

12-4268

To Be Argued By:
ALAN M. SOLOWAY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4268

—————
MONSERRATE VIDRO,
Plaintiff-Appellant,

-vs-

UNITED STATES OF AMERICA,
Defendant-Appellee.

—————
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
*United States Attorney
District of Connecticut*

ALAN M. SOLOWAY
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

This is an action brought against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, seeking damages for the allegedly wrongful acts of two federal task force officers. As such, the United States District Court for the District of Connecticut (Stefan R. Underhill, J.) had subject matter jurisdiction over this case under 28 U.S.C. § 1346(b)(1). The district court dismissed all claims in the plaintiff's complaint in an order dated September 26, 2012. Joint Appendix 7 ("JA__"). Final judgment entered in favor of the United States on October 19, 2012. JA7. On October 24, 2012, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). JA8, JA128-29. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue
Presented for Review**

Under the Federal Tort Claims Act, the United States has waived sovereign immunity for certain torts and wrongful acts of its employees when a private person, under similar circumstances, would be liable under the law of the place where the incident occurred. In this case, the plaintiff alleges that he was injured when two federal agents lied to a federal grand jury sitting in Connecticut. Is the suit against the United States barred because Connecticut law would grant absolute immunity to a private individual for his testimony as a grand jury witness?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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MONSERRATE VIDRO,

Plaintiff-Appellant,

-vs-

UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The Federal Tort Claims Act waives the United States' sovereign immunity for certain torts and wrongful acts committed by federal employees if a private individual in like circumstances would be liable under the law of the state where the incident occurred. In this case, the question is whether the Plaintiff-Appellant, Monserrate Vidro, may recover under the FTCA for intentional infliction of emotional distress arising from the allegedly perjured testimony of

two federal law enforcement agents before a federal grand jury sitting in Connecticut. The answer to this question is “no,” because in Connecticut, grand jury witnesses would be afforded absolute immunity from suit for their testimony. Accordingly, the district court’s judgment dismissing Vidro’s complaint should be affirmed.

Statement of the Case

Monserrate Vidro filed suit against the United States under the Federal Tort Claims Act on September 7, 2011. JA5, JA9-11. The United States moved to dismiss the complaint, and on September 26, 2012, the district court (Stefan R. Underhill, J.) granted that motion. JA7, JA119-26. Final judgment for the United States entered on October 19, 2012. JA7, JA127. On October 24, 2012, Vidro filed a timely notice of appeal under Fed. R. App. P. 4(a). JA8, JA128-29.

Statement of Facts and Proceedings Relevant to this Appeal

For purposes of this appeal, the following facts taken from Vidro's complaint are assumed to be true.¹ *See Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012) (in a motion to dismiss for lack of subject matter jurisdiction, court takes facts alleged in the complaint as true); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) (in ruling on a motion to dismiss for failure to state a claim, court assumes that factual allegations in a complaint are true), *cert. denied*, No. 12-446, ___ S. Ct. ___, 2013 WL 57139 (Jan. 7, 2013).

The events underlying this suit began with a criminal prosecution in the District of Connecticut in 2009. In January of that year, two law enforcement officers working on an FBI strike force testified before a federal grand jury in Connecticut that Monserrate Vidro was involved in drug sales and, indeed, that he was a member of a "drug organization." JA10 (Complaint, ¶¶ 5-6). The officers knew that they had no factual basis

¹ In particular, as discussed in the text, Vidro's complaint alleged that two law enforcement agents committed perjury before a federal grand jury. *See* JA10 (Complaint, ¶¶ 5-7). Vidro's complaint did not explain how he knew the substance of witness testimony before the grand jury, but for purposes of this appeal, the government has assumed that Vidro's characterization of that testimony is true.

for the statements they made about Vidro. JA10 (Complaint, ¶ 7).

As a direct result of this false testimony, Vidro was indicted and detained on the pending charges. JA10 (Complaint, ¶ 7). Approximately four months later, the government dismissed the indictment and Vidro was released from custody. JA10 (Complaint, ¶ 8).

The following year, Vidro filed an administrative claim for damages with the FBI, alleging injury arising from the agents' allegedly false testimony. JA9-10 (Complaint, ¶ 4). When he obtained no relief through the administrative claims process, Vidro filed suit against the United States under the Federal Tort Claims Act on September 7, 2011. JA5, JA9-11.

Vidro's complaint recited the facts surrounding the officers' testimony and his prosecution. JA10 (Complaint, ¶¶ 5-8). On these facts, the complaint alleged a claim for intentional infliction of emotional distress.² Specifically, the com-

² Although Vidro's complaint could be read to allege a claim of false imprisonment, he expressly abandoned any such reading of his complaint in the district court. In particular, when the United States moved to dismiss Vidro's complaint for failure to state a claim for false imprisonment under Connecticut law, Vidro did not contest that argument, but rather responded by asserting that "[t]he Complaint expressly alleges that the suit is based upon the underlying state law tort of intentional infliction of

plaint alleged that “[a]s a direct and proximate consequence of the wrongdoing described above, the plaintiff suffered imprisonment, loss of liberty, public humiliation and disgrace, severe emotional distress and economic losses.” JA10-11 (Complaint, ¶ 9). The complaint further alleged that “[t]he conduct of the agents described above was extreme and outrageous and was carried out with the knowledge that it would cause the plaintiff to suffer emotional distress and other injuries as described above.” JA11 (Complaint, ¶ 10).

The United States moved to dismiss the complaint, and on September 26, 2012, the district court granted that motion in a written decision. JA7, JA119-26. The court found that language in 28 U.S.C. § 2674 authorizing the United States to assert any defense based on “judicial or legislative immunity,” authorized the United States to assert any judicially or legislatively created

emotional distress[.]” JA27. *See also* JA103 (“The Complaint alleges that the suit is based upon the underlying state law tort of intentional infliction of emotional distress”). Indeed, Vidro chided the government for “disingenuously” characterizing his complaint as alleging a false imprisonment claim. *See* JA28. In any event, Vidro could not state a claim for false imprisonment because Connecticut does not recognize such a claim where, as here, Vidro was arrested pursuant to a facially valid warrant. *See Outlaw v. City of Meriden*, 682 A.2d 1112, 1115 (Conn. App. 1996).

immunities for federal employees. JA122-24. Thus, according to the court, the United States was entitled to assert any common law immunities and “functional” immunities like the absolute immunity of grand jury witnesses recognized by the Supreme Court in *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012). JA124.

With this background, the district court surveyed Connecticut law and concluded that Connecticut would recognize an absolute immunity for grand jury witnesses. JA124-26. Indeed, the court found that “Connecticut has long had a capacious protection for witnesses in court proceedings.” JA124. As the court noted, for example, in 1986, the Connecticut Supreme Court described “the common law protection of absolute privilege for communications or testimony elicited in connection with and pertinent to an ongoing judicial or quasi-judicial proceeding.” JA124 (quoting *Petyan v. Ellis*, 510 A.2d 1337, 1342 (Conn. 1986)). The court further noted that Connecticut courts had applied this principle in a variety of contexts. *See* JA124-25. Because the rationale for witness immunity (*i.e.*, witnesses must feel free to testify without fear that they will face a lawsuit based on their testimony) applied with equal force to grand jury witnesses, the district court concluded that Connecticut law would grant absolute immunity to grand jury witnesses, consistent with the Supreme Court’s recent decision in *Rehberg*. JA124-26.

Because grand jury witnesses would have absolute immunity under Connecticut law, the district court dismissed Vidro's complaint. JA126. This appeal followed.

Summary of Argument

The Federal Tort Claims Act waives the United States' sovereign immunity for torts and actions of its employees when a private individual would be liable in like circumstances under the law of the state where the wrongful act took place. Here, the allegedly tortious act was the grand jury testimony of two federal agents before a grand jury sitting in Connecticut. Under Connecticut law, however, the agents would be absolutely immune from civil liability for their testimony because Connecticut grants an absolute privilege to witnesses for statements made in court proceedings. Because the agents would not be liable for their testimony under Connecticut law, the United States is not liable under the FTCA and the complaint was properly dismissed.

Argument

I. The United States has not waived sovereign immunity under the FTCA for Vidro's claim because grand jury testimony would be absolutely privileged under Connecticut law.

A. Governing law and standard of review

1. The Federal Tort Claims Act

“The United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.” *Liranzo*, 690 F.3d at 84 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). “Sovereign immunity is a jurisdictional bar, and a waiver of sovereign immunity is to be construed strictly and limited to its express terms.” *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003) (citing *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) and *Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 374 (2d Cir. 1999)). Where the United States has not waived sovereign immunity, a district court has no subject matter jurisdiction over the claim. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Lunney*, 319 F.3d at 554.

The Federal Tort Claims Act provides a limited waiver of the United States' sovereign immunity for the negligent or wrongful acts or omissions of federal employees while acting

within the scope of their employment. *See* 28 U.S.C. § 1346(b)(1); *Liranzo*, 690 F.3d at 85. This waiver is limited, however, to acts committed “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [tortious] act or omission occurred.” 28 U.S.C. § 1346(b)(1). In other words, the United States has waived sovereign immunity “under circumstances’ where local law would make a ‘private person’ liable in tort.” *United States v. Olson*, 546 U.S. 43, 44 (2005) (emphasis removed); *Lomando v. United States*, 667 F.3d 363, 373 (3rd Cir. 2011) (“[T]he United States is liable only to the extent that in the same circumstances the applicable local law would hold ‘a private person’ responsible.”) (quoting 28 U.S.C. § 1346(b)(1)).

For claims that fall within this jurisdictional grant, another provision of the FTCA establishes the bounds of the United States’ liability and expressly preserves the government’s right to assert any defenses available to it:

The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances

* * *

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judi-

cial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2674; *see also Dolan v. United States Postal Service*, 546 U.S. 481, 485 (2006); *Lomando*, 667 F.3d at 376 (noting that this provision authorizes the United States to assert any defense available to it under state law).

The FTCA does not create new causes of action. Rather, Congress’s chief intent in drafting the FTCA was simply to provide redress for ordinary torts recognized by state law. *See Lomando*, 667 F.3d at 372 (“[T]he FTCA does not itself create a substantive cause of action against the United States; rather, it provides a mechanism for bringing a state law tort action against the federal government in federal court.”) (citation and quotation omitted)); *Devlin v. United States*, 352 F.3d 525, 532 (2d Cir. 2003) (“[T]he FTCA’s basic thrust was decidedly not to create a federal common law of torts, but rather—as expressed in the final clause of section 1346(b)(1) and in section 2674—to tie the government’s liability . . . to the disparate and always evolving tort law of the several states.”).

Accordingly, the United States’ liability under the FTCA—and the extent of its waiver of sovereign immunity—are determined by reference to

state law. *See Ochran v. United States*, 273 F.3d 1315, 1317 (11th Cir. 2001) (“Unless the facts support liability under state law, [a court] lacks jurisdiction to decide an FTCA claim.”). Thus, a claim under the FTCA is cognizable only where the government’s actions, if committed by a private party, would give rise to tort liability under applicable state law. In other words, in determining liability under the FTCA, courts must look to the law of the state where the act or omission occurred. *See, e.g., Meyer*, 510 U.S. at 478 (“[The] law of the place’ means law of the State—the source of substantive liability under the FTCA.”); *Liranzo*, 690 F.3d at 86 (“[T]he FTCA directs courts to consult state law to determine whether the government is liable for the torts of its employees.”); *Lomando*, 667 F.3d at 372 (“[T]he extent of the United States’ liability under the FTCA is generally determined by reference to state law.”) (quotation omitted)).

As authorized by the FTCA, when sued for allegedly tortious conduct of its employees, the United States may assert immunity and other defenses to liability available under state law. *See, e.g., In re FEMA Trailer Formaldehyde Products Liability Litigation*, 668 F.3d 281, 288 (5th Cir. 2012) (affirming dismissal of suit against government based on conclusion that state law would bar suit against a private individual in like circumstances and explaining that “the Government is entitled to raise any and all defenses that would potentially be available to a

private citizen or entity under state law”); *Lomando*, 667 F.3d at 375-79 (holding that United States immune from suit based on state law that provided immunity for employees’ actions); *Knowles v. United States*, 91 F.3d 1147, 1150 (8th Cir. 1996) (under FTCA, United States is liable to the extent an immunized employee would be liable under local law); *Matheny v. United States*, 469 F.3d 1093, 1096 (7th Cir. 2006) (affirming dismissal of FTCA claim because Indiana law had statute that precluded tort liability on the facts of the case); *Mirmehdi v. United States*, 689 F.3d 975, 984-85 (9th Cir.) (noting that United States may not be liable if the individual tortfeasor would be immune from suit and finding California law would not permit recovery for statements made to an immigration judge in a bond revocation proceeding), *pet’n for cert. filed*, No. 12-522 (Oct. 22, 2012); *see also* H. Rep. 100-700 at 5 (June 14, 1988) (noting that United States may raise ordinary tort defenses and “other functional immunities . . . recognized in the constitution and judicial decisions”).

In reaching this conclusion—that the United States may assert immunities and other defenses available under state law—some courts have looked to language in § 2674 that expressly preserves the United States’ authority “to assert any defense based upon judicial or legislative

immunity.”³ *See, e.g., Lomando*, 667 F.3d at 375-76. The broader principle, however, is also found in the waiver of sovereign immunity itself: because the United States is only liable to the extent that “a private person would be liable” under state law, if the employee is immune, the United States is immune too. *See In re FEMA Trailer Formaldehyde Products Liability Litigation*, 668 F.3d at 288; *Knowles*, 91 F.3d at 1150; *Matheny*, 469 F.3d 1096, *Mirmehdi*, 689 F.3d at 984-85; 28 U.S.C. §§ 1346(b)(1). In addition, § 2674 expressly reserves to the United States the authority to assert “any other defenses to which the United States is entitled.” 28 U.S.C. § 2674; *see also* H. Rep. 100-700 at 5 (noting that the listing of “judicial and legislative” immunities “does not imply that traditional common law defenses are not available. . . . Thus ordinary tort defenses, such as contributory negligence, assumption of risk, estoppel, waiver, and *res judicata*, as applicable, continue to be available to the United States. The United States would also be able to continue to assert other functional immunities, such as Presidential and prosecutorial immunity, recognized in the constitution and judicial decisions.”).

³ The district court looked to this language for guidance. *See* JA122-24.

2. Standard of review

The district court granted the United States' motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See* JA119-20. In a case, such as this one, where the question of liability under state law also goes to whether the United States has waived sovereign immunity, the court could also have dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See, e.g., Dorking Genetics v. United States*, 76 F.3d 1261, 1264 (2d Cir. 1996) (explaining that unless a claim meets all of the requirements of § 1346(b)(1), including the requirement that a private individual would be liable under like circumstances, it should be dismissed for lack of subject matter jurisdiction); *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996) (holding that “proper vehicle for dismissing a *Feres*-barred FTCA claim is a dismissal for lack of subject-matter jurisdiction”); Fed. R. Civ. P. 12(h)(3).

“When reviewing the dismissal of a complaint for lack of subject matter jurisdiction, [this Court] review[s] factual findings for clear error and legal conclusions *de novo*, accepting all material facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor.” *Liranzo*, 690 F.3d at 84. “The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence.” *Id.* (quoting *Aurecchione v. Schoolman Transp.*

Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005)). Furthermore, “[t]he United States’ waiver of immunity under the FTCA ‘is to be strictly construed in favor of the government.’” *Id.* (quoting *Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477 (2d Cir. 1988)).

This Court “review[s] *de novo* the District Court’s dismissal of a complaint for failure to state a claim upon which relief can be granted, accepting all well-pleaded factual allegations in the complaint as true and drawing all inferences in favor of the plaintiff. In reviewing a decision based on Rule 12(b)(6), [this Court’s] task is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.” *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596 (2d Cir. 2011) (citations and quotations omitted).

B. Discussion

Vidro’s complaint alleged a claim for the underlying state law tort of intentional infliction of emotional distress. *See* JA10-11, JA27, JA103. Under Connecticut law, however, Vidro’s claim fails because Connecticut law would grant absolute immunity to a grand jury witness for his testimony. And because the United States is not liable if the individual alleged tortfeasor-employees cannot be held liable, Vidro’s complaint was properly dismissed. *See Mirmehdi*, 689 F.3d at 984-85 (“[T]he United States may

not be held liable if the individual tortfeasor would be immune from suit.”).

Connecticut has long recognized an “absolute privilege for statements made in judicial proceedings.” *Petyan v. Ellis*, 510 A.2d 1337, 1338 (Conn. 1986). As explained by the Connecticut Supreme Court, “[t]here is a ‘long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy.’” *Id.* (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1938) (per curiam)). Although the privilege is most often encountered as an immunity from liability for defamatory statements, *see, e.g., id.*; *Craig v. Stafford Construction, Inc.*, 856 A.2d 372, 374 (Conn. 2004), it also protects against damage claims for intentional infliction of emotional distress, *see Gallo v. Barile*, 935 A.2d 103, 108 (Conn. 2007) (“The absolute privilege for statements made in the course of a judicial proceeding applies equally to defamation claims, and claims for intentional infliction of emotional distress.”) (citations omitted); *Petyan*, 510 A.2d at 1342-43; *DeLaurentis v. City of New Haven*, 597 A.2d 807, 826-27 (Conn. 1991).

The absolute privilege described in *Petyan* and related cases protects against the recovery of damages for statements made in judicial proceedings, even if the statements were made “falsely and maliciously.” *Petyan*, 510 A.2d at

1338; *see also Gallo*, 935 A.2d at 108 (“The effect of an absolute privilege is that damages cannot be recovered for the publication of the privileged statement *even if the statement is false and malicious.*”) (emphasis added)).

Although Vidro claims that there is no basis for concluding that Connecticut would grant absolute immunity “to a witness who maliciously commits perjury” before a jury,” Appellant’s Br. at 14, that is just what an *absolute* privilege would do. An absolute privilege precludes liability for statements even when they are false and malicious. A qualified privilege, by contrast, protects from liability false statements that are not malicious. *See Gallo*, 935 A.2d at 106 & n.6. And indeed, the Connecticut Supreme Court has not hesitated to apply an absolute privilege on facts suggesting that a witness made false and malicious statements. *See Petyan*, 510 A.2d at 1342 (finding absolute privilege barred recovery by the plaintiff “even if we were to conclude that the publication of the statement was libelous per se or that a jury could have found malice”); *see also Gallo*, 935 A.2d at 106 & 107 n.9 (in case alleging false and malicious statements by witness at trial, court notes that there was no challenge to “trial court’s conclusion that the defendants’ testimony at the plaintiff’s criminal trial is absolutely privileged”).

As the Connecticut Supreme Court has repeatedly explained, the absolute privilege for statements made in judicial proceedings serves

important public policy interests, namely, the encouragement of participation and candor in judicial proceedings and the protection of judicial proceedings themselves:

The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . The rationale underlying the privilege is grounded upon the proper and efficient administration of justice. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of actions seeking damages for statements made by such participants in the course of the judicial proceeding. Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial . . . proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit.

Gallo, 935 A.2d at 108 (internal citations and quotations omitted). These benefits to the witness and the judicial system that flow from an absolute privilege are further buttressed by forces that discourage a witness—who has the protection of the privilege—from lying. In particular, as the Connecticut Supreme Court has not-

ed, “[w]hile no civil remedies can guard against lies, the oath and the fear of being charged with perjury are adequate to warrant an absolute privilege for a witness’ statements.” *DeLaurentis*, 597 A.2d at 826.

In recognition that the policies served by the absolute privilege extend beyond “civil litigation or criminal trials,” *Gallo*, 935 A.2d at 108 (quoting *Hopkins v. O’Connor*, 925 A.2d 1030, 1042 (Conn. 2007)), the Connecticut Supreme Court has not hesitated to expand the scope of its applicability. Indeed, under Connecticut law, the privilege extends to protect statements made in quasi-judicial proceedings, including “any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether or not the hearing is public or not.” *Craig*, 856 A.2d at 376. Thus, for example, the privilege extends to include “lunacy, bankruptcy, or naturalization proceedings, and an election contest. It extends also to the proceedings of many administrative officers, such as boards and commissions” *Petyan*, 510 A.2d at 1338.

In deciding whether to apply an absolute privilege in new contexts, the Connecticut Supreme Court has been guided by the policy rationales for the absolute privilege. *See Rioux v. Barry*, 927 A.2d 304, 308-12 (Conn. 2007) (considering “the general principles underlying the doctrine of absolute immunity” to determine whether immunity should extend to new contexts). In *Petyan*, for example, the Connecticut

Supreme Court held that statements made by an employer in a form submitted to a state unemployment agency were absolutely privileged. 510 A.2d at 1341. This conclusion rested on a public policy favoring candor to the state agency: if the statements were not privileged, “employers might be reluctant to respond to the employment security division at all or their reply might be colored by fear of subsequent litigation or liability.” *Id.* at 1341. Similarly, in *Craig*, the Connecticut Supreme Court pointed to public policy to support its holding that statements made during an internal affairs investigation of a police department were absolutely privileged. According to the *Craig* Court, applying an absolute privilege in this context served the public policy of encouraging witnesses to come forward and testify. 856 A.2d at 382.

At the same time, the Connecticut Supreme Court has declined to apply an absolute privilege in situations where the public policy rationale for the privilege did not hold.⁴ *See Gallo*, 935

⁴ As Vidro notes, the Connecticut Supreme Court is currently considering a case involving the scope of immunity applicable to attorneys for conduct that occurred during judicial proceedings. *See Simms v. Seaman*, 27 A.3d 373 (Conn. 2011) (granting certification limited to deciding whether “claims of fraud and intentional infliction of emotional distress brought against attorneys for conduct that occurred during judicial proceedings [are] barred as a matter of law by the doctrine of absolute immunity”). Alt-

A.2d at 109-14 (applying qualified privilege for statements to police in criminal investigations because there was no compelling public policy to support allowing false statements to the police); *Rioux*, 927 A.2d at 307-11 (declining to allow absolute privilege for claims of vexatious litigation because, after review of the purpose of absolute immunity, court concludes that an absolute privilege is unnecessary; the elements of the vexatious litigation tort themselves protect against unwarranted litigation against witnesses).

Although there are no Connecticut decisions specifically applying an absolute privilege to witness statements before a grand jury—most likely because Connecticut does not have a grand jury as understood in federal law—Connecticut law points inexorably to the conclusion that the privilege would extend to this context. The same policies that led the Connecticut Supreme Court to establish the absolute privilege for witnesses in judicial proceedings apply with equal force in the grand jury context. As the district court explained, “a witness addressing a grand jury is in the same position as a witness at a trial: The public has an interest in ensuring that they

though the Court’s decision in *Simms* will certainly discuss absolute immunity, there is no reason to believe that a decision in *Simms*—focusing as it likely will on the role of the attorney in the judicial process—will depart from the well-entrenched public policy favoring absolute immunity for witnesses in judicial proceedings.

speak freely, and the witness is deterred from lying by the criminal penalty of perjury.” JA125.

Furthermore, absolute immunity for grand jury witnesses would serve an additional public policy interest: the protection of grand jury secrecy. Grand jury proceedings are secret, in part, to encourage witnesses to come forward and to testify truthfully without fear of retribution. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983). But if grand jury witnesses faced civil liability for their testimony, this secrecy would be compromised because the grand jury testimony would then become evidence in a civil suit. *See, e.g., Rehberg v. Paulk*, 132 S. Ct. 1497, 1509 (2012) (upholding immunity of grand jury witnesses in § 1983 claims in part based on need to preserve grand jury secrecy).

In sum, for sound public policy reasons that have supported the well-established rule of absolute immunity for witness testimony in judicial proceedings, Connecticut would grant that same immunity to grand jury witnesses.

That Connecticut common law would protect the testimony of grand jury witnesses with absolute immunity is further supported by the United States Supreme Court’s recent decision in *Rehberg v. Paulk*. In that case, the Court held that grand jury witnesses are entitled to absolute immunity for any claims under 42 U.S.C. § 1983 based on their testimony. 132 S. Ct. at 1501-1507. The Court reached this conclusion by

extending the absolute immunity granted to trial witnesses to grand jury witnesses.

As the Court explained, it looked to “the common law for guidance in determining the scope of the immunities available” *Id.* at 1502. By consulting the common law, the Court could identify “those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed ‘with independence and without fear of consequences.’” *Id.* at 1503 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). One of those governmental functions that required the protection of absolute immunity was witness testimony at trial. *Id.* at 1503, 1505 (discussing *Briscoe v. LaHue*, 460 U.S. 325 (1983)). This absolute immunity for trial witnesses served important public policy purposes, namely, the protection of the judicial system: without immunity, a witness might not come forward to testify or might “shade” his testimony to avoid liability. *Id.* at 1505.

Significantly, the Court found that these same concerns applied with equal force to grand jury witnesses:

In both contexts, a witness’ fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability

needed to prevent perjurious testimony. In *Briscoe*, the Court concluded that the possibility of civil liability was not needed to deter false testimony at trial because other sanctions—chiefly prosecution for perjury—provided a sufficient deterrent. Since perjury before a grand jury, like perjury at trial, is a serious criminal offense, 18 U.S.C. § 1623(a), there is no reason to think that this deterrent is any less effective in preventing false grand jury testimony.

132 S. Ct. at 1505 (citations omitted). Accordingly, because the policy concerns were the same, the Court held that grand jury witnesses were entitled to the same absolute immunity from any claim based on their testimony. *Id.* at 1506.

In addition to these policy concerns, the Supreme Court identified one special concern, unique to the grand jury context, that further justified an absolute privilege: the need to preserve grand jury secrecy. In short, the Court noted that grand jury secrecy served several important public interests—including encouraging witnesses to come forward and to testify truthfully—and that allowing civil liability for grand jury testimony would undermine those interests. *Id.* at 1509. As the Court explained, “[i]f the testimony of witnesses before a grand jury could provide the basis for, or could be used as evidence supporting, a § 1983 claim, the identities of grand jury witnesses could be discovered by

filing a § 1983 action and moving for the disclosure of the transcript of grand jury proceedings.” *Id.* This subversion of grand jury secrecy (or even the threat its subversion) could be devastating, “[e]specially in cases involving violent criminal organizations or other subjects who might retaliate against adverse grand jury witnesses.” *Id.* In sum, the need to preserve grand jury secrecy further supported the Court’s conclusion that grand jury witnesses were entitled to absolute immunity.

Although *Rehberg* considered the immunity of grand jury witnesses in litigation under § 1983, the policies that motivated its decision are the same policies that have motivated Connecticut’s long-standing immunity for witnesses in judicial proceedings.⁵ Thus, for the same reasons that

⁵ As the Supreme Court noted, the immunity announced in *Rehberg* was broader than the immunity afforded witnesses at common law. At common law, the absolute privilege for witness testimony was limited to claims for slander or libel, but the Court held that witnesses were entitled to immunity for *any claims* brought to challenge the witness’s testimony. *See id.* at 1505. Regardless of whether the Connecticut Supreme Court would extend the common law absolute immunity to cover *all claims* as did the *Rehberg* Court, there is no doubt that absolute immunity would extend to the only claim at issue in this case, a claim for intentional infliction of emotional distress. *See Gallo*, 935 A.2d at 108; *Petyan*, 510 A.2d at 1342-43.

the United States Supreme Court extended the absolute privileges for witnesses to grand jury witnesses, the Connecticut Supreme Court would follow suit.

Vidro attempts to avoid this conclusion by pointing to *Gallo*. Appellant's Br. at 15-17. In *Gallo*, the Connecticut Supreme Court held that statements made to the police in connection with a criminal investigation are protected by a qualified privilege, and not an absolute privilege. There, the Court found "no benefit to society or the administration of justice in protecting those who make intentionally false and malicious defamatory statements to the police." 935 A.2d at 111 (quoting *Fridovich v. Fridovich*, 598 So.2d 65, 69 (Fla. 1992)).

It is worth noting, as a preliminary matter, that in *Gallo*, the same witnesses who spoke to the police also testified at trial and that there was no dispute that the witnesses' trial testimony was absolutely privileged. 935 A.2d at 107 n.9. In any event, in *Gallo*, the Connecticut Supreme Court found no public policy to support protecting false statements to the police with absolute liability. In the grand jury witness context, by contrast, there are strong public policies favoring protecting the testimony. As described above, such a privilege would encourage witnesses to testify freely and openly, without fear of retaliation. And in the grand jury context, these concerns are especially strong because grand jury proceedings are confidential. As the

Supreme Court noted in *Rehberg*, to allow civil liability for grand jury testimony would effectively undermine that secrecy. 132 S. Ct. at 1509. In short, although the Connecticut Supreme Court found no compelling public policies favoring an absolute privilege for statements to police, that conclusion does not indicate that the Court would reach the same conclusion with respect to grand jury witnesses. *See also id.* at 1507-1509 (distinguishing common law cases that disallowed absolute immunity for “complaining witnesses”). Indeed, for all of the reasons discussed above, the Connecticut Supreme Court would almost certainly find those statements absolutely privileged.

Conclusion

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

Dated: January 23, 2013

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read 'Alan M. Soloway', with a vertical line extending downwards from the end of the signature.

ALAN M. SOLOWAY
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

Addendum

28 U.S.C. 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only pu-

nitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.