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UNITED STATES COURT OF APPEALS  
IN THE THIRD CIRCUIT COURT OF APPEALS

-----x  
XIAOXING XI, ET AL., :  
Appellants, :  
 :  
v. : Case No. 21-2798  
 :  
SPECIAL AGENT ANDREW :  
HAUGEN, ET AL., :  
Appellees. :

-----x  
HEARING  
DATE: Wednesday, September 14, 2022  
TIME: 10:53 a.m.  
BEFORE: Honorable Cheryl Ann Krause  
Honorable Stephanos Bibas  
Honorable Marjorie O. Rendell  
LOCATION:  
601 Market Street, 19th Floor  
Philadelphia, Pennsylvania 19106  
JOB No.: 5469780

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1 P R O C E E D I N G S

2 JUDGE #1: We'll call the case of Xi versus  
3 FBI Special Agent Andrew Haugen.

4 MR. RUDOVSKY: May it please the Court, David  
5 Rudovsky for the Plaintiff Appellants in this case,  
6 Professor Xi and his family.

7 JUDGE #2: How does he pronounce his last  
8 name?

9 MR. RUDOVSKY: Xi.

10 JUDGE #2: Xi.

11 MR. RUDOVSKY: I would like to reserve two  
12 minutes for rebuttal, please.

13 JUDGE #1: Granted.

14 MR. RUDOVSKY: This Appeal from a District  
15 Court grant of a Motion to Dismiss, we submit three  
16 basic points. First, that Plaintiff Xi, based on the  
17 plausible allegations in the Second Amended Complaint,  
18 was subjected to a malicious prosecution, searches  
19 without probable cause, fabrication and falsification  
20 of evidence, and ethnic-based bias. The violations are  
21 actionable under the Federal Tort Claims Act and are  
22 not barred by the discretionary function exception,  
23 and the action -- the violations are actionable also  
24 under the Bivens doctrine as they are not presented in  
25 a materially new context.

1           Let me start with just one observation before  
2 I get into the -- the legal arguments of that FTCA and  
3 Bivens. The violations here had a devastating  
4 consequences for Professor Xi and his family. He was  
5 branded as a technological spy for China, suspended as  
6 the Chair of the Physics Department at Temple  
7 University, forced to live for months under a cloud of  
8 suspicion and fear. The District Court was wrong on  
9 all issues. This is a case about accountability.

10           JUDGE #1: Mr. Rudovsky, you started out by  
11 saying this is a case about malicious prosecution and  
12 fabrication and I quite agree. You're arguing that  
13 it's not a new claim under Bivens and yet we've got  
14 three courts of appeals who have looked at  
15 fabrication, malicious prosecution very similar to  
16 this situation, who have said this is a new -- this  
17 would be a new Bivens claim and therefore is barred.  
18 How can you say to us that this is not a new Bivens  
19 claim?

20           MR. RUDOVSKY: Yeah. So on Bivens, we think  
21 we fit into the heartland of Bivens. When we look at  
22 what the agent did in this case, it's not materially  
23 different from Bivens. The Government argues that  
24 there was a different mechanism for the injury and a  
25 different conduct. What happened here was --

1 JUDGE #1: Well, if it were only the search  
2 and seizure -- for only the search, then you'd fit in  
3 Bivens, but the -- the -- the gravamen of your -- of  
4 the Complaint is what you've said. His life was  
5 ruined by the fabrication and the malicious  
6 prosecution, not by the search and seizure.

7 MR. RUDOVSKY: Well, all -- all of it was  
8 part of it. Certainly, with the emotional damage he -  
9 - he suffered from the search of his house, from the  
10 strip search of him --

11 JUDGE #1: But that's not a Bivens claim.

12 MR. RUDOVSKY: -- was accountable. It -- the  
13 fact that they went further than they did in Bivens --  
14 the Jacobs case in the 6th Circuit holds that. That  
15 was a wrongful arrest claim under Bivens and so on.

16 JUDGE #2: But we have Egbert versus Boule,  
17 the Supreme Court saying, "We're not even sure we  
18 decide this Bivens the same way. We're going to  
19 preserve these three specific contexts, but don't go  
20 beyond them at all." And here we have national  
21 security implications and alleged spying and other  
22 things, so any possible grounds to distinguish this  
23 from those three cases don't allow a Bivens claim to  
24 go forward.

25 MR. RUDOVSKY: Judge Bibas, I agree it's a narrow



1 avenue to Bivens. The Court has not overruled Bivens.  
2 Egbert does nothing more than in Abbasi and what the  
3 Government argues here, they concede that five of  
4 the six factors in -- in Abbasi don't apply; they only  
5 argue that somehow if we allow the judiciary to become  
6 involved in this case, that would affect national  
7 security. Bivens itself was a case about drugs, which  
8 was a national security issue according to the  
9 Government. We have -- we have -- we have no  
10 difference here. Our point is when you look exactly  
11 what happened here, Bivens was a search without  
12 probable cause, right, of -- of -- of a home. Under  
13 our allegations, what happened here is both the  
14 indictment and the search warrant were without  
15 probable cause --

16 JUDGE #1: Why -- why haven't --

17 MR. RUDOVSKY: -- based on our --

18 JUDGE #1: -- we --

19 MR. RUDOVSKY: -- plausible allegations.

20 JUDGE #1: -- essentially crossed this bridge  
21 already with Pellegrino and -- and Vanderklok? And  
22 that's to say, when we've -- when we've looked before  
23 at the TSA context, we've said that there are national  
24 security implications for that sort of -- of search  
25 being conducted.

1 MR. RUDOVSKY: And -- and -- and that's --

2 JUDGE #1: Doesn't that apply just --

3 MR. RUDOVSKY: -- right, that's why --

4 JUDGE #1: -- as well here?

5 MR. RUDOVSKY: Yes, and -- and -- and TSA was  
6 different. It was set up after 9/11 or -- or -- or  
7 there was all those operations, obviously, national  
8 security. What you have here is simply an agent who's  
9 given a label, right, as someone involved with  
10 investigating possible confidential material going to  
11 China, spying by China, and so on and so forth. The  
12 Court has said national security is not a talisman for  
13 rejecting a Bivens claim and that's really what the  
14 Government is arguing here just because we gave him  
15 that label. It turns out when you look at what this  
16 agent did, it was based on ethnic bias. There ought  
17 to be strict scrutiny. It's one thing to say --

18 JUDGE #2: All right.

19 JUDGE #1: I -- I --

20 JUDGE #2: I'd like to know --

21 JUDGE #1: Wait, I -- I -- I appreciate that  
22 if we -- if -- or we're to drill down on that this  
23 specific case, that it looks like more like a run-of-  
24 the-mill 4th Amendment case, but Egbert tells us that  
25 we should be thinking of this in terms of the entire

1 field and if we're looking at the field involving  
2 counterintelligence and FISA warrants which, according  
3 to the Complaint, are also implicated here, then  
4 aren't we really in a -- in a very different terrain  
5 and one that does implicate national security --

6 MR. RUDOVSKY: If -- if -- if --

7 JUDGE #1: -- as a field.

8 MR. RUDOVSKY: -- that's right. If it was  
9 FISA, if it was national security, we'd be in a  
10 different field. That issue still hasn't been decided by  
11 the District Court. That's Count 10 of our -- of our  
12 -- of -- of our Complaint. The District Court has not  
13 decided any issues concerning FISA. This case is not  
14 based on a FISA violation, it's based on a straight  
15 4th Amendment violation of an agent who conducted an  
16 investigation, was able to obtain an indictment with  
17 false information to the grand jury, and a search  
18 warrant without probable cause.

19 JUDGE #1: But the -- but the 4th Amendment  
20 violation was not by him, it was by -- by other  
21 officers.

22 MR. RUDOVSKY: No, he -- no -- no, he -- he  
23 provided all the information. Other officers went to  
24 the house, but it was based completely on the  
25 information that he had provided. The Search Warrant

1 Affidavit and the Indictment is all based on the false  
2 information that he gave to other Governmental  
3 officials.

4 JUDGE #1: So isn't the gravamen of your  
5 Complaint the false information?

6 MR. RUDOVSKY: Falsification of evidence

7 --

8 JUDGE #1: Right.

9 MR. RUDOVSKY: -- false information --

10 JUDGE #1: And how is that not a new Bivens  
11 claim?

12 MR. RUDOVSKY: It -- because it's based --

13 JUDGE #1: We don't -- we don't even get to  
14 whether there are reasons --

15 MR. RUDOVSKY: Right, I -- I --

16 JUDGE #1: -- to have caution --

17 MR. RUDOVSKY: -- I -- I -- I --

18 JUDGE #1: -- we get to the issue of --

19 MR. RUDOVSKY: -- I understand the  
20 reluctance, but -- and -- and which is why we placed  
21 most of our emphasis on the Federal Tort Claims Act,  
22 which --

23 JUDGE #1: All right. Well, maybe you'd --

24 MR. RUDOVSKY: -- which I'd like to move to.

25 JUDGE #1: -- better address that.

1 MR. RUDOVSKY: I've made my point about  
2 Bivens. I understand where this Court is on Bivens.  
3 Let me move, if I can, to the Federal Tort Claims Act.

4 JUDGE #1: Okay. Can you start where you  
5 opened talking about it being sufficiently pleaded  
6 here under Iqbal and Twombly and where -- the -- the  
7 concerns that Judge Surrick had focused on the -- the  
8 sort of generalized allegations of knowledge of  
9 falsity without information about how specifically he  
10 was advised, when the -- the special agent was  
11 advised, and -- and contrast to show that he had -- he  
12 had -- he knew or should have known. Where -- where  
13 do we find in the Complaint any specificity about that  
14 -- that knowledge?

15 MR. RUDOVSKY: In a number of places. First  
16 of all, Paragraph 3 of the Complaint states very  
17 clearly that Agent Haugen had this information before  
18 from the inventor of the pocket heater. That's the  
19 critical point. He spoke to the inventor of the  
20 pocket heater. He had the information that what was  
21 sent to China on these email communications had  
22 nothing to do with the pocket heater, it had  
23 everything to do with a device that Professor Xi  
24 himself had invented; they're two different devices.  
25 Paragraph 3 and Paragraph 53 both state -- and I don't

1 understand why Judge Surrick wouldn't understand  
2 this -- both state that this information was known to  
3 FBI Agent Haugen before he provided the false  
4 information both to the U.S. Attorney and to the grand  
5 jury and --

6 JUDGE #1: But why was that (cross talk) --

7 MR. RUDOVSKY: -- and beyond that, Paragraph  
8 55 is as detailed as you can be. We have six subparts  
9 under Paragraph 55, which lays out all the false  
10 information that Agent Haugen included after being  
11 informed -- after being informed by the inventor of  
12 the pocket heater and -- and let -- let me be clear on  
13 what -- on what happened. The inventor of the pocket  
14 heater informed Haugen that based on his view -- he  
15 looked at the emails, he looked at the schematics that  
16 were sent allegedly illegally by Professor Xi to his  
17 colleagues in China, and he informed Agent Haugen that  
18 they were not related to the pocket heater. This is  
19 the person who invented the pocket heater and he said,  
20 "I'm familiar with the pocket heater; I'm also  
21 familiar with the device, a separate superconductivity  
22 device, that Professor Xi had invented" --

23 JUDGE #1: But where is there anything in the  
24 Complaint about that -- that sequence that -- that he  
25 was advised of that by the inventor before --

1 MR. RUDOVSKY: Paragraph 3 and Paragraph 53  
2 both say he had that information before -- before he  
3 provided the false information to the --

4 JUDGE #1: It -- it says --

5 MR. RUDOVSKY: -- grand jury.

6 JUDGE #1: -- it alleges that he had  
7 knowledge before, but Paragraph 55 that you're  
8 pointing us to about how -- how -- any specificity  
9 about how he obtained that knowledge and why we should  
10 find that there is, you know, enough here for knew or  
11 should have known ahead of time, doesn't say anything  
12 about when he's told.

13 MR. RUDOVSKY: But Paragraph 55 is the  
14 details of that. Paragraph 3, "Before the indictment  
15 was sought and returned, Defendant Haugen knew or  
16 recklessly disregarded the fact." Paragraph 53 says  
17 the same thing. Paragraph 55 then fills in all the  
18 plausible details as to why he should have known and  
19 did know that what he was presenting was false and  
20 fabricated.

21 JUDGE #1: But you'd have us link those up to  
22 say that it meets the -- the standard for sufficiency  
23 of pleading?

24 MR. RUDOVSKY: Absolutely. This is -- you --  
25 you -- it -- it's hard to be more detailed than we

1 were in Paragraph 55 as to everything that the  
2 inventor of the pocket heater told FBI Agent Haugen.  
3 And on that point, if he was told that -- we're not  
4 claiming that to get an indictment in a scientific  
5 issue of a somewhat complex case -- well, this case  
6 turns to be much less complex than the Government  
7 suggests that it is -- that the Government has to seek  
8 out their own experts, but when they consult the  
9 leading expert on this issue and that expert tells  
10 them, "You're mistaken, there's nothing in any of  
11 these emails that implicate or reveal secrets about  
12 the pocket heater. It has nothing to do with the  
13 pocket heater." It's like comparing a microwave to a  
14 toaster; just because both things heat or cook food,  
15 that's -- that's the agent's view. Once he knew that,  
16 he's left with nothing. There's no reliable evidence  
17 that Agent Haugen had to support the claim that  
18 Professor Xi had shared confidential information with  
19 colleagues in China. There's nothing left.

20 JUDGE #1: Can -- can I back up on it?  
21 You're -- what you're saying now is addressed to the  
22 fact that there -- there is a tort -- there are tort  
23 claims here, correct?

24 MR. RUDOVSKY: Absolutely.

25 JUDGE #1: Now we have the -- the -- Judge --



1 Judge Surrick decided that the discretionary function  
2 exception didn't apply because the law was not clearly  
3 established.

4 MR. RUDOVSKY: Well, the -- the --

5 JUDGE #1: And -- and now he didn't analyze  
6 the claims, he just said discretionary function would  
7 apply. So there -- so I'm assuming that you're going  
8 to argue that discretionary function should not apply  
9 because you've pled Constitutional violations; is that  
10 correct?

11 MR. RUDOVSKY: Absolutely. That -- that's  
12 our basic argument --

13 JUDGE #1: Okay.

14 MR. RUDOVSKY: -- consistent with what this  
15 Court has said for 30 years.

16 JUDGE #1: All right.

17 MR. RUDOVSKY: Assuming -- and we would grant  
18 that when an agent is investigating criminal activity,  
19 there's certain discretion that's involved, this Court  
20 has held, a majority of the circuits in this country  
21 have held, you've held it for 30 years that if the  
22 agent violates the Constitution, has mandatory  
23 provisions, it's no different than the language in the  
24 statute that says if there's a policy, regulation or  
25 statute that is mandatory in nature, it's no longer

1 discretionary.

2 JUDGE #1: Right, so which of the claims --

3 MR. RUDOVSKY: If you violate the -- I'm  
4 sorry.

5 JUDGE #1: -- so which of the claims under  
6 the Federal Tort Claims Act fall under that category?  
7 You've pled Count 4 is Malicious Prosecution, Count 5  
8 is Invasion of Privacy, Count 6 is False  
9 Light/Emotional Distress. Which -- and should we  
10 analyze this or should we send this back to the  
11 District Court to say, "You were wrong about  
12 discretionary function. If there's a Constitutional  
13 violation alleged, then you have no discretion to  
14 violate the Constitution. Please analyze these  
15 claims." Should we -- do we need to do that?

16 MR. RUDOVSKY: We don't need a remand. The  
17 Government doesn't even argue that we have not -- if -  
18 - if we've stated Constitutional claims. And remember  
19 the process --

20 JUDGE #1: Which are the -- which are the  
21 specific Constitutional --

22 MR. RUDOVSKY: Okay.

23 JUDGE #1: -- claims you believe you've pled?

24 MR. RUDOVSKY: Specific Constitutional claims  
25 that -- that we have alleged -- and even if we -- if

1 we were required to show they were clearly  
2 established, this Court has already done that in  
3 Halsey and -- and Pfeiffer and -- and Black versus  
4 Montgomery County. Malicious Prosecution Number One,  
5 "Fabrication of Evidence Two" -- there's a separate  
6 freestanding fabrication of evidence claim under the  
7 5th Amendment. This Court held that in Black and  
8 Halsey.

9 JUDGE #1: Well, I don't see a Federal --  
10 you've got two arguably qualifying Federal Tort Claims  
11 Act, malicious prosecution and invasion of privacy.

12 MR. RUDOVSKY: And we've got fabrication of  
13 evidence, a search warrant without probable cause, and  
14 --

15 JUDGE #1: Well, that would be invasion of  
16 privacy, but I -- fabrication of evidence would come  
17 in under malicious prosecution, I assume.

18 MR. RUDOVSKY: Right, and -- and -- and --  
19 and the reason it -- it's framed that way, it's under  
20 the Tort Claims Act. We're not arguing that we've got  
21 a claim under the Federal Tort Claims Act because  
22 there was a federal Constitutional violation, that's  
23 not a basis for a Federal Tort Claims Act --

24 JUDGE #1: No, it's -- it's (cross talk) --

25 MR. RUDOVSKY: -- we have -- it's got to be

1 state --

2 JUDGE #1: -- to take you out of the  
3 discretionary function exception.

4 MR. RUDOVSKY: -- it -- that's -- that's  
5 right. It -- it's state law -- under state law, we  
6 state claims that under Pennsylvania law, there was a  
7 malicious prosecution, there was fabrication of  
8 evidence, there was a search warrant privacy interest  
9 without probable cause, and -- and that there was race  
10 or ethnic bias.

11 JUDGE #2: Okay. What (cross talk) --

12 MR. RUDOVSKY: The District Court did not  
13 disagree on any of that. The District Court didn't  
14 say, "You didn't properly state -- state" -- I'm  
15 sorry, Judge Bibas, but just -- just finish this one  
16 point.

17 JUDGE #2: Yeah, finish this please.

18 MR. RUDOVSKY: District Court did not say  
19 that there was a lack of a basis for state law. That  
20 gets us within the umbrella of the Tort Claims Act.  
21 The Government then comes back and says, "That may be  
22 true, but it's discretionary function," but the  
23 response to that, obviously, which is what we made, is  
24 that if there's a Constitutional violation under  
25 Pooler and -- and -- and the other case in this

1 Circuit, it's no longer discretionary. The Supreme  
2 Court has said the Constitution is mandatory, Owens  
3 versus City of Independence.

4 JUDGE #1: What about Fisher? Specifically,  
5 we asked you about the -- the false light claim and  
6 where there's the intervening act of the U.S.  
7 Attorney's Office press release appearing to be the  
8 cause of the putting in the false light for the  
9 reputational damage --

10 MR. RUDOVSKY: Yeah, I -- I -- I (cross talk)  
11 --

12 JUDGE #1: -- why -- why doesn't Fisher take  
13 that out of the equation?

14 MR. RUDOVSKY: -- I think all that is cause  
15 and we need more discovery on that obviously. There's  
16 stuff in the Protective Order that -- that -- that's  
17 going to be relevant on that, but the point is that  
18 everything that happened here from the grand jury  
19 indictment to the search warrant for his house to the  
20 arrest warrant for him to any statement by the U.S.  
21 Attorney's Office, which by the way, within three  
22 months after they saw the same evidence that Haugen  
23 had, dismissed the indictment, right, based on that.  
24 All of that is the causation of Haugen.

25 JUDGE #2: They're "but for" causes, but

1 Fisher suggests it might not count as a proximate  
2 cause.

3 MR. RUDOVSKY: Well, let me address Fisher  
4 for a second. I -- I -- I -- I think there are at  
5 least four different distinguishing factors. We -- we  
6 received your Notice about -- to look at Fisher and I  
7 think the reason the Government didn't argue and we  
8 didn't -- as I said, we both agree it's not relevant.  
9 It's inapposite on -- on -- on multiple levels.  
10 Fisher said we have two possible causal agents, right,  
11 in -- in this case. We have the lab agents who were  
12 negligent, right, they found them negligent. That  
13 could have been a Tort Claims Act, but that was  
14 supervened, right, when the head of the agency acting  
15 on a health emergency question, right, you know,  
16 people could be poisoned by these -- by these grapes -  
17 - decided in his discretion or her discretion, whoever  
18 the -- the -- the -- the leader was at that point --  
19 that, "I'm going to pull these, you know, and destroy  
20 these -- these items from the market, right, to  
21 protect the public." That's far different from here.  
22 We don't have two agents. We're challenging only the  
23 actions of Defendant Haugen, who was the sole cause of  
24 the violation, and the grand jury, which is the  
25 operative, right, agency here, is not a Government

1 employee; therefore, we don't have the kind of  
2 situation you had in Fisher where you had two possible  
3 causal agents and we had to decide which one. You  
4 only have one here.

5 JUDGE #2: But the grand jury with secrecy  
6 doesn't really -- we're -- we're talking here about  
7 the press release that the U.S. Attorney released,  
8 which is a separate Governmental actor that made a  
9 decision to issue the press release.

10 MR. RUDOVSKY: Right, so to the extent there  
11 was a press release, that increased the damage, it  
12 did, but the -- the -- the damage to Professor Xi and  
13 his family wasn't because of a press release. I mean,  
14 that -- that adds to the damages here to -- to what he  
15 suffered. The damage was he's indicted, he's -- his  
16 house is searched, he's strip-searched, he's accused  
17 of being a technological spy basically in the  
18 indictment. That's the information that caused him to  
19 be suspended at -- at Temple University and that's the  
20 information that defamed him nationally. And he was  
21 under a cloud -- he was facing 80 years in prison and  
22 \$1 million fine based on completely false information.  
23 And -- and therefore, under -- under -- under the Tort  
24 Claims Act, the -- the -- let me just say with respect  
25 to Fisher, Fisher didn't deal with the intentional

1 tort provision in the -- in the FTCA and the Myles  
2 decision at the 9th Circuit, which we've advised the  
3 Court of recently, goes even further. Myles says not  
4 only by 9th Circuit law and by law of most of the  
5 circuits, if there's a Constitutional violation,  
6 there's no discretionary function, but Myles make  
7 another important point that distinguishes it from --  
8 from Fisher. Myles says if the Government was right  
9 in arguing, as it did in the Shivers and the other case in  
10 the -- in the 7th Circuit, which -- which is found by  
11 statutory construction, a defense under discretionary  
12 function, it would read out all the intentional torts.  
13 When Congress amended the FTCA in 1974 to include  
14 intentional torts as opposed to just negligence by the  
15 Government, that became an important factor. These  
16 are all intentional torts. If -- if you read Fisher,  
17 right, to bar that, that whole section of the FTCA  
18 becomes inoperable.

19 JUDGE #2: No -- no -- no, there's a  
20 difference between one person doing something  
21 intentional versus one person inducing someone else to  
22 do something intentional. That's what it's getting  
23 at.

24 MR. RUDOVSKY: Well, and -- and -- and -- and  
25 we understand by Fisher, very close case 7-6



1 in this, you know, en banc -- and in the  
2 circuits, you could, you know, you obviously have good  
3 arguments on both sides to be sure, but Fisher also  
4 recognized that what that agent in the lab did was  
5 negligent. It could have been actionable if that was  
6 the action of the agency; that's exactly what we have  
7 here. We have the lower agent -- we don't have the  
8 head of the FBI making a decision after this; this is  
9 a single agent that's acting. This single agent acted  
10 in violation of the Constitution. We've got plausible  
11 allegations here of that and as a result of that, we  
12 have two arguments. One, there's a complete -- I  
13 could use the word "trump" of the -- of the  
14 discretionary function exception because you have a  
15 Constitutional violation, that's why it's relevant.  
16 And, Number Two, to -- to -- as a matter of statutory  
17 construction, think about what happens to that clause.  
18 There -- there -- there's nothing left in the usual  
19 case where you have a single agent acting.

20 JUDGE #2: Well, what's -- well, let -- let's  
21 talk about that. I think the best argument for the  
22 minority position that maybe Constitutional violations  
23 are not -- don't categorically come out of it is if  
24 Shivers from the 11th Circuit says, "Look, we've got  
25 this language at the end of the discretionary function

1 exception that says, 'Whether or not such discretion  
2 is abused.'" And the way the 11th Circuit puts it at  
3 1 F4th at 931, "The inquiry is not about how  
4 poorly, abusively, or unconstitutionally the employee  
5 exercises discretion, but whether the underlying  
6 function or duty itself was a discretionary one." So  
7 it's a -- it -- the fit with the language, you're  
8 focusing on whether the act was unconstitutional, but  
9 the language, whether or not such discretion was  
10 abused suggests maybe the individual act was wrongful,  
11 but if the whole function is the kind that was carved  
12 out by that clause, doesn't that put it on a different  
13 footing?

14 MR. RUDOVSKY: Completely inconsistent with  
15 what this Court has said for 30 years and what a  
16 majority of the circuits have said. You'd have to  
17 reverse yourself. On Pooler and the other cases, you  
18 have not taken that view of the FTCA, nor has the D.C.  
19 Circuit, the 2nd Circuit, the 9th Circuit and -- and  
20 the -- and the fundamental misreading of the 11th  
21 Circuit -- and it was a good dissent on the 11th  
22 Circuit case as well -- is that they said their --  
23 their proposition was that the federal -- a federal  
24 Constitutional violation doesn't violate the FTCA. We  
25 agree -- we agree with that. That's their position.

1 They didn't go further, they didn't analyze the FTCA  
2 as I just did, saying you look to state law first,  
3 that's the first step. Was there a violation of state  
4 law? Yes. Assuming the agent was otherwise engaged  
5 in discretionary functions, did the agent violate the  
6 Constitution? Yes. If so, there's no discretion to  
7 violate the Constitution?

8 JUDGE #2: Well, what's left then of the  
9 whether or not such discretion is abused clause? What  
10 situation --

11 MR. RUDOVSKY: It -- it --

12 JUDGE #2: -- would that still cover?

13 MR. RUDOVSKY: -- it -- the proposition is --  
14 and -- and the language in the statute -- the language  
15 in the statute says if you violate a mandatory statute  
16 --

17 JUDGE #2: Uh-huh.

18 MR. RUDOVSKY: -- policy or regulation,  
19 you've got no discretion.

20 JUDGE #2: Right.

21 MR. RUDOVSKY: There's no difference between  
22 violating a statute, a regulation, and a policy, and  
23 violating the Constitution. Owens versus City of  
24 Independence says the Constitutional are -- are  
25 mandatory. The Government tries to argue it will

1 certainly not be mandatory, we ought to do it by  
2 --

3 JUDGE #1: Well, and -- and isn't the answer  
4 that abuse of discretion is far -- a far lighter  
5 problem than Constitutional violation. I mean, abuse  
6 of discretion is something --

7 MR. RUDOVSKY: Absolutely.

8 JUDGE #1: -- we -- we know about.

9 MR. RUDOVSKY: Which -- which is -- which is  
10 why the fiduciary case in this Circuit from -- from  
11 the beginning, this Court has recognized, as has every  
12 circuit until these two recent decisions, which I  
13 submit are wrong. I think Myers (ph) is right on that  
14 -- the -- the answer to that, but however you think  
15 about that, this Court, if it's going to follow the  
16 precedent in this Court, this is an easy case.

17 JUDGE #2: Let me ask you about pleading. I  
18 don't see the specific pleading of ethnic and  
19 nationality discrimination here. What in your  
20 Complaint satisfies Twombly and Iqbal?

21 MR. RUDOVSKY: So the -- the -- the -- the --  
22 the -- the -- the pleading is this, when you look at  
23 what the agent did, having been informed by the  
24 inventor of the pocket heater that nothing in this --  
25 in these four emails, right, has anything to do with

1 the pocket heater -- you're misreading it, this  
2 relates to his own instrument -- the agent is left  
3 with nothing if you accept that allegation. And we're  
4 at a Motion to Dismiss stage -- we'll -- we'll find  
5 out more about what the agent did and why he thought -  
6 - continued to think, if that's what he did, that  
7 there was a violation, when we get to discovery. But  
8 once that's done, the agent is left with nothing,  
9 right? And so our allegation is his motive, at least  
10 in part, because he was part of this unit that's  
11 investigating, right, scientist of sharing of  
12 information with China. Nothing wrong with the  
13 Government doing that kind of investigation; we  
14 understand that. We've got an inference, as least at  
15 this point, that what he acted on was the ethnic bias.

16 JUDGE #1: Where -- what gives rise to that  
17 inference? The inference just as -- as easy that he  
18 just didn't like him and he -- maybe he resented him -  
19 -

20 MR. RUDOVSKY: There are whole --

21 JUDGE #1: -- there's -- there's nothing  
22 here.

23 MR. RUDOVSKY: -- there's -- there's a whole  
24 range of possibilities here.

25 JUDGE #1: Right, but at least in --

1 MR. RUDOVSKY: He didn't -- he didn't like  
2 him.

3 JUDGE #1: -- at least in your pleading --

4 MR. RUDOVSKY: I'll get -- I'll get credit --

5 JUDGE #1: -- you have to -- you have to  
6 plead something that gives rise to that inference.

7 MR. RUDOVSKY: The -- the fact that he's of  
8 this unit, right, and -- and -- and at this point, on  
9 -- on a -- on a Motion to Dismiss, if he's left with  
10 nothing, sure, one inference is he continued to think  
11 wrongly, "I did it right." That's going to be an  
12 issue whether it's negligence or recklessness or --  
13 but that -- that's a jury issue. The second inference  
14 is possibly, "I'll do it because if I can get an  
15 arrest, that's a credit to me as a, you know, as an  
16 FBI agent." Sure, you know, it's just work-related.  
17 The third inference is that he acted this way because  
18 of the ethnicity of Professor Xi, that if Professor Xi  
19 was not, right --

20 JUDGE #1: That's not an inference, that's a  
21 possibility.

22 MR. RUDOVSKY: I -- I -- I think we have  
23 enough at -- our position is at least at the -- at the  
24 pleading stage, before we get to discovery -- and  
25 remember, we were hampered in -- in part. We -- we

1 gave this Court a lot, we gave the District Court a  
2 lot in terms of the details. Some of the information  
3 we couldn't make public, it was subject to a  
4 protective order during that --

5 JUDGE #2: Anything here that --

6 MR. RUDOVSKY: -- criminal trial.

7 JUDGE #2: -- suggests that a -- a white  
8 person suspected of passing information to the Chinese  
9 Government or another Government would not have  
10 received this treatment. What -- what is there?

11 MR. RUDOVSKY: Well, we do know on the record  
12 and you -- and you have it from the amicus briefs  
13 -- of the number of cases which have been dismissed  
14 after indictments were returned of other Chinese  
15 American scientists, right?

16 JUDGE #1: But there's no allegation that  
17 Special Agent Haugen was involved with those cases.  
18 Don't we need -- I mean, as -- as -- in terms of an  
19 inference of discriminatory animus, doesn't that have  
20 to be --

21 MR. RUDOVSKY: Yeah.

22 JUDGE #1: -- specific to the -- this actor?

23 MR. RUDOVSKY: The -- this Court's decision  
24 in Pitts, which we cite under -- under racial  
25 discrimination, it says you can -- you can prove it by

1 circumstantial evidence --

2 JUDGE #1: Of course.

3 MR. RUDOVSKY: -- you don't need a smoking  
4 gun, you don't need --

5 JUDGE #1: But we don't even have any  
6 circumstantial evidence. We have --

7 MR. RUDOVSKY: I -- I --

8 JUDGE #1: -- a possibility.

9 MR. RUDOVSKY: -- when -- when -- when you're  
10 left with nothing, when -- when an agent knows based  
11 again, on our allegations, since we're only at the  
12 Motion to Dismiss stage, when the agent knows for  
13 sure, "I've got nothing," and proceeds anyway and that  
14 agent is part of a unit that's looking specifically at  
15 Asian Americans, there is a risk under strict  
16 scrutiny, right, that that agent --

17 JUDGE #2: There is a risk.

18 MR. RUDOVSKY: -- that that -- that agent,  
19 right, is looking through a different lens than the  
20 agent should look at -- that -- that's our position.

21 JUDGE #1: We -- we can't -- we can't read an  
22 -- an inference of discrimination into -- into  
23 silence. I mean the implications of that for  
24 malicious prosecution and retaliation claims are --  
25 that -- that's just not tenable.



1 JUDGE #2: Nothing can't be enough to satisfy  
2 Twombly and Iqbal .

3 MR. RUDOVSKY: Right, but let me be clear. I  
4 -- I understand the Court's understanding and -- and  
5 maybe the -- the -- the gap here at this stage in  
6 terms of racial or ethnic bias. That has nothing to  
7 do with our other claims, right? Our other claims are  
8 sufficient, malicious prosecution, falsification of  
9 evidence, search without probable cause --

10 JUDGE #1: To be clear, is the -- the -- the  
11 circumstantial evidence that you would say  
12 distinguishes this case is that you've made  
13 allegations about the bias of the agency to which this  
14 actor is associated?

15 MR. RUDOVSKY: That's right.

16 JUDGE #1: Okay.

17 MR. RUDOVSKY: That would be the basis, but  
18 let me clear, even if the Court disagrees with that,  
19 the basic doctrine under the FTCA we have, we've got a  
20 state law claim, we've got a Constitutional violation,  
21 which removes under this Court's precedent, any  
22 defense from the discretionary function, and we should  
23 at least be able to go to discovery on the FTCA claim.

24 JUDGE #1: So let's -- let's go back to the  
25 discriminatory -- I'm sorry, to the discretionary

1 function exception. Say, on the basis of our case  
2 law, we -- we are to agree that there's no requirement  
3 that the right be clearly established and there --  
4 there are scholars looking at that that have  
5 distinguished that from a finding that the conduct be  
6 clearly unconstitutional. Do you see a meaningful  
7 distinction there and --

8 MR. RUDOVSKY: I -- I -- I --

9 JUDGE #1: -- in -- in the qualified immunity  
10 context or as applied here?

11 MR. RUDOVSKY: -- I -- I don't and I think  
12 one of the reasons that there cannot be is that the  
13 Supreme Court has made absolutely clear that  
14 Governmental entities are not entitled to qualified  
15 immunity. I mean, that's been the law for 40 years  
16 since Owen versus City of Independence. That's where  
17 the Court said, "Sure, individual agents." That's  
18 why, you know, Agent Haugen on the Bivens claim, if we  
19 got that far, could argue qualified immunity. The  
20 United States as an entity is not entitled to  
21 qualified immunity. Qualified immunity is to protect  
22 the individual who's acting, right, from -- from --  
23 from liability and -- and therefore, just as a  
24 doctrinal matter, there's no basis for qualified  
25 immunity. What the Government tries to argue -- they

1 -- and they don't even push that argument really that  
2 -- that somehow there's qualified immunity and even  
3 if there is, our -- our claims are all clearly established  
4 in the circuit, so it becomes irrelevant. The -- the  
5 Government says, "Well, yeah, we -- we -- we've got a  
6 problem here," because really what they're arguing is  
7 that an agent has to get affirmative proof from his  
8 own expert, right, before he gets an indictment in a  
9 case like this, where it may be complex." That's not  
10 our position; our position is just the opposite. When  
11 you're informed by an expert that you have nothing,  
12 then you've got to go further. There -- there's no -  
13 - there's no requirement. You've got probable cause  
14 for that expert advice, but not in this kind of  
15 misunderstanding. So qualified immunity doctrinally  
16 should not apply and even if it did, these Court's  
17 decision in Halsey and Black made -- have made clear  
18 that the Constitution is violated in this kind of  
19 situation by his acts, malicious prosecution, search  
20 without probable cause clearly established in this  
21 Circuit.

22 JUDGE #1: What -- what do we do just in  
23 terms of the standard where the law is unsettled? If  
24 it's not until a given case that's presented to the  
25 Court that there's a determination that it is, in

1 fact, a Constitutional violation, how does that -- how  
2 does that map onto the discretionary function  
3 exception?

4 MR. RUDOVSKY: So our view is, and I think  
5 all the circuits agree on this, in saying that if  
6 there is a violation -- if a court decides in a  
7 particular case, even if they've never held it before  
8 and it was not clearly established, we look at it for  
9 the first time, what you did amounts to a 4th  
10 Amendment violation, let -- let's take that case --  
11 the specific agent has a qualified immunity defense  
12 under a -- if it was 1983, for example, and we didn't  
13 have a Bivens issue -- has a defense of qualified  
14 immunity, the municipality that, right, is sued as  
15 well, does not. The United States under the Tort  
16 Claims Act does not have it and -- and -- and that's  
17 been the rule in every circuit. The -- no -- and, in  
18 fact, you know, the -- the -- the 11th Circuit and 7th  
19 Circuit don't go up on qualified immunity, they go up  
20 on a different kind of reading of the -- of the  
21 statute. No circuit has suggested or held of the 11  
22 circuits that qualified immunity is a defense to a  
23 Tort Claims Act. If a court decides it was a  
24 constitutional violation, the Government loses the  
25 discretionary function defense.

1 JUDGE #1: Fair enough, but the -- the  
2 concept of what's clearly established presumably would  
3 carry over if there were requirement in this context,  
4 in the -- in the FTCA context that the right be  
5 clearly established.

6 MR. RUDOVSKY: But only if -- if you grafted  
7 on qualified immunity to this doctrine that where  
8 there's a Constitutional violation, there's no  
9 discretionary function defense.

10 JUDGE #2: What's weird is that the Supreme  
11 Court has used some language about specific directives  
12 in Gaubert and in Berkowitz, so it's -- it's not  
13 out of nowhere that the -- the court has this idea  
14 where it's looking for something that's specific or  
15 clear.

16 MR. RUDOVSKY: Right, and -- and -- and --  
17 and I understand that in -- in that context. There's  
18 -- there's got to be a mandatory principle, right? A  
19 statute can do it, regulation can do it, a policy can  
20 do it, the Constitution can do it.

21 JUDGE #2: Right.

22 MR. RUDOVSKY: The 4th Amendment says no  
23 unreasonable searches, no searches without warrant, so  
24 on and so forth. There's a specific the Fourth Amendment's  
25 been interpreted to that say you can't

1 maliciously prosecute somebody. You have to have a  
2 cause of action. Our point is in any specific case --  
3 in any specific case, if a court finds that  
4 Constitutional violation after going through all the  
5 facts in the case, even if they haven't addressed it  
6 before, there's no discretionary function defense.  
7 Our basic point in this case is it doesn't matter.  
8 Even if you went that far, every right we argue here -  
9 - I -- I understand the Court's problem with -- with  
10 the 5th Amendment claim on racial discrimination, but  
11 every other of the 4th Amendment rights that we argue  
12 here have been clearly established for years in this  
13 Circuit and the United States Supreme Court. So it's  
14 -- it's a -- it's -- in a sense, it's a non-issue.  
15 When Judge Surrick said it's got to be clearly  
16 established, he didn't even wrestle with all your  
17 Court's cases, which -- which -- which made it clear  
18 that it was. So all we ask the Court to do is apply  
19 this Court's precedent. That's -- that's all we're  
20 asking the Court to do on the FTCA. I understand on  
21 Bivens, room for disagreement as to whether we're in  
22 the heartland or whether we're just a little bit -- we  
23 don't have a -- a client named Bivens, but we think  
24 the facts are -- are very similar. I -- I know I've  
25 run over my time. I know I've tested the patience of the

1 Court. If I could just have those two minutes for rebuttal.

2 JUDGE #1: Indeed. Thank you. We'll hear  
3 from the Government.

4 MR. OVERVOLD: Good morning, Your Honors.  
5 May it please the Court, Leif Overvold with the  
6 Department of Justice on behalf of the Appellees.

7 JUDGE #2: How does the agent pronounce the  
8 name? Haugen, Haugen?

9 MR. OVERVOLD: Haugen.

10 JUDGE #2: Haugen.

11 MR. OVERVOLD: Yes, Your Honor. Thank you.

12 I -- I'd like to start where I think the -- my  
13 colleague's argument ended with the discretionary  
14 function exception and particularly, Judge Bibas  
15 with what your question about the Court's -- the  
16 Supreme Court's case law about the specificity of the  
17 directive that the Court has used, even in the  
18 statutory context to identify the types of legal  
19 requirements that cabin the discretion that  
20 might otherwise be available given the nature of the  
21 actions at issue. The Supreme Court's tests in both  
22 Berkowitz and Gaubert, which this Court has recognized  
23 in Fisher Brothers and numerous other cases  
24 since then, requires that there be a specific  
25 mandatory directive.

1 JUDGE #1: But as soon as the Court has made  
2 the determination that -- that conduct as pleaded  
3 would constitute a Constitutional violation. Surely  
4 the Government agrees that it's mandatory that that  
5 not be violated.

6 MR. OVERVOLD: We certainly don't take issue  
7 with the mandatory component. The -- the difficulty  
8 is that it -- to satisfy the specificity requirement,  
9 the legal requirement must specifically prescribe a  
10 course of conduct in the case before it. And  
11 determining whether a given factual pattern meets  
12 probable cause, that is the sort of thing in which  
13 discretion inherently exists. I mean, this Court  
14 concluded that in Pooler. The D.C. Circuit in Gray  
15 has also articulated the reasons why that's so  
16 and concluding that just because it's the -- a  
17 Constitutional violation is alleged, the elements of  
18 the Constitutional 4th Amendment claim here and the  
19 malicious prosecution claim are identical. I mean,  
20 it's the lack of probable cause and malice.

21 JUDGE #1: So is it the Government's position  
22 that any time there's a probable cause determination  
23 involved that regardless whether there is a  
24 Constitutional violation or not, the discretionary  
25 function exception applies simply because probable



1 cause is part of the analysis?

2 MR. OVERVOLD: No, Your Honor. Our position  
3 is that the Constitutional requirement, just as a  
4 statutory requirement, has to specifically prescribe a  
5 course of conduct and to conclude that a specific  
6 course of conduct is prescribed in the face of a given  
7 factual pattern would overturn Pooler, which was a  
8 malicious prosecution case, which the Court concluded  
9 was clearly subject to the discretionary function  
10 exception, both the sort of activities in determining  
11 what sort of investigation to conduct and then the --  
12 the decision to submit that information to prosecuting  
13 authorities as the basis for an indictment.

14 JUDGE #1: But this is based on fabrication  
15 of evidence. That's the -- the essential problem here  
16 that distinguishes it from your normal malicious  
17 prosecution case, isn't it? And how can fabrication  
18 of evidence be anything but a Constitutional  
19 violation?

20 MR. OVERVOLD: Well, if you look at the  
21 actual factual allegations of the complaint, Your Honor,  
22 this is much closer to a malicious prosecution case.  
23 The supposed fabrication of evidence is coming to a  
24 judgement that the Plaintiff's communications were  
25 unlawful rather than lawful and presenting that

1 assessment to --

2 JUDGE #1: No, they made up -- they made --  
3 he made up stuff. That's very different from your  
4 standard malicious prosecution case.

5 MR. OVERVOLD: Your Honor, there's not an  
6 allegation in the complaint of any particular factual  
7 statement that was made up. I -- it's -- there are certain  
8 allegations that exculpatory evidence was provided at  
9 some point without any real specificity of in what  
10 manner or when it was provided and the -- the agent,  
11 nonetheless, with prosecution -- prosecutors presented  
12 the -- this case to a grand jury.

13 JUDGE #1: Well, they specifically plead that  
14 the special agent was advised by the inventor that  
15 these emails did not relate to this device, that it  
16 was a different device. And --

17 MR. OVERVOLD: Well, even if --

18 JUDGE #1: -- in -- in light of that, if --  
19 if we -- if we do accept the -- the inference that can  
20 be drawn to -- for sequencing purposes, that he was  
21 advised of that before making statements that went  
22 into a search warrant or went in front of the grand  
23 jury, why isn't that a -- a specific false statement?

24 MR. OVERVOLD: Well even as to that  
25 allegation, Your Honor. I mean, there's no -- there's

1 no allegation in the Complaint that Special Agent  
2 Haugen said that the inventor advised him differently  
3 and if you look at the Complaint, it's -- it's in the  
4 allegations that Professor Xi initially purchased this  
5 technology from a company owned by one of the  
6 inventors of the pocket heater, only to have another  
7 company assert ownership, require him to sign an NDA  
8 as a condition of leasing, so in the light of the  
9 allegations of the Complaint, that's much more the  
10 sort of conflicting inferences, even if you accept the  
11 inference that it was presented to the agent before  
12 the indictment, it's the sort of conflicting  
13 inferences that the probable cause standard does not  
14 require an agent to resolve correctly to rule out sort  
15 of an innocent explanation for suspicious facts.

16 JUDGE #1: At -- at the very least, shouldn't  
17 this be something that maybe the District Court looks  
18 at in the first instance? I mean, the District Court  
19 here required there to be clearly established law and  
20 if we don't believe that that's correct, then  
21 shouldn't you make this argument in the first  
22 instance to the -- to the District Court as to  
23 discretionary function as to these -- all of these  
24 specific allegations?

25 MR. OVERVOLD: Well, the District Court

1 concluded entirely sort of consistent with this  
2 Court's case law that the discretionary function  
3 analysis looks to the nature of the actions. They  
4 have not argued that the nature of the actions here  
5 are different from those at issue in Pooler. It does  
6 not sort of rely on the subjective intent of the  
7 person exercising discretion and in looking for the  
8 sort of specific mandatory directive that the Supreme  
9 Court has required, in -- in the -- my colleague's  
10 Reply Brief, I mean, the -- what they point to in  
11 terms of their argument as to why it's sufficiently  
12 specific is their briefing on the clearly established  
13 Constitutional violation argument. They are relying  
14 on those arguments for the -- the claim that they've  
15 alleged a sufficiently specific directive. So it's  
16 entirely natural, consistent with the -- the Court's  
17 decision in Bryan, for the District Court to look  
18 to the same -- same standard. So we're -- we're not  
19 arguing that the standards are identical, but there's  
20 certainly no error when there's no other basis to  
21 conclude that the Constitution provides a sufficiently  
22 specific directive to look to that clearly established  
23 standard in this case given the sort of that's the  
24 basis by which they've argued -- they've alleged a  
25 sufficiently specific directive.

1           JUDGE #1: You -- you seem to be reverting to  
2 the -- the concept of clearly established in the  
3 qualified immunity context, that is -- that is  
4 sufficiently specific and mandatory that an agent  
5 would know ahead of time, but the argument that seems  
6 to be put forth by the Plaintiff is that here we're  
7 talking about just the finding of a Constitutional  
8 violation and it doesn't matter whether it's there's  
9 advanced notice to a reasonable officer or not, that  
10 we have different concerns when it comes to the  
11 discretionary function exception and -- and narrow  
12 interpretation of exceptions to the waiver of  
13 sovereign immunity in the False Tort Claims Act.

14           MR. OVERVOLD: Well, we agree, I mean, it's  
15 a different sort of standard when you're applying the  
16 express discretionary function exception in the  
17 context of a waiver of sovereign immunity. I -- that  
18 doesn't sort of provide a basis for reading in a  
19 Constitutional exception to the discretionary function  
20 exception's analysis that is not there in the text and  
21 I -- I think the 11th Circuit's decision in Shivers  
22 does note that. I mean, I -- as a matter of just  
23 textual analysis, the notion that you can dispense  
24 with the Berkowitz/Gaubert lbert inquiry whenever you've  
25 alleged a constitutional violation does not track the

1 text and the way the Supreme Court has indicated that  
2 text should be --

3 JUDGE #2: The text --

4 MR. OVERVOLD: -- interpreted.

5 JUDGE #2: -- you might have a point on, but  
6 I think Mr. Rudovsky has a strong point about the way  
7 the Supreme Court has been applying this. In cases  
8 like Gaubert and Berkowitz, it hasn't been looking  
9 function by function, it's been looking act by act and  
10 so, if that's the case, then the 7th and 11th Circuits  
11 need to take it up with the Supreme Court.

12 MR. OVERVOLD: Well, I -- in my  
13 the 7th and 11th Circuit do look at the specific  
14 natures of the acts alleged. I mean, in the 7th  
15 Circuit case, it was a malicious prosecution  
16 allegation and they concluded the nature of those  
17 actions consistent with the Court's previous case law  
18 was that those were discretionary. I believe the 11th  
19 Circuit --

20 JUDGE #2: But can it be just -- how can an  
21 act be within discretion if the act is  
22 unconstitutional. The -- the logic of the statute --  
23 the -- when you look at, you know, cases like  
24 Berkowitz and Gaubert, the logic of treating statutes  
25 and regs, like we -- we got to look for clear

1 things is, well, in that situation maybe it was  
2 delegated to the agency if it wasn't clear, but  
3 there's no way in which an unclear Constitutional  
4 provision delegates any power to an agency.

5 MR. OVERVOLD: Well, the indictment decisions  
6 -- the sort of -- the actions underlying a malicious  
7 prosecution claim, the decision whether to take  
8 certain action in enforcing the laws of the United  
9 States, those are delegated both Constitutionally and  
10 statutorily to the Executive Branch. I mean, that's  
11 the Gray sort of articulates why -- as -- absent the  
12 sort of Constitutional allegations. That's why this  
13 Court and others have held that those malicious  
14 prosecution claims are generally subject to the --

15 JUDGE #2: Well, but --

16 MR. OVERVOLD: -- discretionary function  
17 exception.

18 JUDGE #2: -- let's say you have some kind of  
19 selective prosecution violation of, you know, the 5th  
20 Amendment or something like that, that's not  
21 delegated. The ability to engage in selective  
22 prosecution is not delegated to a prosecutor.

23 MR. OVERVOLD: It's certainly possible if  
24 the nature of the actions were different, if they were  
25 challenging, sort of not a particular decision to go

1 or not go forward with an indictment, that might  
2 change the -- the discretionary function analysis. If  
3 the alleged Constitutional violation was clearly  
4 established, that again might cabin the  
5 discretion similar to the way it does in the Berkowitz  
6 or Gaubert context, but what you can't do, I would  
7 submit, is that accepting the general -- the --  
8 the probable cause standard is obviously  
9 Constitutionally grounded, that in any case a Court  
10 determines it was not met in a particular case, you  
11 have essentially gutted Pooler and the cases Pooler  
12 reflects that malicious prosecution is sort of the  
13 quintessentially discretionary actions that the -- the  
14 exception does protect.

15 JUDGE #1: I'm confused about your -- your  
16 reliance on Pooler because we -- we said there if the  
17 complaint were that the agents of the government in  
18 the course of investigation had violated  
19 Constitutional rights or federal statutes, the outcome  
20 would be different since federal officials do not  
21 possess discretion to commit such violations, but when  
22 the sole complaint is -- is here -- as here to the  
23 quality of the investigation as judged by its outcome,  
24 the discretionary function should and, we hold, does  
25 apply. How does Pooler help you?



1 MR. OVERVOLD: So Pooler, in talking about  
2 the types of Constitutional allegations that might not  
3 be sufficient, mentions specifically unlawful  
4 searches, which are unlikely to be covered by the  
5 discretionary function exception in the first place --

6 JUDGE #1: Well, there's a difference in  
7 obtaining an unlawful search on someone, you know,  
8 lacking probable cause or something, and a purposeful,  
9 you know, omission of information or making up  
10 information. It's -- this -- this is of a different  
11 character from a -- the quality of the investigation  
12 being poor.

13 MR. OVERVOLD: There are certainly -- I mean,  
14 Pooler was before --

15 JUDGE #1: But there again, shouldn't we have  
16 the District Court analyze whether it's just the  
17 quality of the investigation and get further into the  
18 weeds of this --

19 MR. OVERVOLD: Well, I think the District --

20 JUDGE #1: -- because it's a matter of -- of  
21 -- matter of degree.

22 MR. OVERVOLD: -- I think the District Court  
23 did in determining that the -- they did not state a  
24 clearly established Constitutional violation here, did  
25 -- there are violations that go beyond the quality of

1 the investigation. The 1st Circuit's decision in  
2 Limone involves actual allegations of fabricated  
3 evidence to sort of frame the -- the Plaintiff in that  
4 case which were proven. That -- those, both in the  
5 nature of the actions involved and the clarity with  
6 which they -- they violated Constitutional standard,  
7 that might get you out of the discretionary function  
8 exception. The other point I would make on Pooler is  
9 that since Pooler, the Supreme Court in Gaubert has  
10 made quite clear the inquiry is the nature of the  
11 actions, not the subjective intent of the decision-  
12 maker exercising discretion. Having it turn on sort  
13 of whether it's a garden variety malicious prosecution  
14 claim versus a Constitutional claim flips that  
15 inquiry. I mean, it again reads out the Gaubert  
16 standard.

17 JUDGE #1: But does -- does this just boil  
18 down to the -- the sufficiency of -- of the pleading  
19 here?

20 MR. OVERVOLD: Well, certainly as in Karkalas,  
21 I mean, if this Court concludes that they have not  
22 stated a Constitutional violation, which we submit  
23 they have not, it need not decide how the --

24 JUDGE #2: Well, let me ask you. Mr.  
25 Rudovsky argued with some force that if we put

1 Paragraphs 3, 53, and 55(A) together, we have the  
2 inventor of the pocket heater telling Special Agent  
3 Haugen that this is something completely different and  
4 3 and 53 tell us that those statements were made to  
5 him before he went ahead and said the contrary. So  
6 how is that not specific enough? What more does he  
7 need to plead?

8 MR. OVERVOLD: Well, even if you stitch  
9 together the -- the Complaint -- the allegations that  
10 way to get the sort of timing assertion, it -- it  
11 still is the sort of conflicting inference that it  
12 doesn't give rise to a Constitutional violation at the  
13 probable cause stage. Again, in the context of we  
14 know from the allegations that Professor Xi that  
15 initially purchased this technology from one company  
16 owned by one inventor, another company, presumably  
17 with some other connection to the -- the technology,  
18 then asserted ownership and required him to sign an  
19 NDA. The fact that one inventor in that context is  
20 saying, "This is not the -- one of the emails is not  
21 concerning this technology," that does not sort of  
22 give rise to an inference that in nonetheless  
23 proceeding with the indictment the agent  
24 intentionally, knowingly, or recklessly provided a  
25 false statement.

1 JUDGE #1: Again, then I say, well, let's let  
2 the District Court sort -- sort this out.

3 MR. OVERVOLD: Well, Your Honor, I -- the  
4 District Court erred in sort of using the clearly  
5 established violation only if you -- not -- I -- I  
6 apologize. We don't think it erred in using that  
7 formulation when that's the only articulation the  
8 other side has given of how they've alleged a  
9 sufficiently specific directive; otherwise, you're  
10 reading a Constitutional exception into the  
11 discretionary function exception absent any textual  
12 basis to do that, absent even -- even putting the  
13 Constitutional requirement to the same standard that a  
14 statutory violation --

15 JUDGE #1: Berkowitz says there has to be a  
16 permissible exercise of policy judgement. If there's  
17 -- if -- if -- if what is pleaded tracks what has been  
18 held to be a standard type of Constitutional violation  
19 for purposes of -- of malicious prosecution, then how  
20 -- how can it be a permissible exercise of policy  
21 judgement? Why shouldn't we be at the Motion to  
22 Dismiss stage certainly, and the way we're supposed to  
23 draw inferences, concluding that that is sufficiently  
24 -- sufficiently pleaded as a run-of-the-mill violation  
25 and -- and the discretionary function exception

1 therefore can't preclude it from moving forward.

2 MR. OVERVOLD: Well, Gaubert makes clear that  
3 again, the subjective intent of the decision-maker is  
4 not the basis on which the Court determines whether or  
5 not judgement has been permissible -- the -- the  
6 judgement is permissible in a particular case. I see  
7 that -- I would add that -- this Court's decision in Baer  
8 in particular, I think, also articulates well that  
9 even a -- and I -- I believe it's a regulatory  
10 standard there, but an allegation that the discretion  
11 was impermissibly exercised because it was in  
12 violation of some regulatory requirement not to give  
13 preferential treatment, that doesn't sort of get you  
14 out of the Gaubert inquiry when the nature of the  
15 actions otherwise don't -- are -- are discretionary.

16 JUDGE #1: Okay.

17 JUDGE #2: That's it.

18 JUDGE #1: All right. Thank you.

19 MR. OVERVOLD: Thank you.

20 JUDGE #1: Mr. Rudovsky?

21 MR. RUDOVSKY: I think the last thing that  
22 the government argued makes our point. On their  
23 reading of the Complaint, there are conflicting  
24 inferences that you can draw as to what Agent Haugen  
25 did. On a Motion to Dismiss when there are

1 conflicting inferences, this Court is clear, the case  
2 must go on to discovery. It will be reviewed again in  
3 Summary Judgement, a jury can make a decision. If  
4 they want to argue that Agent Haugen was just  
5 negligent at some point and didn't deliberately violate  
6 Professor Xi's rights, they're free to argue that.  
7 They can argue it at Summary Judgement, they can argue  
8 it to the jury. The point and -- and -- and I think  
9 you all made it -- is that -- and I'll -- I'll -- let  
10 me -- let me just read from Owens versus City of  
11 Independence, the case that rejected qualified  
12 immunity for government entities, as to the question  
13 of whether Constitutional dictates are mandatory or  
14 not compared to statutes, regulations -- even more  
15 than statutes and regulations. They said  
16 Constitutional dictates -- and I quote -- "are  
17 absolute and imperative." The 4th Amendment, once you  
18 define it, is absolute imperative. Sure, there are  
19 exceptions, but you reach a -- a decision, the -- the  
20 -- and -- and so much water has passed under the  
21 bridge since Pooler and Berkowitz -- this Court has  
22 said in -- in the 1983 context, which is the same as  
23 to the Constitutional violations, malicious  
24 prosecution is a 4th Amendment violation,  
25 falsification of evidence is both a 4th and 5th

1 Amendment due process violation. They've made that  
2 clear. The -- the -- even under a clearly established  
3 mandatory standard, we win -- and -- and -- and  
4 that's why, Judge Rendell, I -- I -- I resist -- I  
5 push back on the notion for remand. We waited for two  
6 and a half years for Judge Surrick to decide this  
7 case. It took a long time. He had it -- I think he  
8 made a -- two fundamental errors in misreading the  
9 Complaint and application of the law. Based on  
10 clearly established law in this Court and the Supreme  
11 Court, this Court should remand, not for  
12 reconsideration on a Motion to Dismiss, but to go  
13 ahead with discovery, let the government make these  
14 arguments, if they can, at Summary Judgement. That --

15 JUDGE #1: Mr. Rudovsky, to -- to clarify --  
16 for the purposes of the Federal Tort Claims Act, if we  
17 were to agree with you as to the sufficiency of the  
18 pleading for a malicious prosecution claim that would  
19 negate the discretionary function exception, is there  
20 any need for us to reach your claims of an equal  
21 protection violation?

22 MR. RUDOVSKY: I -- I -- I think you have to  
23 address them because we -- we -- we -- we stand by  
24 them. I -- I think we've got that claim, but I've  
25 made clear that even if we only succeed on malicious

1 prosecution, falsification of evidence, and a search,  
2 right, without probable cause, any one of them defeats  
3 the discretionary function as to those claims. So  
4 each claim stands on its own. If you think that we  
5 haven't pled enough for 5th Amendment racial/ethnic  
6 discrimination claim, you -- you could certainly  
7 affirm dismissal of that, but it still leaves the  
8 others standing and they operate to defeat the  
9 discretionary function, if I understand your question.

10 JUDGE #1: Well, the -- the nature of the  
11 claims you've brought in Counts 4 through, I guess, 9  
12 we're dealing with, none seem to be specific to race  
13 or ethnic discrimination.

14 MR. RUDOVSKY: I -- I -- I understand the  
15 Court's point about that. I -- I -- I think given the  
16 way we -- we pled it both in the factual pleadings and  
17 then in the counts, there's sufficient plausibility  
18 here that there's an independent 5th Amendment claim.  
19 I -- I understand the Court's feeling that where's the  
20 evidence for that. I -- I think we have enough for an  
21 inference, but it's --

22 JUDGE #1: I understand how the independent  
23 claim might inform a Bivens claim. I guess I'm trying  
24 to understand for purposes of the Federal Tort Claims  
25 Act --



1 MR. RUDOVSKY: Right, and --

2 JUDGE #1: -- what relevance it has.

3 MR. RUDOVSKY: -- right, and -- and -- right  
4 -- right, and -- and that's right and then, but if --  
5 I may be misunderstanding your question -- if you  
6 decide that there's not sufficient evidence for a  
7 freestanding 5th Amendment race/ethnic discrimination  
8 claim, that leaves the Court with consideration of  
9 malicious prosecution, falsification of evidence, and  
10 the 4th Amendment search without probable cause -- all  
11 of those are clearly established, all of those would  
12 operate to defeat the discretionary function defense  
13 as to those three claims.

14 JUDGE #1: Yeah.

15 MR. RUDOVSKY: That -- that's my point.

16 JUDGE #1: The point is that it's not pled as  
17 a Federal Tort Claim Act, it's pled assuming a Bivens  
18 --

19 JUDGE #2: (Cross talk).

20 JUDGE #1: -- it -- it's -- it's only -- the  
21 only purpose, in other words, the only relevance for  
22 purposes of the Federal Tort Claims Act is as it  
23 relates to discretionary function exception; is that  
24 right?

25 MR. RUDOVSKY: Exactly. It -- it -- it --

1 that's right. It -- it -- it operates to defeat the  
2 discretionary function, which is exactly what Pooler  
3 says, all the other cases say, and which every  
4 circuit, until the recent decisions, have -- have made  
5 the same point.

6 JUDGE #1: But it doesn't -- it doesn't  
7 expressly underlie the claims of malicious  
8 prosecution, invasion of privacy, emotional distress?

9 MR. RUDOVSKY: That's right. That's correct.

10 JUDGE #1: Okay. Thank you.

11 MR. RUDOVSKY: Thank you.

12 JUDGE #1: Okay. Absolutely. We thank  
13 Counsel for excellent briefing and argument in this  
14 case as well and could the Parties please also arrange  
15 for a transcript to be produced in this case? Again,  
16 we'll put out an Order to that effect and we will take  
17 the case under submission. Thanks, all.

18 (Whereupon, at 11:51 a.m., the proceeding was  
19 concluded.)

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CERTIFICATE OF TRANSCRIBER

I, MITZI LIMBURG, do hereby certify that this transcript was prepared from the digital audio recording of the foregoing proceeding, that said transcript is a true and accurate record of the proceedings to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

MITZI LIMBURG

[&amp; - accept]

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