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***Via ECF***

Ms. Patricia S. Dodszuweit  
Clerk, United States Court of Appeals for the Third Circuit  
21400 U.S. Courthouse  
601 Market Street  
Philadelphia, PA 19106

**RE: *Xi v. United States*, No. 21-2798 (3d Cir.)**

Dear Ms. Dodszuweit:

Plaintiffs write pursuant to Fed. R. App. P. 28(j) to notify the Court of the recent decision in *Myles v. United States*, No. 20-44910 (9th Cir. Sept. 2, 2022).

*Myles* held that the Federal Torts Claim Act (“FTCA”) discretionary function exception does not apply to malicious prosecution claims premised on a federal law enforcement officer’s false statements and fabrication of evidence. As explained by the Court, “[t]he discretionary function exception was designed to prevent ‘judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy.’” *Id.* at 15 (quoting *United States v. Gaubert*, 499 U.S. 315, 323 (1991)). The court reasoned that because “decisions to knowingly lie under oath . . . or fabricate evidence cannot be ‘grounded in’ and are not ‘susceptible to’ such analyses, . . . the discretionary function exception does not provide refuge for such conduct.” *Id.* (quoting *Gaubert*, 499 U.S. at 323).

The Ninth Circuit found support for its ruling in the FTCA’s history. *Id.* at 15–16. In 1973, Congress amended the FTCA to allow plaintiffs to bring malicious prosecution claims. *Id.* at 16 (citing 28 U.S.C. § 2680(h)). The court reasoned that if “allegations of perjury, witness tampering, and fabrication of evidence[] are insufficient to render Myles’s malicious prosecution claim outside the scope of the discretionary function exception, it is hard to imagine any malicious prosecution action . . . that would survive application of the discretionary function exception.” *Id.* Thus, prohibiting a FTCA claim under such circumstances would contradict clear congressional intent. *Id.*

As in *Myles*, Professor Xi challenges a law enforcement officer’s fabrication of evidence and false statements—“[c]onduct . . . [that] has no role to play in the legitimate functioning of government.” *Id.* at 15. Professor Xi has focused on the unconstitutionality of the government’s conduct, Br. 32–39, as grounds for finding the absence of discretion. The Ninth Circuit’s focus makes the same point, but more broadly: law enforcement officers do not act with discretion when they fabricate evidence or make false statements that would support claims for malicious prosecution.

Sincerely,

/s/ David Rudovsky  
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