No. 11-1647

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Hans Keil,

Plaintiff-Appellant,

v.

Glenn Triveline; Laura Foster; Michael Spinella;
Todd Hamilton; Jack Barnhart; United States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

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SUMMARY OF THE CASE

Federal agents arrested plaintiff Hans Keil in connection with an investigation into the mistreatment of Samoan citizens brought to the United States to perform at a theater in Branson, Missouri. In a criminal complaint approved by a Magistrate Judge, plaintiff was charged with falsely representing himself to be a U.S. citizen (in violation of 18 U.S.C. § 911), and misusing a passport (in violation of 18 U.S.C. § 1544). After plaintiff later uncovered new evidence concerning his entitlement to U.S. citizenship on a theory he had previously disavowed, the United States promptly dismissed the charges against him.

Plaintiff filed a *Bivens* action against individual federal agents, and a Federal Tort Claims Act (FTCA) suit against the United States. The district court granted the defendants' dispositive motions and entered judgment against plaintiff. Plaintiff now appeals, but only on the narrow and limited question of whether the agents were legally entitled to qualified immunity because they had probable cause to arrest him.

In the government's view, while the district court's decision is correct, oral argument may nevertheless assist the Court in the disposition of this appeal. Fifteen minutes of argument per side should allow sufficient time to present the case.

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BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346(b). The court entered final judgment on January 11, 2011. Defendants-Appellees' Appendix ("App.") 107. Plaintiff filed a timely notice of appeal on February 3, 2011. App. 107; Fed. R. App. P. 4(a). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether federal agents were entitled to qualified immunity because they had probable cause to arrest plaintiff for criminal and immigration offenses.

8 U.S.C. § 1324; 18 U.S.C. §§ 371, 911, 1542, 1544, 1546; 22 C.F.R. §§ 51.1(*l*), 51.2; *Devenpeck* v. *Alford*, 543 U.S. 146 (2004); *Amrine* v. *Brooks*, 522 F.3d 823 (8th Cir. 2008); *Smithson* v. *Aldrich*, 235 F.3d 1058 (8th Cir. 2000).[1]

STATEMENT OF THE CASE

Plaintiff was arrested in connection with a federal investigation into the mistreatment of Samoan citizens brought to the United States to perform at a theater in Branson, Missouri, and was charged with falsely representing himself to be a U.S. citizen (in violation of 18 U.S.C. § 911) and misusing a U.S. passport (in violation of 18 U.S.C. § 1544). After plaintiff presented new evidence concerning his claim to citizenship, the government dismissed the charges pending against him.

Plaintiff then filed this suit against individual federal agents under *Bivens* and against the United States under the Federal Tort Claims Act.

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[1] The pertinent statutory provisions are reprinted in an addendum to this brief.

The district court dismissed the claims against one of the individual *Bivens* defendants (Glenn Triveline) for failure to state a claim and for lack of personal jurisdiction. It later granted summary judgment to the remaining *Bivens* defendants on qualified immunity grounds, holding in pertinent part that plaintiff's arrest was supported by probable cause. The court also granted the United States' motion to dismiss and for summary judgment on plaintiff's FTCA claims, explaining that there was no legal basis for holding the United States liable in tort. Plaintiff now appeals only the limited probable cause determination, and has abandoned the remaining *Bivens* claims (including those against defendant Triveline), and all of his FTCA claims against the United States.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Issuance and Use of Passports

In the Passport Act, Congress granted the Secretary of State the authority to issue passports, to deny passport applications, and to revoke passports already issued. 22 U.S.C. § 211a; *Haig* v. *Agee*, 453 U.S. 280,

290-291 (1981). The Act also gives the Secretary "broad rule-making authority," *Haig*, 453 U.S. at 291 (citing *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965)), to promulgate rules governing the issuance and use of passports, *see, e.g.*, 22 C.F.R. §§ 51.1 *et seq*.

It is a crime for any person to "falsely and willfully represent[] himself to be a citizen of the United States." 18 U.S.C. § 911. It is also a crime to "willfully and knowingly use[] or attempt[] to use any passport in violation" of the "rules * * * regulating the issuance of passports," 18 U.S.C. § 1544, including the requirement that only a citizen or non-citizen national may use a U.S. passport, *see* 22 C.F.R. §§ 51.1(*l*), 51.2. It likewise is a crime to "make[] any false statement in an application for [a] passport with intent to induce or secure the issuance of a passport," or to "use[] or attempt[] to use * * * any passport the issue of which was secured in any way by reason of any false statement." 18 U.S.C. § 1542.

B. Nonimmigrant Visas and the Penalties for Their Misuse

The Immigration and Nationality Act ("INA") specifies certain categories of persons who may be admitted to the United States on nonimmigrant visas "for such time and under such conditions as the

Attorney General may by regulations prescribe." 8 U.S.C. § 1184. As relevant here, a person who "performs as an artist or entertainer" and "seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique," may obtain entry to the United States under what is known as a "P-3" nonimmigrant visa. *Id.* § 1101(a)(15)(P)(iii); 8 C.F.R. § 214.1(a)(2) (correlating statutory sections with visa designations). The P-3 visa does not authorize non-immigrants to perform other kinds of work while in the United States.

Congress has enacted several provisions designed to discourage the misuse of nonimmigrant visas. In particular, it has prohibited visa fraud by making it a crime for any person to "use[], attempt[] to use, possess[], obtain[], accept[], or receive[] any [immigrant or nonimmigrant] visa * * * knowing it * * * to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained." 18 U.S.C. § 1546. It is also a crime to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in

reckless disregard of the fact that such coming to, entry or residence is or will be in violation of law," 8 U.S.C. § 1324(a)(1)(A)(iv), or to conspire to commit such an offense, *id.* § 1324(a)(1)(A)(v)(I).

II. FACTUAL BACKGROUND

A. Investigation Of The Dutton Family Theater

In October 2007, U.S. Immigration and Customs Enforcement ("ICE") Senior Special Agent Laura Foster, an individual *Bivens* defendant here, received a tip regarding the mistreatment of Samoan performers at the Dutton Family Theater in Branson, Missouri. App. 18, 28-30. The tip alleged that the theater had recruited Samoan performers to come to the United States; that, upon arrival, the proprietors took the performers' travel documents and forced them to work long hours in food service, child care, and housekeeping; and that some of the Samoans were forced to sleep in crowded apartments without enough beds. App. 18, 28-30.

Agent Foster queried immigration databases, and learned that a theater representative had helped to secure P-3 performer visas for seventeen citizens of the Independent State of Samoa. App. 18.[2] As

[2] The Independent State of Samoa, formerly known as Western Samoa, is not part of the United States. It is distinct from American

noted, that visa category allows certain entertainers to enter the United States "temporarily and solely to perform, teach, or coach," as part of a "program that is culturally unique," 8 U.S.C. § 1101(a)(15)(P)(iii), and does not authorize other types of work.

Agent Foster visited the theater complex to investigate, and observed individuals who appeared to be of Pacific Islander descent running a cash register at the theater's deli, serving customers, and sweeping. App. 19. These individuals confirmed that they were Samoans performing with a Pacific Island dance show called "Island Fire." App. 19. Agent Foster also saw performers change into street clothes so that they could work at the concession stand. App. 19. She spoke to a performer, who stated that the Samoans were required to work sixty to eighty hours per week, mostly at the deli, motel, and theater. The performer also confirmed that the proprietors had taken the Samoans' passports and visas. App. 20. Over the following weeks, Agent Foster interviewed several of the Samoans; each confirmed that the performers had been assigned to staff the deli, clean the motel, and perform domestic and yard

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Samoa, which is an "outlying possession" of the United States. App. 33.

work. *Ibid.*

B. Plaintiff's Involvement in the Investigation

1. In her interviews with the Samoan performers, Agent Foster learned that plaintiff and his daughter, Belle Keil Dutton, had recruited them to come to the United States. App. 20. Agent Foster obtained a copy of the performers' visa petition, and saw that it was accompanied by a letter from plaintiff, who identified himself as an "Associate Minister" of the "Government of Samoa." App. 32. The letter stated that the performers were part of a group that had traveled and performed internationally, and urged that the visas be issued. App. 31-32.[3]

In late November 2007, ICE agents went to the theater to apprehend fourteen Samoans for working outside the scope of their visas. App. 20. When the agents arrived, four of the performers were serving breakfast at the deli, and one was working at the motel. App. 20. During interviews at ICE offices, the performers stated that plaintiff and his daughter had recruited them, and that plaintiff told them they could work at the deli and motel in addition to performing. App. 21. Several also stated that

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[3] In fact, only two of the performers had previously performed as part of the group; the rest were recruited to perform in Branson. App. 20.

plaintiff had instructed them to tell the U.S. consular official conducting their visa interview only that they would be performing and promoting Samoa. App. 21.

Plaintiff came to Branson the following month, and agreed to meet with Agent Foster and another ICE agent. App. 21. During that interview, plaintiff stated that he was a minister for the Samoan government; that he was born in Samoa (then Western Samoa) to a German father and a Samoan and Chinese mother; that he had recruited the Island Fire performers; that he had contacted a U.S. consular official to expedite the visa process; and that he had come to Branson to escort the performers back home. App. 21.[4]

After meeting with plaintiff, Agent Foster checked immigration databases and learned that plaintiff had not returned to Samoa with the performers but, instead, had departed the United States for Belgium. App. 21. She also discovered that plaintiff presented a U.S. passport upon arrival in and departure from the United States. Agent Foster decided to investigate plaintiff's use of a U.S. passport because plaintiff had not

[4] The performers were allowed to voluntarily depart the United States with the understanding that they would return the following spring. App. 21.

mentioned being a U.S. citizen and, to the contrary, indicated he was born outside the United States to a German father and a Chinese and Samoan mother. App. 21. She sought assistance from Jack Barnhart, a Special Agent in the State Department's Diplomatic Security Service (also a defendant in this *Bivens* action). App. 22.

2. Agent Foster also sought assistance from the U.S. Citizenship and Immigration Services ("CIS"). App. 22. The CIS Field Office Director in Kansas City, Missouri, reviewed plaintiff's immigration records and determined that plaintiff was not a U.S. citizen. She sent Agent Foster a letter explaining why. App. 22, 33-34 (letter).

CIS noted that Keil was born in 1944 in Western Samoa, which is not part of the United States. His father was likewise born in Western Samoa in 1923, and there was "no record that he ha[d] ever become a U.S. citizen." App. 33. Keil's mother, by contrast, was born in American Samoa – which, unlike Western Samoa, is an "outlying possession" of the United States – and had obtained U.S. citizenship at birth. App. 33.

CIS explained, however, that plaintiff was not entitled to U.S. citizenship through his mother. At the time of plaintiff's birth, a child born abroad to a U.S. citizen and an alien would receive citizenship only

if the citizen-parent had lived in the United States (or an outlying possession) for at least ten years – five of which must have been after the age of sixteen – prior to the child's birth. App. 34; Nationality Act of 1940, 8 U.S.C. § 601(g) (1946) (repealed 1952). Plaintiff's mother did not meet this requirement because she married his father at the age of 18 and moved with him to Western Samoa, where she gave birth to plaintiff two years later. Plaintiff was thus not entitled to citizenship through his U.S.-citizen mother. App. 34.

Agent Foster also discovered that Keil had twice applied for a certificate of U.S. citizenship, but had abandoned both applications. Keil first applied for a certificate of citizenship in 1967. App. 22, 35-40. That application claimed U.S. citizenship through his mother and specifically stated: "FATHER NOT A U.S. CITIZEN." App. 36. (A contemporaneous passport application similarly indicated that plaintiff's father was not a U.S. citizen. App. 68.) The Immigration and Naturalization Service ("INS") sent plaintiff a letter instructing him to appear for a hearing, but no indication exists that he ever appeared or that INS ever granted his application. App. 22, 41.

Plaintiff again applied for a certificate of citizenship in 1976, App.

22, 42-45, inaccurately indicating that he "HA[D] NOT previously filed an application for a certificate of citizenship * * *." App. 44. As before, plaintiff claimed U.S. citizenship through his mother; the portion of the form where he could have explained his father's citizenship is blank. App. 43. INS requested evidence of plaintiff's mother's presence in the United States before his birth, but, again, no evidence exists that plaintiff ever responded or that INS ever granted his petition. App. 22, 47.[5]

3. Although it appeared that plaintiff was not entitled to, and had never been granted, citizenship, he had nevertheless applied for and received a U.S. passport five times beginning in 1967. App. 21, 57, 60-61, 67.[6] He presented these passports upon arrival in the United States on

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[5] Defendant does not dispute that he submitted these two applications; that he stated his father was not a citizen; and that he never appeared for his INS hearing or provided the information requested about his mother. *See* Pl's Resp. to Defs.' Mot. to Dismiss and for Summary Judgment (Dkt. No. 83) ("Pl's Resp.") at A-B (facts in paragraphs 20, 22, 24-25, and 28-29 are "uncontroverted").

[6] The Department of State issued Keil a passport in 1967 "with the understanding that [he would] submit a Certificate of Citizenship from the Office of Immigration and Naturalization." App. 70. When plaintiff failed to provide the requested certificate of citizenship, the Department sent him a follow-up letter requesting that he "submit immediately evidence of citizenship." App. 71. As noted above, plaintiff never obtained such a certificate, App. 22, 41, 60, but he nevertheless continued to renew his 1967 passport. App. 61.

multiple occasions. App. 57. On plaintiff's most recent passport application, in 2006, his signature appears below a statement that he is a U.S. citizen. App. 57, 62-63.

That application also lists as plaintiff's address a residence in Buena Park, California. App. 57, 62-63. Diplomatic Security Service Agents visited that address, which turned out to be where plaintiff's mother lived; plaintiff did not live there. App. 58. Agent Barnhart noted that individuals seeking to obtain U.S. passports often invoke a U.S. address at which they do not reside to avoid scrutiny of their passport application. App. 57-58.[7]

C. Plaintiff's Interference With the Visa Fraud Investigation and Arrest For Falsely Claiming U.S. Citizenship and Misusing a Passport

1. In 2008, many of the same Samoan performers returned to Branson on P-3 performer visas to perform at the Dutton theater. App. 22. Agents Foster and Barnhart again interviewed several performers,

[7] Agent Barnhart also investigated whether plaintiff, who claimed to be a Minister of the Government of Samoa, App. 32, was entitled to diplomatic privileges. *See* App. 56-57. The State Department's Deputy Assistant Chief of Protocol for Diplomatic Affairs provided Agent Barnhart a letter stating that Keil was "not a duly accredited member of the diplomatic community and is not afforded privileges and immunities." App. 64.

who stated that plaintiff had instructed them not to talk to law enforcement officers – in particular, ICE agents – about work outside of dancing at the theater. App. 22-23, 57.

In August 2008, one of the Samoan performers asked to meet with Agent Foster. Four performers subsequently met with Agent Foster and ICE Senior Special Agent Todd Hamilton (another *Bivens* defendant here), and reported that the proprietors had forced one performer to return to Samoa without explanation; that plaintiff's daughter threatened to send more performers home; and that plaintiff had warned that persons sent back to Samoa for talking to ICE agents would be fired from their jobs in Samoa. App. 23, 81.

The following month, a Samoan performer, Ameto Galu, reported to Agent Foster that the performer who had been sent back to Samoa had been fired from his job there. App. 23. Galu also reported that plaintiff was returning to Branson "because he had become angry about the performers' contact with ICE." App. 23. Agents Foster, Barnhart, and Hamilton discussed this information with ICE Resident-Agent-in-Charge Michael Spinella (a *Bivens* defendant here as well). App. 24, 58, 81, 86. The Agents believed that the performers were witnesses in the ongoing

investigation, and that their return to Samoa would hinder the investigation and prosecution. App. 24, 58, 81, 86.

The agents also concluded at that time that they had probable cause to arrest plaintiff, who could be difficult to apprehend if he returned to Samoa. App. 24, 58, 81, 86. The agents prepared to arrest plaintiff on criminal charges. App. 24, 86. Agent Foster also prepared an administrative immigration warrant for plaintiff's arrest on civil immigration charges, which Agent Spinella signed. App. 48, 86, 89 (administrative warrant).

2. On the morning of September 9, 2008, Agents Spinella, Foster, Hamilton, and Barnhart waited outside the theater and watched as the performers, and then plaintiff, entered. App. 24, 58-59, 82, 87. Galu called Agent Foster and "sounded terrified"; he stated that plaintiff was making him return to Samoa. App. 24.

The other Agents (Hamilton, Barnhart, and Spinella) saw Galu run out of the back entrance of the theater and across the parking lot. App. 59, 82, 87. Plaintiff ran out of the same entrance in apparent pursuit. App. 59, 82, 87. Agents Hamilton and Barnhart drove up to plaintiff, identified themselves, and asked whether plaintiff had a U.S.

passport. App. 59, 82. Plaintiff said that he did and invited the Agents into the theater, where he retrieved the passport and provided it to the Agents. App. 59, 82. Agent Barnhart asked plaintiff whether he was a U.S. citizen; plaintiff responded that he was. App. 59, 82. Agent Barnhart then seized the passport, and Agent Hamilton arrested plaintiff. App. 59, 82. Agent Hamilton, the arresting officer, effectuated the arrest "based on [his] honest belief that Keil had violated federal criminal and immigration laws." App. 83; *see* App. 97 ¶¶10-11 (plaintiff violated 18 U.S.C. §§ 911 and 1544 by claiming citizenship and presenting his passport to the Agents); *see also* 8 U.S.C. § 1357(a) (arrest authority for ICE agents); 22 U.S.C. § 2709(a) (arrest authority for State Department Special Agents).

After being advised of his *Miranda* rights, plaintiff consented in writing to be interviewed by Agents Barnhart and Foster. Plaintiff told them, among other things, that he had been living and working outside the United States since 1967 and had not filed a U.S. tax return in that time; that he filed the application for a certificate of citizenship in 1976 because he "doubted" whether he was a U.S. citizen; that he had received INS notice of the need for an interview but had decided not to attend; and

that his father was a German citizen. App. 25, 59-60.

D. The Criminal Complaint and Dismissal of Charges After Plaintiff's Assertion of a New Claim to Citizenship Through His Father

The following morning, on September 10, 2008, Agent Barnhart appeared before a United States Magistrate Judge to swear out an affidavit in support of a criminal complaint charging plaintiff with making a false claim of citizenship in violation of 18 U.S.C. § 911, and misuse of a passport in violation of 18 U.S.C. § 1544. App. 60, 95-97. The Magistrate Judge approved the complaint, formally charging plaintiff with those offenses. App. 93. The Magistrate Judge also signed a warrant for plaintiff's arrest on these criminal charges, which the U.S. Marshal executed. Add. 2-3; App. 98 (criminal warrant).

A week later, the State Department revoked plaintiff's passport. Agent Barnhart served plaintiff with a letter explaining that the Department had determined plaintiff was not entitled to citizenship through his mother because she had not lived in the United States for five years after her sixteenth birthday and before his birth. App. 60, 65-66.

The following month, plaintiff's attorneys sent the State Department a letter asserting for the first time that Keil's *father* was a U.S. citizen,

and thus that plaintiff had acquired U.S. citizenship at birth by being born to two U.S.-citizen parents. App. 72-74. This assertion was contrary to Keil's repeated attestation in immigration and passport-related paperwork that his father was *not* a citizen. *See, e.g.*, App. 36, 43, 68. Among other things, the letter relied on a newly-discovered 1896 State of Illinois document that, according to plaintiff, demonstrated that his grandfather had become a naturalized U.S. citizen. App. 61, 72-77. Based on that document, plaintiff asserted that his father was born a citizen under a U.S. law in effect from 1878 to 1934, which granted citizenship to any child whose father was a U.S. citizen and had resided in the United States. App. 73.

Shortly thereafter, the State Department determined in keeping with plaintiff's new theory that his father was, indeed, a U.S. citizen, and that plaintiff therefore was a U.S. citizen by virtue of being a child of two U.S.-citizen parents. App. 61. Accordingly, the United States promptly dismissed the charges pending against him. App. 99.

Three days after the charges were dismissed, the Department of State sent plaintiff's counsel a letter informing her that, although plaintiff's passport revocation had been "proper, based upon the

information provided by Mr. Keil to the State Department up until and including the time of the revocation," the Department was rescinding the revocation in light of the new information. App. 61, 78-79.

III. PRIOR PROCEEDINGS

Plaintiff filed this *Bivens* suit against Agents Foster, Barnhart, Hamilton, and Spinella, as well as Glenn Triveline (the Acting Field Office Director for ICE's Office of Detention and Removal Operations in Chicago, Illinois), alleging that his arrest and detention violated the Fourth and Fifth Amendments. After filing the requisite administrative claim, *see* 28 U.S.C. § 2675, plaintiff also filed a separate Federal Tort Claims Act ("FTCA") suit against the United States, alleging negligence, conversion, and false imprisonment. The FTCA and *Bivens* claims were consolidated. App. 7 (Dkt. No. 40).

The defendants moved to dismiss and for summary judgment. The district court first disposed of the claims against Acting Director Triveline, holding that plaintiff's complaint failed to state a claim against him, and that the court lacked personal jurisdiction. App. 100-106. The court also denied plaintiff's request to amend his complaint to supplement the allegations against Acting Director Triveline, holding that the proposed

amendments would be futile. App. 103-104. Plaintiff has not appealed those rulings.

After a period of discovery, the district court then granted the defendants' dispositive motions on all remaining claims. Plaintiff's Addendum ("Add.") 1-12. The court held that the Agents were entitled to qualified immunity on plaintiff's Fourth Amendment claims because his arrest was supported by probable cause under 18 U.S.C. §§ 911 and 1544 – the two statutes under which plaintiff was criminally charged. *See* App. 93. The court stressed that the issue for qualified immunity purposes "is not a question of whether or not Keil was, in fact, a U.S. citizen, but rather is a question of whether the Agents had probable cause to believe that Keil was not a U.S. Citizen." Add. 5. The court answered that question in the affirmative, explaining that the Agents at the time of their challenged conduct reasonably believed that plaintiff was not a citizen. Having thus found that probable cause existed under sections 911 and 1544, the district court did not reach the Agents' arguments that there likewise was probable cause to arrest plaintiff under at least three other statutes: 8 U.S.C. § 1324 (encouragement or inducement to illegally enter the United States); 18 U.S.C. §§ 371, 1546 (conspiracy to commit visa

fraud); and 18 U.S.C. § 1542 (making false statements in passport applications).[8]

The court next granted the government's motion to dismiss and for summary judgment on plaintiff's FTCA claims. The court explained, among other things, that plaintiff could not make out a negligence claim against the United States because a private person would not be liable in similar circumstances (as required by 28 U.S.C. § 2674), and that, under applicable state law, plaintiff could not establish a *prima facie* case for false imprisonment in light of facially-valid arrest warrants. Add. 8-11.

On this basis, the district court entered judgment for all of the defendants. On appeal in this Court, plaintiff now pursues only the narrow and limited issue of the existence of probable cause underlying his arrest.

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[8] The court also rejected numerous other *Bivens* claims raised by plaintiff in his complaint, but not pursued in this appeal. It held that Keil could not make out a *Bivens* claim based on the Agents' issuance of an immigration detainer (Add. 5-6); that his Fifth Amendment due process claims based on his arrest and the seizure of his passport must be analyzed under the Fourth Amendment, and thus fail for the reasons already given (Add. 6-7); and that plaintiff could not make out a substantive due process claim (Add. 7). All of these claims have been abandoned on appeal.

SUMMARY OF ARGUMENT

Plaintiff raises only one issue on appeal: whether the Agents had probable cause to arrest him. As the district court properly explained, the facts known to the Agents at the time of plaintiff's arrest would lead a reasonable person to believe that he violated 18 U.S.C. §§ 911 and 1544 by falsely representing himself to be a citizen, and by using a U.S. passport although he was not entitled to do so. The Agents knew that plaintiff had twice applied for a certificate of citizenship, but never obtained one. They also knew that a U.S. Citizenship and Immigration Services official determined shortly before his arrest in 2008 that plaintiff was *not* entitled to citizenship through his U.S.-citizen mother, even though he had always claimed citizenship though his mother but not his father. Moreover, the Agents knew that plaintiff had repeatedly represented himself to be a citizen; had obtained a U.S. passport and renewed it multiple times (using what appeared to be his mother's address in the United States and not his own address in Samoa); and had used that passport on many occasions. Indeed, immediately before his arrest, plaintiff claimed to the Agents that he was a citizen, and showed them a U.S. passport as apparent proof of that fact. The Agents could reasonably

believe under these circumstances that plaintiff knew he was not a citizen and was improperly using a U.S. passport.

Plaintiff's argument that no probable cause could have existed as a matter of law – because he was a U.S. citizen at birth and possessed a U.S. passport – is without merit. Plaintiff's current claim to birthright citizenship through both of his parents is utterly irrelevant to this appeal; plaintiff first advanced that claim one month *after* his arrest, and thus it has no bearing on the Agents' contemporaneous conduct. It was only after his arrest that plaintiff claimed, for the first time, that his *father* was a citizen; prior to that time plaintiff had persistently maintained that his mother but *not* his father was a citizen. Nor does the possession of a passport immunize plaintiff against arrest on suspicion that he misused the passport in violation of its terms, or otherwise falsely claimed to be a citizen.

Although the district court did not reach the issue and this Court likewise need not do so, the Agents also had probable cause to arrest plaintiff under a variety of other statutes in addition to 18 U.S.C. §§ 911 and 1544, including for visa fraud and conspiracy crimes that had nothing to do with plaintiff's own immigration status. In particular, the Agents

had probable cause to believe that plaintiff violated 8 U.S.C. § 1324 and 18 U.S.C. §§ 371 and 1546, by recruiting Samoan performers to come to the United States and helping them obtain "P-3" performer visas, but instructing them not to tell U.S. officials about doing work outside the scope of those visas. Plaintiff did not dispute the basic facts underlying these provisions in district court and does not do so on appeal. These additional statutes provide alternative grounds for affirming the Agents' qualified immunity from suit.

For all these reasons, the judgment of the district court should be affirmed. We reiterate that plaintiff appeals from only a limited and discrete portion of that judgment, and, in particular, has waived any appeal from the dismissal of the *Bivens* claims against Acting Director Triveline, and from any aspect of the district court's judgment for the United States on the FTCA claims.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment and its determination that the Agents were entitled to qualified immunity. *Amrine* v. *Brooks*, 522 F.3d 823, 830 (8th Cir. 2008).

ARGUMENT

The Agents Were Entitled to Qualified Immunity Because They Had Arguable Probable Cause To Arrest Plaintiff

I. The Agents Are Legally Protected by Qualified Immunity

Plaintiff has sued federal Agents Spinella, Foster, Hamilton, and Barnhart in their individual capacities and seeks to recover damages from their personal resources.[9] Such personal-capacity suits "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

To protect against these harms, the Supreme Court has long held that *Bivens* defendants may invoke a qualified immunity that "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson* v. *Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow* v. *Fitzgerald*, 457

[9] As discussed below, plaintiff has waived all of his claims against defendant Triveline.

U.S. 800, 818 (1982));[10] *see also Amrine*, 522 F.3d at 831; *Sparr* v. *Ward*, 306 F.3d 589, 593 (8th Cir. 2002). This rule provides "'an immunity from suit rather than a mere defense to liability,'" which is "'effectively lost if a case is erroneously permitted to go to trial.'" *Pearson*, 129 S. Ct. at 818 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)).

The protection afforded by qualified immunity is "ample." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). It "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft* v. *al-Kidd*, — U.S. —, 2011 WL 2119110, at *9 (May 31, 2011). This immunity shields "all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341, and applies "regardless of whether the government official's [alleged] error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 129 S. Ct. at 815 (internal quotation marks omitted); *see also Serna* v. *Goodno*, 567 F.3d 944, 952 (8th Cir. 2009)

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[10] Prior to *Pearson*, the Supreme Court mandated a two-step qualified immunity inquiry that asked, first, whether the plaintiff had alleged a violation of a constitutional right and, second, whether that right was clearly established at the time. *See Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). In *Pearson*, the Court made clear that those questions may be addressed in either order. *See* 129 S. Ct. at 818.

(officials are "not liable for bad guesses in gray areas" (quotation marks and citation omitted)).

In the specific context at issue in this appeal – Fourth Amendment claims for wrongful arrest – this Court has held that an official is legally entitled to qualified immunity so long as there was "*arguable* probable cause" to make an arrest. *Amrine*, 522 F.3d at 832 (emphasis added); *see also Smithson* v. *Aldrich*, 235 F.3d 1058, 1062 (8th Cir. 2000). Thus, officials are entitled to qualified immunity even if "they arrest a suspect under the *mistaken* belief that they have probable cause to do so, provided that the mistake is objectively reasonable." *Amrine*, 522 F.3d at 832 (emphasis added); *see also McCabe* v. *Parker*, 608 F.3d 1068, 1078 (8th Cir. 2010).

In this setting, the officer's subjective motivation is irrelevant, and an officer is entitled to qualified immunity if the facts reasonably known to him create probable cause to believe the arrestee has violated any applicable statute, even one unrelated to the provisions contemplated by the officer at the time of arrest. *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004); *Lawyer* v. *City of Council Bluffs*, 361 F.3d 1099, 1106 (8th Cir. 2004). Simply put, "[t]hose are lawfully arrested whom the facts known

to the arresting officers give probable cause to arrest." *Devenpeck*, 543 U.S. at 155.

It is also fundamental that determining whether probable cause may exist "is not an exact science." *Flynn* v. *Brown*, 395 F.3d 842, 844 (8th Cir. 2005) (quotation marks and citation omitted). Probable cause is a "fluid concept" that "turn[s] on the assessment of probabilities in particular factual contexts," and is "not readily, or even usefully, reduced to a neat set of legal rules." *United States* v. *Chauncey*, 420 F.3d 864, 870 (8th Cir. 2005). The Court must consider whether, "at the moment the arrest was made * * * the facts and circumstances within [the Agents'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that an offense had been committed. *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (quotation marks and citation omitted); *see also United States* v. *Taylor*, 519 F.3d 832, 834 (8th Cir. 2008).

II. The Agents Had Probable Cause To Believe Plaintiff Violated Federal Law

Applying these principles, the district court correctly concluded as a matter of law that the Agents here are entitled to qualified immunity

because they reasonably believed they had probable cause to arrest plaintiff. Indeed, at least five separate federal statutes provided grounds for plaintiff's arrest based on the information reasonably known to the officers at the time they took plaintiff into custody.

A. The District Court Properly Held That the Agents Had Probable Cause To Arrest Plaintiff for Falsely Claiming U.S. Citizenship and Misusing a U.S. Passport

1. First, as the district court expressly held, the Agents had probable cause to believe that plaintiff violated 18 U.S.C. § 911 by falsely representing himself to be a citizen. To violate this provision, a person must falsely claim to be a U.S. citizen; the misrepresentation must be willful; and the misrepresentation must be made to someone with good reason to inquire into the defendant's citizenship. *See United States* v. *Romero-Avila*, 210 F.3d 1017, 1020-21 (9th Cir. 2000).

The Agents reasonably believed that plaintiff had violated this statute. *See* App. 89-92 (administrative immigration warrant); 93-97 (criminal complaint and supporting affidavit). The Agents knew that plaintiff had represented himself to be a U.S. citizen on numerous occasions to persons with good reason to inquire, such as officials deciding whether to issue him a passport or inspecting him upon arrival in the

United States, and to Agents Barnhart and Hamilton immediately before they arrested him. App. 21, 57, 59, 62-73, 82, 83.

The Agents reasonably believed that these representations of citizenship were false. At all times prior to his arrest, plaintiff consistently claimed to be a citizen through his mother but not his father. App. 22, 35-40, 42-45. Yet, just months before his arrest, a CIS official expressly determined that plaintiff was *not* entitled to citizenship through his mother, because she had not resided in the United States for five years after her sixteenth birthday and prior to plaintiff's birth. App. 22, 33-34. See also App. 78 (September 2008 State Department letter to plaintiff's counsel noting that his passport revocation, though rescinded, had been "proper, based upon the information provided by Mr. Keil to the State Department up until and including the time of the revocation").

The Agents also reasonably believed that Keil knew his claim of citizenship was false. Over the years, plaintiff had twice applied for a certificate of citizenship, but never received one, and both times he failed to respond to requests from INS to personally appear and to provide additional information concerning his mother's residence. App. 22, 35-47.

As the district court properly explained, "[t]hese facts would warrant

a prudent person in believing Keil was falsely representing U.S. citizenship." Add. 5. The Agents were therefore legally entitled to qualified immunity on this basis alone, and this Court need not proceed any further to dispose of this appeal.

2. The district court also correctly held that the Agents had probable cause to arrest plaintiff for misusing a passport in violation of 18 U.S.C. § 1544. That statute provides that "[w]hoever willfully and knowingly uses or attempts to use any passport in violation * * * of the rules prescribed pursuant to the laws regulating the issuance of passports * * * [s]hall be fined * * * imprisoned * * * or both." Among those rules is the requirement that only a citizen or non-citizen national may use a U.S. passport. *See* 22 C.F.R. §§ 51.1(*l*), 51.2.

At the time of arrest, the Agents reasonably believed that plaintiff was not entitled to use a U.S. passport and that plaintiff knew he had no right to such a passport. See App. 95-97. Plaintiff failed to appear in 1967 for a hearing on his first application for a certificate of citizenship, App. 22; had been notified of problems with his claim to citizenship in connection with his second application in 1976, App. 22, 46-47; and was claiming a purported California address at which he did not live instead

of his actual address in Samoa – a practice that, in the Agents' experience, is common among individuals who seek to avoid scrutiny of their passport applications, App. 57-58, 62-63. A CIS official had also informed the Agents in 2008 that plaintiff was, in fact, not a citizen. App. 22, 33-34.

The district court properly concluded that these facts, taken together, reasonably suggested to the Agents that plaintiff was not a citizen and therefore was not entitled to use a U.S. passport. Add. 5. Thus – and regardless of whether plaintiff actually was a citizen, *see ibid.* – the Agents reasonably concluded that plaintiff violated § 1544 by presenting his U.S. passport at immigration inspection and to the Agents themselves immediately before his arrest, App. 21, 59, 82, 95-97.

Like its determination regarding 18 U.S.C. § 911, the district court's determination regarding section 1544 fully and independently compels the conclusion that the individual defendants here were legally entitled to qualified immunity from suit, and that the judgment of the district court should therefore be affirmed. And, as noted above, a U.S. Magistrate Judge formally approved a criminal complaint charging plaintiff with violations of sections 911 and 1544. App. 93.

B. Plaintiff's Attacks on the District Court's Probable Cause Determination Lack Merit

Rather than addressing the Agents' reasonable grounds for doubting his citizenship at time of his arrest – the legal touchstone for qualified immunity here, *see Akins* v. *Epperly*, 588 F.3d 1178, 1184 (8th Cir. 2009); *Amrine*, 522 F.3d at 832 – plaintiff maintains that "it was legally impossible for Petitioner to have committed either [a violation of 18 U.S.C. §§ 911 or 1544]." Br. 19. This argument rests on two distinct premises, neither of which defeats the Agents' entitlement to qualified immunity: (1) that plaintiff, in retrospect, "was a United States Citizen at birth," Br. 8, 15, and (2) that "his possession of [a] passport made him a citizen by law," Br. 19.

1. Plaintiff's first assertion – that the Department of State has now determined that plaintiff was a citizen at birth by virtue of being born to two U.S.-citizen parents (Br. 8, 15, 18) – is entirely irrelevant to this case. Plaintiff concedes (Br. 8) that he first advanced this two-parent theory of citizenship in October 2008 – a month *after* his arrest. *See* App. 72-74 (letter from counsel). Prior to that time, plaintiff repeatedly and expressly took the opposite position: that his father was *not* a citizen. App. 36, 43,

68. No reasonable Agent could have foreseen that plaintiff would later produce an 1896 document from the State of Illinois pertaining to his long-deceased grandfather, and claim that, as a result, his father had been born a citizen under a U.S. law in effect from 1878 to 1934, and, in turn, that plaintiff was therefore a citizen by virtue of being born to two U.S.-citizen parents. Because the relevant question for qualified immunity purposes is what the Agents reasonably believed at the time of the arrest, *Hunter*, 502 U.S. at 228; *Akins*, 588 F.3d at 1184; *Amrine*, 522 F.3d at 832, plaintiff's new, after-the-fact claim to birthright citizenship through both parents has no bearing whatsoever on the Agents' entitlement to qualified immunity.

2. Plaintiff's second argument fares no better. Plaintiff contends that the Agents could not have had probable cause to arrest him for falsely claiming U.S. citizenship or misusing a passport because he was "a citizen by virtue of his possession of a U.S. Passport." Br. 18; *see also* Br. 15-16, 17, 19, 20. This argument rests on a fundamental misreading of federal law; the cited provision, 22 U.S.C. § 2705, does not prevent the government from arresting a person or initiating a criminal prosecution for falsely claiming citizenship or misusing a passport.

As plaintiff notes, 22 U.S.C. § 2705 states that a passport "shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." The Board of Immigration Appeals (BIA) has interpreted this provision to make a passport conclusive proof of a person's citizenship in "*administrative* immigration proceedings." *In re Villanueva*, 19 I. & N. Dec. 101, 102-03 (B.I.A. 1972) (emphasis added); *see also Vana* v. *Attorney General*, 341 F. App'x 836, 839 (3d. Cir. 2009) (passport is "unassailable in collateral *administrative* proceedings" (emphasis added)). It does not follow, however, that "the mere fact Petitioner [sic] possesses the passport makes him a citizen," even outside the context of an administrative immigration proceeding. Br. 20.

To the contrary, "[a] finding by an administrative law judge [that a person is a citizen] *does not preclude* a subsequent related criminal prosecution" under section 911. *United States* v. *Bustamante*, 248 F. App'x 763, 764 (8th Cir. 2007) (emphasis added); *see also United States* v. *Payne*, 2 F.3d 706, 710 (6th Cir. 1993) (administrative determination does not prohibit subsequent prosecution); *United States* v. *Alexander*, 743 F.2d

472, 477 (7th Cir. 1984) (same); *United States* v. *Lasky*, 600 F.2d 765, 768 (9th Cir. 1979). Thus, even if plaintiff had established his citizenship in an administrative immigration proceeding by producing a facially valid passport, that administrative finding would not estop the government from bringing charges under 18 U.S.C. § 911 if it had reason to doubt plaintiff's claim of citizenship. *Bustamante*, 248 F. App'x at 764; *see also United States* v. *Mugo*, 2008 WL 5105009, at *1-*2 (E.D. Mo. Dec. 1, 2008) (allowing prosecution under 18 U.S.C. § 911 for making a false claim to citizenship even though that issue was resolved in defendant's favor in an administrative immigration proceeding).

Indeed, and contrary to plaintiff's litigating position here, many defendants in possession of passports at the time of their arrests have been convicted of violating 18 U.S.C. § 911 by using those passports as apparent proof of citizenship when, in fact, they were not citizens. *See, e.g.*, *United States* v. *Maciel-Alcala*, 612 F.3d 1092, 1094-1095 (9th Cir. 2010); *United States* v. *Castillo-Roman*, 291 F. App'x 273, 274 (11th Cir. 2008); *United States* v. *Lowes*, 265 F. App'x 887, 888 (11th Cir. 2008).[11] It

[11] Likewise, defendants have also been convicted of violating 18 U.S.C. § 911 by making false claims to citizenship in passport applications. *See, e.g.*, *White* v. *INS*, 6 F.3d 1312, 1313 (8th Cir. 1993);

would make little sense to require the State Department to complete the process of formally revoking a passport before a person could be arrested under section 911, even if there were overwhelming evidence that he was not a citizen. Here, plaintiff may well have evaded arrest if the Agents were required to wait for his passport to be formally revoked before they could arrest him; in the interim, plaintiff could have used the passport to leave the country. *Cf. Kelso* v. *U.S. Dept. of State*, 13 F. Supp. 2d 1, 5 (D.D.C. 1998) ("It would unduly frustrate the compelling interest that law-enforcement officials possess in preventing suspected felons from evading arrest if the State Department had to conduct a prerevocation hearing prior to revoking their passports.").

It is equally – if not more – apparent that possession of a passport cannot prevent an arrest upon suspicion that the person *misused* that passport in violation of 18 U.S.C. § 1544 (criminalizing use of a passport in violation of applicable rules). Contrary to plaintiff's theory, possession of a passport is an element of, not a defense to, that crime.

United States v. *Vidal-Reyes*, 562 F.3d 43, 46 (1st Cir. 2009); *United States* v. *Zamor*, 233 F. App'x 976, 977 (11th Cir. 2007).

3. Even if there were merit to plaintiff's legal arguments – and there is none – it would not defeat the Agents' entitlement to qualified immunity. As noted, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341, and attaches "regardless of whether the government official's [alleged] error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact," *Pearson*, 129 S. Ct. at 815 (internal quotation marks omitted). And where, as here, the question involves the "'fluid concept'" of probable cause, *Chauncey*, 420 F.3d at 870 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)), the relevant inquiry is whether the Agents had "arguable" probable cause to arrest plaintiff – that is, a reasonable (even if mistaken) belief that they had probable cause. *Amrine*, 522 F.3d at 832; *Smithson*, 235 F.3d at 1062.

Because no court has ever held that possession of a passport forecloses arrest under 18 U.S.C. §§ 911 or 1544, there was – and still is – no clearly established law that would have required the Agents to wait for the State Department to complete the process of revoking plaintiff's passport before arresting him. Under these circumstances, and applying settled principles, "it is improper to subject petitioners to money damages

for their conduct." *Pearson*, 129 S. Ct. at 823.

C. Probable Cause Existed To Arrest Plaintiff for Violating Other Federal Statutes as Well

For the above reasons, the district court properly concluded that the Agents reasonably believed that probable cause existed to arrest plaintiff under 18 U.S.C. §§ 911 and 1544. The district court's judgment may be upheld on the basis of either or both of these two statutes alone, and this Court need not proceed any further.

The Agents, however, are entitled to qualified immunity if probable cause existed to arrest plaintiff under any statute, even one not contemplated at the time of arrest. *See Devenpeck*, 543 U.S. at 153; *Lawyer*, 361 F.3d at 1106. Here, several other statutes also justified plaintiff's arrest on the uncontested facts. Each of these provisions was briefed below and provides an independent basis to affirm the judgment of the district court. *See Pucket* v. *Hot Springs School Dist.*, 526 F.3d 1151, 1156 (8th Cir. 2008) (court may affirm summary judgment "on any basis supported by the record" (quotation marks and citation omitted)).

First, the Agents had probable cause under 18 U.S.C. § 1542 to arrest plaintiff for making a false statement in a passport application and

using a passport procured by false means. In his 2006 passport renewal application, plaintiff declared that he was a U.S. citizen. App. 57, 63. Plaintiff then used the passport to pass through immigration inspection, and he also presented the passport to Agents Hamilton and Barnhart immediately prior to his arrest. App. 21, 59, 82. Because of the Agents' reasonable belief that plaintiff was not a U.S. citizen, they had probable cause to believe that he thus violated § 1542.

The Agents also had probable cause to arrest plaintiff for visa fraud offenses that had nothing to do with his own claims of citizenship. As detailed above, the Agents learned that plaintiff recruited Samoan performers to come to the United States and helped them obtain limited, "P-3" nonimmigrant visas; told them they could perform other types of work at the theater, contrary to the P-3 visa limitations; and instructed the Samoans not to tell U.S. consular officials about the work they would be doing outside the scope of their visas. App. 18, 21-23, 31-32, 57. Plaintiff has never contested these facts. *See* Pl's Resp. (Dkt. No. 83) at A (facts in ¶¶ 14 & 16 are "uncontroverted"). The Agents also understood that plaintiff had instructed the performers not to speak with ICE agents about their work at the theater. App. 23-24, 57, 81.

In these circumstances, the Agents had probable cause to arrest plaintiff for conspiracy to commit visa fraud under 18 U.S.C. §§ 371 and 1546, and for encouraging illegal entry in violation of 8 U.S.C. § 1324. All of these provisions, too, legally compel affirmance of the district court's decision, even apart from provisions (18 U.S.C. §§ 911 and 1544) upon which the court expressly relied.

III. Plaintiff's Remaining Claims Are Waived

To preserve an issue on appeal, a party's opening brief must identify the issue as a matter on appeal, and must also include a substantive discussion of the contention of error. *See* Fed. R. App. P. 28(a)(5), (a)(9); *United States* v. *Brooks*, 175 F.3d 605, 606 (8th Cir. 1999) (failure to raise issue in briefs is deemed abandonment); *United States* v. *Darden*, 70 F.3d 1507, 1549 n.18 (8th Cir. 1995) (court will not consider argument raised for the first time in a reply brief). Because plaintiff has identified only a single, narrow question for appeal – the probable cause issue – and has discussed only that one issue in his opening brief, he has now irrevocably waived numerous other claims that he raised in district court.

First, plaintiff has waived all of his claims against individual defendant Glenn Triveline. As noted above, the district court dismissed

the *Bivens* claims against Triveline for lack of personal jurisdiction and failure to state a claim, and denied as futile plaintiff's motion to amend that complaint. App. 100-106. Plaintiff's opening brief does not mention, let alone contest, these rulings, and he has thus waived any possible challenge to them.

Plaintiff has waived other *Bivens* claims as well. He does not challenge either the district court's conclusion that he failed to make out a valid Fourth Amendment claim based upon the issuance of an immigration detainer, Add. 5-6, or the court's decision to grant the Agents summary judgment on plaintiff's two separate Fifth Amendment claims. Add. 7-8. Those claims, too, are thus abandoned, and are not a part of this appeal.

Finally, plaintiff has waived all of his FTCA claims against the United States. The district court properly concluded that plaintiff could not pursue a negligence claim against the United States because a private person would not be liable for negligence in like circumstances, as required 28 U.S.C. § 2674. Add. 8. The court also properly determined that plaintiff could not make out a *prima facie* false imprisonment claim because, under applicable state law, his arrest was justified by facially-

valid warrants. Add. 9-11. See also Add. 9 (FTCA's detention-of-goods exception, 28 U.S.C. § 2680(c), legally bars plaintiff's conversion claim); *id.* § 2680(a) (discretionary function exception).

Plaintiff does not even mention the Federal Tort Claims Act in his opening brief (aside from in his short summary of the case and request for oral argument); has not identified any FTCA questions as issues on appeal; has not pointed to any state-law basis for potential government liability here; and has not challenged any aspect of the court's FTCA reasoning in his opening brief. All the FTCA claims in this case are therefore forfeited. In any event, the district court's resolution of the FTCA claims was in all respects correct. See Add. 8-11.

As we have shown, the sole and limited issue raised in this appeal pertains to the district court's qualified immunity determination regarding probable cause. The district court's decision in that regard is correct and should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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JUNE 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel Wordperfect X4, the foregoing Brief for Appellees contains 8,737 words. The text of the brief is composed in 14-point Century Schoolbook typeface.

s/Michael P. Abate
Michael P. Abate

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2011, I filed the above Brief for Appellees with the Court and served it on opposing counsel by filing it with the Court's CM/ECF system.

s/Michael P. Abate
Michael P. Abate