Court makes "'every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'" *United States v. Ninety-Three Firearms*, 330 F.3d 414, 420 (6th Cir. 2003) (quoting *Cafarelli v. Yancy*, 226 F.3d 492, 499 (6th Cir. 2000)). Holding that federal courts lack subject matter jurisdiction to adjudicate claims that are specifically authorized by § 2680(h)'s law enforcement proviso would do just that, though. *See Sutton*, 819 F.2d at 1297 ("We conclude, therefore, that if the law enforcement proviso is to be more than an illusory—now you see it, now you don't—remedy, the discretionary function exception cannot be an absolute bar which one must clear to proceed under § 2680(h).").

Consequently, adopting the District Court's view of the interaction between § 2680(a) and § 2680(h) would be problematic. *See id.* at 1295 ("We may safely presume Congress knew that existing law provided that decisions on when, where, and how to investigate and whether to prosecute were considered discretionary at the time Congress amended § 2680(h). It is equally clear that we should act under the assumption that Congress intended its enactment to have meaningful effect and must, accordingly, construe it so as to give it such effect."). There is also no textual ground to support this conclusion, and U.S. Supreme Court precedent on a related matter strongly counsels against doing so. *Garey*, 2021 WL 4150602, at *18. As the Eastern District of Arkansas recently noted:

> The Supreme Court said that "[t]he plain language of the law enforcement proviso" tells us "when a law enforcement officer's acts or omissions may give rise to an actionable tort claim under the FTCA," and that "[n]othing in the text further qualifies the category of acts or omissions that may trigger FTCA liability."158 The Supreme Court rejected "additional limitations" that "[a] number of lower courts ha[d] nevertheless read into the text" and were "designed to narrow the scope of the law enforcement proviso." "Had Congress intended to further narrow the scope of the proviso," the Supreme Court explained, it could have done so explicitly.
>
> In short, the Supreme Court acknowledged the breadth of the language of the affirmative waiver of sovereign immunity that arises from the text of the law enforcement proviso. And it has told the lower courts not to undermine the breadth of that language unless there is a clear textual justification for doing so. I do not believe there is a clear textual justification for using the

> discretionary function exception to cabin the language of the law enforcement proviso.

Id. (quoting *Millbrook*, 569 U.S. at 54–57).

The Eleventh Circuit has additionally observed, correctly, that contrary decisions addressing the matter have attempted to avoid conflicts between § 2680(a) and § 2680(h) by reading § 2680(a) so narrowly as to render it meaningless. *Nguyen*, 556 F.3d at 1257. Specifically, the *Nguyen* court explained:

> Some of those decisions have tried to avoid making the subsection (h) proviso meaningless by defining "discretionary" in subsection (a) so narrowly that it excludes most of the actions of rank and file federal law enforcement officers that lead to subsection (h) proviso claims. *See Garcia*, 826 F.2d at 809 ("While law enforcement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability."); *Pooler*, 787 F.2d at 872 ("Reading the intentional tort proviso as limited to activities in the course of a search, a seizure or an arrest as a practical matter largely eliminates the likelihood of any overlap between section 2680(a) and section 2680(h)."); *Gray*, 712 F.2d at 508 ("[I]f the 'investigative or law enforcement officer' limitation in section 2680(h) is read to include primarily persons (such as police officers) whose jobs do not typically include discretionary functions, it will be rare that a suit permissible under the proviso to section 2680(h) is barred by section 2680(a)"); *Caban*, 671 F.2d at 1234–35 (holding that INS officers' decisions about whether to detain an alien did not constitute a discretionary function under the FTCA and that sovereign immunity did not bar the lawsuit).

Id.

To be sure, it is true that taking an artificially restrictive view of § 2680(a) is necessary to avoid widespread conflict between § 2680(a)'s discretionary function exception and § 2680(h)'s law enforcement proviso. *See, e.g., Sutton*, 819 F.2d at 1297 n.17 ("if we applied the discretionary exception as broadly as *Gray*, no remedy would be available in any of the cases which prompted Congress to amend the FTCA."). But it is also true that artificially narrowing the meaning of § 2680(a) in order to avoid a conflict with § 2680(h) is not a faithful attempt to interpret the text of *either* provision. *See, e.g., Nguyen*, 556 F.3d at 1256 ("We are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it[.]"). This Court should decline the invitation to interpret *both* provisions incorrectly as a result.

Further, no matter how restrictively § 2680(a) is interpreted, there will still be scenarios in which a claim that is expressly authorized under § 2680(h)'s law enforcement proviso will fall within § 2680(a)'s discretionary function exception. Under those circumstances, reading § 2680(a) in a manner that precludes federal courts from exercising subject matter jurisdiction over claims that Congress expressly and specifically authorized plaintiffs to bring under § 2680(h) would "render[] other provisions of the same statute inconsistent, meaningless or superfluous.'" *Ninety-Three*

Firearms, 330 F.3d at 420. Indeed, such a result—that one provision of a statute deprives federal courts of subject matter jurisdiction to adjudicate claims that Congress expressly authorized plaintiffs to bring—is properly characterized as an absurdity. *Cf. United States v. Coatoam*, 245 F.3d 553, 558 (6th Cir. 2001) ("When, however, a plain meaning analysis of a statute produces an absurd result, in that the interpretation is clearly at odds with Congress's intent in drafting the statute, then the language of the statute must yield to interpretive guidance from legislative history or statutory structure."). That absurdity must be avoided, and the District Court's judgment embracing it should be reversed as a result.

c. The legislative history of § 2680(h)'s law enforcement proviso confirms Congress's intention to permit claims that § 2680(a)'s discretionary function exception precluded.

Given that textual canons of construction yield only one permissible conclusion regarding the interaction between § 2680(h)'s law enforcement and § 2680(a)'s discretionary function exception, examining the legislative history of § 2680(h)'s law enforcement proviso is unnecessary. Assuming that ambiguity remained after applying elementary canons of statutory construction, however, and in light of the absurd result yielded by the District Court's contrary interpretation, an inquiry into § 2680(h)'s legislative history is appropriate. *See United States v. Bedford*, 914 F.3d 422, 427 (6th Cir.

2019) ("in cases where 'the language is ambiguous or leads to an absurd result, the court may look at the legislative history of the statute to help determine the meaning of the language.'") *cert. denied*, 139 S. Ct. 1366 (2019) (quoting *In re Corrin*, 849 F.3d 653, 657 (6th Cir. 2017)).

The legislative history of § 2680(h)'s law enforcement proviso similarly yields only a single conclusion: "The primary motivation for amending the FTCA was the Drug Abuse Law Enforcement (DALE) raids in Collinsville, Illinois[,]" *Sutton*, 819 F.2d at 1296 n.11, and the proviso was adopted to enable redress for abusive actions by federal agents in Collinsville and in *Bivens*. *See Sutton*, 819 F.2d at 1295–96 ("The Senate Committee report states that the proviso was added to the FTCA in response to 'abusive, illegal, and unconstitutional "no-knock" raids' engaged in by federal narcotics agents in the Collinsville raids and in Bivens.") (citing S.Rep. 93–588, 93d Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Ad.News 2789, 2790). In *Nguyen*, 556 F.3d at 1255–56, for instance, the Eleventh Circuit quoted the Senate Report at length as follows:

> The Committee amendment to the bill, contained in a new section 2 thereof, would add a proviso at the end of the intentional torts exception to the Federal Tort Claims Act (28 U.S.C. 2680(h)). 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. Thus, after the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the Bivens case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved)....
>
> This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

Id.

This legislative history carries surpassing importance for the simple reason that "[b]oth the Collinsville raids and *Bivens* arose out of activities that were within the agents [sic] discretion." *Sutton*, 819 F.2d at 1297, n.17. Thus, with that specific context in mind, "Congress expressly stated the purpose of the law enforcement proviso was to provide a remedy for victims of situations like *Bivens* and Collinsville." *Id.*

Given this context, legislative history powerfully supports the conclusion that § 2680(a)'s discretionary function exception does not prohibit claims that are cognizable under § 2680(h)'s law enforcement proviso. Instead, the entire purpose of the proviso—and the "primary motivation" for it, *Sutton*, 819 F.2d at 1296, n.11—was to *enable* such claims *even though* they may fall within a law enforcement officer's discretion. As a result, the District Court's ruling—which would prevent the *Bivens* and Collinsville victims from opening the courthouse door despite a proviso that Congress specifically enacted to afford them a remedy—must be reversed.

2. Even if 28 U.S.C. § 2680(a)'s discretionary function exception applied, Mr. Mynatt's claims were not subject to dismissal under 28 U.S.C. § 2680(a)'s discretionary function exception.

In the alternative, *even if* claims that Congress has expressly authorized plaintiffs to bring under 28 U.S.C. § 2680(h)'s law enforcement proviso must separately clear 28 U.S.C. § 2680(a)'s discretionary function bar, the District Court still erred by dismissing Mr. Mynatt's claims, because his Complaint alleges misconduct that was not within any federal employee's discretion. Federal employees lack discretion to commit criminal offenses, to violate the Constitution, and to commit torts that are proscribed by state law. During the course of applying 28 U.S.C. § 2680(a)'s discretionary function exception to Mr. Mynatt's claims, the District Court also improperly

construed his allegations in the manner most favorable *to the Defendants*. Both errors warrant reversal.

a. Federal employees lack discretion to commit state criminal offenses, to violate the United States Constitution, and to commit torts proscribed by state law.

As its title implies, 28 U.S.C. § 2680(a)'s discretionary function exception "covers only acts that are discretionary in nature[.]" *United States v. Gaubert*, 499 U.S. 315, 322 (1991). Such acts must "involve an element of judgment or choice," and "it is the nature of the conduct, rather than the status of the actor that governs whether the exception applies." *Id.* (cleaned up). Given this context, "conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation." *See U.S. Fid. & Guar. Co.*, 837 F.2d at 120.

"A two-part test governs whether conduct is protected by the discretionary-function exception." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 648 (6th Cir. 2015). "First, the conduct must be discretionary, meaning that 'it involves an element of judgment or choice.'" *Id.* (quoting *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Second, "the conduct must also be of the type that the discretionary-function exception was designed to shield." *Id.* (citing *Rosebush v. United States*, 119 F.3d 438, 441 (6th Cir. 1997)). Thus, "despite the decidedly discretionary

conduct involved," *Adkisson*, 790 F.3d at 649, "[e]ven clearly discretionary conduct is thus not necessarily protected by the discretionary-function exception." *Id.*

This case does not present a particularly close call, though. At the present stage of proceedings, all of Mr. Mynatt's factual allegations are taken as true; his Complaint must be construed liberally in his favor; and he is entitled to have all reasonable inferences drawn in his favor. *See, e.g., Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016) ("We must accept the complaint's well-pleaded factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor.") (citing *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008)). Applying those standards, Mr. Mynatt's Complaint also unmistakably alleges conduct that is simultaneously criminal, unconstitutional, and tortious under applicable state law, none of which can be regarded as discretionary. Consequently, because criminal, unconstitutional, and tortious misconduct is not discretionary within the meaning of 28 U.S.C. § 2680(a), the discretionary function exception does not and cannot bar Mr. Mynatt's claims. *Cf. Kohl v. United States*, 699 F.3d 935, 940 (6th Cir. 2012) ("In determining whether Kohl's claims fall within the discretionary-function exception, 'the crucial first step is to determine

exactly what conduct is at issue.'") (quoting *Rosebush*, 119 F.3d at 441).

Consider, for instance, Mr. Mynatt's central allegations that employees of the United States generated and 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."). Such conduct is criminally proscribed by (at minimum) Tennessee law, *see* Tenn. Code Ann. § 39-16-503, which provides that:

> (a) It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress, to:
>
> (1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or
>
> (2) Make, present, or use any record, document or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.
>
> (b) A violation of this section is a Class C felony.

Id.

Perjury, of course, is a criminal offense, too. *See* Tenn. Code Ann. § 39-16-702. *See also* 18 U.S.C. § 1621. And as several courts have noted, committing such crimes <u>cannot be discretionary</u>. *See, e.g., 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? *See* IND.CODE §§ 35–44–2–1(a)(1), 35–44–2–2(d)(1).”); *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.”).

Further, initiating an intentionally malicious prosecution without probable cause that results in an innocent person’s seizure violates the Fourth Amendment to the United States Constitution. *See generally Laskar*, 972 F.3d at 1284—97; *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). “[C]onduct cannot be discretionary if it violates the Constitution,” though, because “Federal officials do not possess discretion to violate constitutional rights . . . .” *See U.S. Fid. & Guar. Co.*, 837 F.2d at 120. *See also Andrade-Tafolla v. United States*, No. 3:20-cv-01361-IM, 2021 WL 1740242, at *6 (D. Or. May 3, 2021) (“Because ‘governmental conduct cannot be discretionary if it violates a legal mandate,’ law enforcement action that offends the Fourth Amendment is not protected by the discretionary function exception.”) (quoting *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000)).

Federal courts largely agree on this conclusion. As the D.C. Circuit recently explained in *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016), after canvassing authority on the matter:

> [T]he FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription. At least seven circuits, including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, have either held or stated in dictum that the discretionary-function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority. In *Nurse v. United States*, for example, the Ninth Circuit held that "[i]n general, governmental conduct cannot be discretionary if it violates a legal mandate," including a constitutional mandate. 226 F.3d 996, 1002 (9th Cir. 2000). The discretionary-function exception was inapplicable, that court explained, because the plaintiff had alleged tort claims based on "discriminatory, unconstitutional policies which the[ ] [defendants] had no discretion to create." *Id.* Likewise, the Eighth Circuit in *Raz v. United States* held that the FBI's "alleged surveillance activities f[e]ll outside the FTCA's discretionary-function exception" where the plaintiff had "alleged they were conducted in violation of his First and Fourth Amendment rights." 343 F.3d 945, 948 (8th Cir. 2003); *see also, e.g., Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (holding that challenged "conduct was unconstitutional and, therefore, not within the sweep of the discretionary function exception"); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (In "determin[ing] the bounds of the discretionary function exception ... we begin with the principle that federal officials do not possess discretion to violate constitutional rights or federal statutes." (internal quotation marks, alterations, and citations omitted)); U.*S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988) ("[C]onduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation. Federal officials do not possess discretion to violate constitutional rights or federal statutes."); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[A]ction does not

> fall within the discretionary function exception of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."); *Myers & Myers Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.").

Id.

As a general matter, federal employees lack discretion to violate state tort law, too. *See, e.g., In re: Orthopedic Bone Screw Prods. Liab. Litig.*, No. 1014, 1999 WL 33740509, at *11 (E.D. Pa. Jan. 11, 1999) ("The Fifth Circuit case *Johnson v. Sawyer* is instructive regarding the limits of the discretionary function exception of the FTCA. In that case, IRS agents violated a state statute prohibiting disclosure of tax return information. This established a claim for negligence *per se* under Texas law. This tort liability in turn was actionable against the Government via the FTCA.") (citing *Johnson v. Sawyer*, 980 F. 2d 1490, 1503 (5th Cir. 1992)). Further, as the Tennessee Court of Appeals just made clear under essentially identical facts involving the same plaintiff, Mr. Mynatt's allegations are actionable as a tortious malicious prosecution under applicable Tennessee law. *See Mynatt*, 2021 WL 4438752.

In light of the foregoing, for several overlapping reasons, none of the federal employees identified in Mr. Mynatt's Complaint had discretion to

violate state criminal law; to violate the United States Constitution; or to violate state tort law. As a result, Mr. Mynatt's allegations were not susceptible to dismissal under 28 U.S.C. § 2680(a)'s discretionary function test, and the District Court's contrary ruling must be reversed.

b. The District Court erroneously construed the allegations in Mr. Mynatt's Complaint in *the Defendants'* favor, rather than in the light most favorable to the Plaintiff.

In ruling that Mr. Mynatt's claims were forbidden by 28 U.S.C. § 2680(a)'s discretionary function bar, the District Court did not hold that the federal employees identified in Mr. Mynatt's Complaint had discretion to violate state criminal law. Nor did it hold that the agents involved had discretion to violate the United States Constitution. Neither did the District Court determine that the agents had discretion to commit state torts. Instead, the District Court circumvented all such analysis by erroneously construing Mr. Mynatt's allegations in favor of *the Defendants* and drawing inferences against Mr. Mynatt, both of which the District Court lacked authority to do. *See Luis*, 833 F.3d at 626 ("We must accept the complaint's well-pleaded factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor.") (citing *Bassett*, 528 F.3d at 430).

Even a cursory comparison of the Plaintiff's allegations against the

District Court's construction of them confirms that the District Court erroneously construed Mr. Mynatt's allegations against him and drew inferences regarding his allegations in the wrong direction. Take, for instance, Mr. Mynatt's allegations that officers of the United States generated and 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."). Despite the specificity of these allegations and their centrality to his claims, this Court will search the District Court's Memorandum Opinion in vain for any mention of "false testimony," "forged documents," or "altered documents" whatsoever. *See* Memo., R. 40, PageID ## 150-160. Thus, without reviewing the Plaintiff's actual Complaint, one would never know that Mr. Mynatt's claims were premised upon such claims at all.

Instead, the District Court's Memorandum states that Mr. Mynatt's claims are premised upon "the ***investigation*** undertaken by OLMS and TIGTA agents and their ***recommendations*** to the District Attorney." *Id.* at PageID #156 (emphases added). In light of Mr. Mynatt's specific allegations about false testimony, forged documents, and altered documents,

though, this is a rather significant understatement.

Nonetheless, upon construing Mr. Mynatt's claims as being concerned with mere "investigations and recommendations" by federal employees, the District Court set about answering a different question altogether. *Id.* at PageID #157. Specifically, the District Court stated that "the Court must determine whether the investigations and recommendations of the respective agents are discretionary functions." *Id.* Thereafter, upon concluding that investigations and recommendations are indeed discretionary functions, the District Court dismissed Mr. Mynatt's Complaint in its entirety based on 28 U.S.C. § 2680(a)'s discretionary function bar. *Id.* at PageID ## 157–160.

The District Court's analysis of Mr. Mynatt's Complaint is not faithful to the actual allegations in it, though. Nobody—including Mr. Mynatt—contends that undertaking mere "investigations" or making mere "recommendations" is non-discretionary (or even objectionable). Presenting "false testimony and forged documents" to state prosecutors and "using false testimony and altered documents" to procure an innocent man's indictment without probable cause to retaliate against him for blowing the whistle on IRS misconduct—*which is what Mr. Mynatt's Complaint actually alleges occurred*, *see* Compl., R. 1, PageID #5, ¶ 9(e)—is absolutely objectionable,

however, and as myriad courts have held, it is not plausibly discretionary. *See supra*, at pp. 29–35. *Cf. Camacho v. Cannella*, No. EP-12-CV-40-KC, 2012 WL 3719749, at *10 (W.D. Tex. Aug. 27, 2012) ("Plaintiff also alleges that Agent Cannella lied and intentionally mischaracterized evidence. Agent Cannella had no discretion to lie or mischaracterize evidence in a criminal complaint in which she swore that 'the following is true to the best of my knowledge and belief.' . . . **Because lying or not lying was not a 'matter of choice' for Agent Cannella, the discretionary function exception appears largely inapplicable in this case.**") (emphasis added); *Paret-Ruiz*, 943 F. Supp. 2d at 291 ("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."); *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?"). Given that the District Court improperly sanitized the actual allegations in Mr. Mynatt's Complaint and construed them *in the Defendants'* favor as an essential precursor to finding that Mr. Mynatt's claims involved discretionary functions, though, the District Court's judgment must be reversed.

B. THIS COURT SHOULD REMAND THIS CASE WITH INSTRUCTIONS TO CONSIDER THE DEFENDANTS' ALTERNATIVE ARGUMENTS FOR DISMISSAL IN THE FIRST INSTANCE.

In addition to contending that Section 2680(a)'s discretionary function exception barred the Plaintiff's claims, the Defendants raised several alternative arguments for dismissal. In particular, the Defendants asserted:

1. That Mr. Mynatt's Complaint failed to state a claim for relief and should be dismissed under Fed. R. Civ. P. 12(b)(6), because: (a) the federal agents identified in Mr. Mynatt's Complaint did not themselves prosecute him; (b) "only conclusory statements" allege that the Defendants knowingly provided false statements or misrepresentations to state prosecutors; and (c) Mr. Mynatt did not sufficiently plead a civil conspiracy.[37]

2. That Mr. Mynatt's claims did not fall within the ambit of 28 U.S.C. § 2680(h)'s law enforcement proviso and should be dismissed under Fed. R. Civ. P. 12(b)(1), "because OLMS Agent Kemp is not an 'investigative or law enforcement officer'" and "OLMS agents are not empowered to execute searches, seize evidence, or make arrests."[38] And:

3. That the Plaintiff did not allege relevant misconduct involving TIGTA agents—whom the Defendants seemingly conceded were

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[37] Defs.' Mem. In Supp. of Its Mot. To Dismiss, R. 22, PageID ## 75–81.

[38] *Id.* at PageID ## 81–82.

investigative or law enforcement officers—and accordingly, that Mr. Mynatt's claims should be dismissed under Fed. R. Civ. P. 12(b)(1) because "close examination of the complaint shows that his allegations that false evidence was used to secure his indictment are limited to OLMS Agent Kemp[.]"[39]

Unsurprisingly, all of these arguments were (and remain) fiercely contested. More importantly, though, "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). As a result, "[b]ecause this is 'a court of review, not of first view,'" *id.* (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005)), this court should "'remand the case to the district court to resolve [these issues] in the first instance,'" *id.* (quoting *Cavin v. Mich. Dep't of Corr.*, 927 F.3d 455, 459 (6th Cir. 2019)).

This Court does, of course, have discretion to consider the Defendants' alternative arguments for dismissal in the first instance if it decides to do so. It ought not exercise that discretion here, though, for multiple reasons.

First, with respect to the Defendants' assertion that the Plaintiff's Complaint failed to allege cognizable state-based malicious prosecution and civil conspiracy claims, there is new, post-judgment authority from the

[39] Defs.' Mem. In Supp. of Its Mot. To Dismiss, R. 22, PageID ## 81–82

Tennessee Court of Appeals holding otherwise. *See Mynatt*, 2021 WL 4438752. That post-judgment authority warrants supplemental briefing from the Parties that was never presented to the District Court in the first instance. While this case was pending before the District Court, the Parties also jointly recognized (and jointly represented to the District Court) that Mr. Mynatt's "parallel state court action . . . raises some of the same allegations" presented in this case, and that "[a] state court ruling" on that now favorably-resolved (to Mr. Mynatt) issue was "a cause to stay these proceedings," which are materially affected by it.[40] Accordingly, new briefing on the matter is warranted, and it should be presented to the District Court in the first instance.

Second, with respect to the Defendants' argument that the Plaintiff's claims did not fall within the ambit of 28 U.S.C. § 2680(h)'s law enforcement proviso and should alternatively be dismissed under Fed. R. Civ. P. 12(b)(1) for that reason,[41] at least some jurisdictional fact-finding is necessary. Mr. Mynatt specifically—and repeatedly—alleged that his claims were being filed based on the acts and omissions of investigative and law enforcement

[40] Joint Mot. To Stay Discovery, R. 34, PageID #140, n.1.

[41] Defs.' Mem. In Supp. of Its Mot. To Dismiss, R. 22, PageID ## 81–82.

officers—including, but not limited to, OLMS Agent Kemp—within the meaning of 28 U.S.C. § 2680(h).[42] The Defendants, for their part, contested these jurisdictional allegations,[43] though as the Plaintiff pointed out below, information on OLMS's own website suggest that OLMS agents are indeed investigative and law enforcement officers, and the Plaintiff's allegations were not remotely limited to Agent Kemp as the Defendants suggested.[44]

Regardless, the Defendants' motion attacks the factual basis for the Plaintiff's claim of jurisdiction. That claim accordingly requires the trial court to "weigh the evidence" supporting the Plaintiff's jurisdictional

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[42] *See, e.g.*, Compl., R. 1, PageID #3, ¶ 7 ("Special agents KEMP, EWING, UNDERWOOD, NEEL are special agents of OLMS, while MAPPIN and MAYES are agents of TIGTA and are 'investigative or law enforcement officers' within the meaning of 28 U.S.C. §2680(h)[.]"); *id.* at PageID #3, ¶ 9 ("The claims of PLAINTIFF are based upon the acts and events set forth below, all of which actions were taken (and events were caused) by investigative and law enforcement officers of the United States Government while acting within the scope of their employment."); id. at PageID #12, ¶ 8; id. at PageID #14, ¶ 12; id. at PageID #15, ¶ 13.

[43] Defs.' Mem. In Supp. of Its Mot. To Dismiss, R. 22, PageID ## 81–82.

[44] *See* Pl.'s Resp. To Defs.' Mot. To Dismiss, R. 29, PageID #114; *id.* at PageID #113 ("Additionally, TIGTA Agent Mayes is an investigative or law enforcement officer under the FTCA and was actively engaged and participated in the malicious prosecution of the Plaintiff."). *See also* Department of Labor-OLMS, https://www.dol.gov/agencies/olms/enforcement (last visited Dec. 20, 2021) (stating that OLMS' responsibilities include "conduct[ing] civil and criminal investigations of alleged violations of the Labor-Management Reporting and Disclosure Act (LMRDA) and related laws.").

allegations, *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004), which must otherwise "be considered as true" on the face of the Plaintiff's Complaint. *Id.* Accordingly, "factual findings" regarding subject matter jurisdiction that this Court is not equipped to make in the first instance are necessary. *Id.* Limited jurisdictional discovery—over which this Court similarly is not equipped to preside—may be necessary to develop the required jurisdictional fact-finding involved, too. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981) ("discovery may be appropriate when a defendant moves to dismiss for lack of jurisdiction."). Thereafter, any remaining dispute regarding the law enforcement proviso must be "resolved in favor of a broad" construction. *See Pellegrino v. U.S. Transp. Sec. Admin.,* 937 F.3d 164, 171 (3d Cir. 2019) ("Even if there were uncertainty about the reach of the term 'officer of the United States,' it would be resolved in favor of a broad scope."); *id.* ("no limiting words — like 'criminal' or 'traditional" before 'officer' — should be added to the proviso."). *Cf. Caban v. United States*, 671 F.2d 1230, 1233 (2d Cir. 1982) (considering immigration officials to be law enforcement officers for purposes of the proviso); *Pellegrino*, 937 F.3d at 171 (reversing a decision that deemed Transportation Security Administration employees to fall outside the definition of law enforcement officers because "TSOs are officers by name,

wear uniforms with badges noting that title, and serve in positions of trust and authority"); *Moore v. United States*, 213 F.3d 705, 708 (D.C. Cir. 2000) (considering postal inspectors to be law enforcement officers for purposes of the proviso because they are "'empowered to execute searches, to seize evidence, or to make arrests for violations of Federal law.'"); *Iverson v. United States*, 973 F.3d 843, 848 (8th Cir. 2020) (finding that Transportation Security Officers were law enforcement officers based on the dictionary definition of officer as "one charged with a duty" and "one who is appointed or elected to serve in a position of trust, authority, or command esp. as specif. provided for by law." (quoting *Officer*, Webster's Third New Int'l Dictionary (1971)). *See also Millbrook*, 569 U.S. at 55–56 ("A number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso. . . . None of these interpretations finds any support in the text of the statute.").

Taken together, due to: (1) new, intervening substantive law affecting the merits of Mr. Mynatt's claims, and (2) the need for jurisdictional fact-finding arising from the Defendants' unresolved challenge to the factual basis for the Plaintiff's claim of subject matter jurisdiction, this Court should remand this case to the District Court to adjudicate the Defendants' alternative arguments for dismissal in the first instance. *See VanderKodde,*

951 F.3d at 404. *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)).

X. CONCLUSION

For the foregoing reasons, the District Court's judgment should be **REVERSED**, and this Court should remand with instructions to consider the Defendants' alternative arguments for dismissal 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 Fed. R. App. P. 32(a)(7)(B) because it contains 10,508 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that on this 20th day of December, 2021, 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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