No. 20–________

IN THE

Supreme Court of the United States

WILLIAM L. HUNTRESS AND ACQUEST DEVELOPMENT, LLC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

GEORGE ROBERT BLAKEY
WILLIAM J. & DOROTHY K. O'NEILL PROFESSOR OF LAW EMERITUS, NOTRE DAME LAW SCHOOL*
8630 East Monterosa Avenue
Scottsdale, AZ 85251
(574) 514-8220
*For identification only

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for Petitioners
(Additional counsel on inside cover)

GARY T. CORNWELL
THE CORNWELL LAW FIRM
900 North Rainbow
Ranch Road
Wimberly, TX 78676
(409) 659-7788

BRADLEY R. CAHOON
DURHAM JONES & PINEGAR
111 South Main Street, Suite 2400
Salt Lake City, UT 84111
(801) 415-3000

QUESTIONS PRESENTED

In 2006, this Court rejected the EPA's Clean Water Act jurisdiction over a wetland that does not abut navigable-in-fact waters. *Sackett* v. *E.P.A.*, 566 U.S. 120, 123–24 (2012) (explaining *Rapanos* v. *United States*, 547 U.S. 715 (2006)). Yet the EPA filed a civil action in 2009 and a felony criminal indictment in 2011 against Petitioners for alleged violations related to purported wetlands located miles from navigable waters. After a court dismissed the indictment for the Government's grand-jury interference, the Government re-indicted in 2013—after *Sackett*. That indictment was dismissed in 2016.

Petitioners filed this Federal Tort Claims Act suit for abuse of process and malicious prosecution. That Act creates subject-matter jurisdiction and waives sovereign immunity for United States employees' negligent or wrongful conduct, subject to a few exceptions, including the exercise of "a discretionary function." 28 U.S.C. 2680(a). But the Act also includes a law-enforcement proviso that clarifies the Act's provisions "*shall* apply to *any* claim" for "abuse of process[ ] or malicious prosecution." 28 U.S.C. 2680(h) (emphasis added). The court of appeals picked § 2680(a) over § 2680(h) and dismissed. That ruling presents two recurring, important questions for this Court's review:

1. Whether the discretionary-function exception nullifies the law-enforcement proviso (as four circuits have now held), limits that proviso (as one circuit has held), or yields to it (as one circuit has held).

2. Whether the discretionary-function exemption applies when government officials act outside their jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners are William L. Huntress and Acquest Development, LLC.

Respondent is the United States of America.

LIST OF ALL PROCEEDINGS

1. U.S. Court of Appeals for the Second Circuit, No. 19-1147-cv, *William L. Huntress, Acquest Development, LLC* v. *United States of America*, judgment entered April 30, 2020, *en banc* rehearing denied July 1, 2020.

2. U.S. District Court for the Southern District of New York, No. 18-cv-2974, *William L. Huntress, et al.* v. *United States*, final judgment entered March 29, 2019.

CORPORATE DISCLOSURE STATEMENT

Petitioner Acquest Development, LLC, has no parent corporation or publicly held company that owns 10% or more of its stock.

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JURISDICTION

The judgment of the court of appeals was entered on April 30, 2020. App.1a. The court of appeals denied Petitioners' timely request for rehearing *en banc* on July 1, 2020. App.22a. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

A provision of the Federal Tort Claims Act, 28 U.S.C. 2674, provides, in pertinent part:

> 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.

Section 1346(b)(1) of Title 28 provides, in pertinent part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . 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.

Section 2680 of Title 28 provides, in relevant part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . . [The "discretionary-function exception."]
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title *shall apply* to *any* claim arising . . . out of assault, battery false imprisonment, false arrest, *abuse of process*, or *malicious prosecution*. For the purpose of this subsection "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." [The "law-enforcement proviso" (emphasis added).]

INTRODUCTION

The federal courts of appeal have "struggled" to resolve the "unsettled" question of "whether and how to apply the" Federal Tort Claim Act's discretionary-function exception in 28 U.S.C. 2680(a) in cases brought under the law-enforcement proviso found in 28 U.S.C. 2680(h). *Medina* v. *United States*, 259 F.3d 220, 224 (4th Cir. 2001). Accord App.20a–21a n.7 ("Circuit courts appear to disagree over whether claims listed in the law-enforcement-officer proviso would be barred if they are based on the performance of discretionary functions within the meaning of § 2680(a).") (multiple citations omitted). This case provides an ideal vehicle for this Court to apply the law-enforcement proviso's plain language, resolve the circuit split, and affirm that the discretionary-function exception does not bar suits involving bad acts committed by federal investigatory and law-enforcement officers.

The Federal Tort Claims Act creates federal-court jurisdiction over, and waives the United States' sovereign immunity from, claims involving injuries "caused by the negligent or wrongful act[s] or omission[s]" of government employees. 28 U.S.C. 2674; 28 U.S.C. 1346(b)(1). The Act contains a list of exceptions to this jurisdictional grant and immunity waiver, including the so-called "discretionary-function exception," which exempts claims "based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a) (emphasis added).

A later subsection goes on to exempt certain torts as well. 28 U.S.C. 2680(h). But, recognizing the seriousness of misconduct perpetuated by federal investigators and law-enforcement officers, that subsection also sets forth what has become known as the law-enforcement proviso: "Provided, That, with regard to acts or commission of investigative or law enforcement officers of the United States *Government*, *the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of*" six bad acts, including *"abuse of process" and "malicious prosecution."* 28 U.S.C. 2680(h). And the proviso defines "investigative or law enforcement officer" broadly: "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

The present dispute is the latest in a long line of cases at the intersection between the discretionary-function exemption and the law-enforcement proviso.

Petitioners William Huntress and Acquest Development are successful and well-regarded real-estate developers who have constructed office buildings across the country to house esteemed companies and federal agencies, including the U.S. Treasury, the IRS, and even the EPA, among many others.

In 1997, a Huntress-owned company, Acquest Wehrle, LLC, purchased a commercially zoned property on Wehrle Drive in Amherst, New York, that the U.S. Army Corps of Engineers, in 1997 and again in 2001, determined had a non-jurisdictional 2.6-acre "isolated wetland," which did not abut any waterway of the United States. When Huntress and Acquest sought to develop the property, in 2002, the EPA tried to assert Clean Water Act jurisdiction over the parcel, precipitating contentious civil litigation.

Things got worse after another Huntress-affiliated company, Acquest Transit, LLC, purchased a nearby, 97-acre farm, a property that had its own isolated (alleged) wetlands on Transit Road in Amherst. In 2009, alleging Clean Water Act violations, the EPA sued Huntress and Acquest in dual civil lawsuits. And when Huntress and Acquest refused to capitulate, the EPA escalated the matter and filed a felony criminal indictment against them in 2011. A federal district court dismissed the indictment after Huntress and Acquest established that the Government interfered with the grand jury's investigation, but the EPA re-indicted in 2013.

Aside from the EPA's obvious retaliation, the problem with these felony proceedings is that the EPA lacks Clean Water Act jurisdiction over parcels that do not abut and are miles from navigable-in-fact waters. This Court rejected the EPA's more expansive wetlands-jurisdiction theory in *Rapanos* v. *United States*, 547 U.S. 715 (2006), five years *before* the EPA first indicted Petitioners. And the Court confirmed *Rapanos*' holding in *Sackett* v. *E.P.A.*, 566 U.S. 120, 123–24 (2012), a year before the re-indictment. But this Court's rulings were of no moment to the EPA. At a 2007 conference, a year after *Rapanos*, the EPA demanded that Huntress and Acquest pay $2 million to develop the Wehrle property or the EPA would prohibit *any* development at the site and fine Petitioners $400,000. When Huntress and Acquest's counsel raised their jurisdictional objection, the EPA's local Regional Counsel grew agitated and, referring to the *Rapanos* ruling, declared, "Let the Chief Justice try to enforce it!" App.61a. That same Regional Counsel was the EPA staff member who ultimately referred Petitioners' jurisdictional challenge to the EPA's Criminal Investigative Division for indictment.

After the 2013 re-indictment was dismissed, Huntress and Acquest filed this lawsuit under the Federal Tort Claims Act, claiming damages for the EPA's destruction of their business based on the very public and damaging accusation that they were felons. The Government challenged jurisdiction and asserted immunity, arguing that the EPA officials' conduct fell within the discretionary-function exception. Huntress and Acquest responded that the Government had no discretion to bring criminal indictments in the absence of Clean Water Act jurisdiction, and that the abuse of process and malicious prosecution claims fell within the law-enforcement proviso in any event.

The district court recognized the circuits' disagreement "over whether claims listed in the law-enforcement-officer proviso would be barred if they are based on the performance of discretionary functions within the meaning of § 2680(a)." App.20a–21a n.7 (contrasting *Medina* v. *United States*, 259 F.3d 220, 224–26 (4th Cir. 2001), *Gasho* v. *United States*, 39 F.3d 1420, 1435 (9th Cir. 1994), and *Gray* v. *Bell*, 712 F.2d 490, 507–08 (D.C. Cir. 1983), with *Nguyen* v. *United States*, 556 F.3d 1244, 1257 (11th Cir. 2009), and *Sutton* v. *United States*, 819 F.2d 1289, 1297 (5th Cir. 1987)). But the court ultimately agreed with the circuits holding that "Plaintiffs 'must clear the § 2680(a) discretionary function hurdle' before they can proceed on their intentional torts claims arising from law enforcement officers' misconduct under § 2680(h)." *Id.* (quoting *Medina*, 259 F.3d at 226). This result, said the court, was consistent with the Second Circuit's unpublished decision in *Wang* v. *United States*, 61 F. App'x 757, 758–59 (2d Cir. 2003). *Id.* The Second Circuit affirmed in a summary order. App.1a–6a.

Huntress and Acquest ask this Court to grant the petition and reverse. The interplay between the law-enforcement proviso and the discretionary-function exception has long flummoxed the circuits, and resolution of this unsettled question is essential to deter overzealous federal regulators pursuing criminal charges. What's more, this case presents an ideal vehicle to resolve the split. Certiorari is warranted.

STATEMENT

A. Petitioners and their business

William Huntress is a lifelong resident of New York State, other than the four years he served in the United States Air Force. App.30a–31a. After working as a Certified Public Accountant for Price Waterhouse Coopers and a real-estate investment and development firm, Huntress started his own company, Acquest, for which he is the sole member and manager. App.31a.

Through Acquest and its related, single-purpose entities, Huntress has built and provided beautiful commercial buildings for a long list of prominent private companies, including AT&T, Prudential Securities, American Airlines, Liberty Mutual Insurance, Red Bull, and numerous medical practices. App.31a n.1. Huntress also has had a long, productive relationship with the federal government, building state of the art facilities to house federal agencies across the country. App.31a. These agencies have included the National Labor Relations Board, the Small Business Administration, the Department of Commerce, the Food & Drug Administration, the Department of Labor, the General Services Administration, the Navy, the Internal Revenue Service, the Department of Veteran's Affairs, and even the EPA, among many others. App.31a–32a n.2.

B. The disputed properties

In 1997, an Acquest entity purchased a 20-acre commercially zoned property in the Town of Amherst, on Wehrle Drive. App.35a. Huntress fully expected to develop the property into the same type of high-quality commercial development that Acquest routinely built for government agencies and private companies across the United States. App.35a.

Huntress was no novice when it came to purchasing and developing real property. He purchased the Wehrle land understanding the need to determine legal and environmental restrictions that might be an impediment to the project. App.36a. He was aware of an existing Army Corps of Engineers Nationwide Permit allowing the Wehrle property's previous owner to fill .99 acres of an alleged 2.6 acre "isolated wetland" on the property, a permit that ran with the land. App.36a. It seemed clear that the Wehrle land was isolated from any traditional navigable waterways. App.36a. But to remove any doubt, Huntress obtained from the Army Corps in 2001 a jurisdictional determination that the land contained only "isolated wetlands" and was therefore not subject to Clean Water Act jurisdiction and needed no permit from the Corps. App.36a.

That small, isolated wetland was not what initially precipitated the EPA's interest, however. It was an *unrecorded*, 50-year development moratorium on the property that the EPA had required as a condition of monetary grants the EPA made to the Town of Amherst for sewer improvements. App.36a. But because the Grant and Moratorium Agreement had never been recorded in the County Clerk's office, Huntress had no notice of it. App.37a.

Once the EPA's recording mistake became clear, the agency issued a determination in 2002 that the Wehrle property constituted a "Special Case," an unusual and rarely used designation. App.37a. The EPA did this to take regulatory control away from the Army Corps and reverse the Corps' determination—made only one year before—that the small, isolated spot of "wetlands" was not within Army Corps or EPA jurisdiction. App.37a. Incidentally, the EPA's designation also violated a 1989 EPA and Army Corps Memorandum of Agreement that made the Army Corps' jurisdictional determination binding on the federal government. App.38a; *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016); 33 U.S.C. 1319, 1344(s); 33 C.F.R. pt. 331; EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act § VI-A (1989). This was the EPA's first step to show Huntress and Acquest who was boss. App.38a.

In 2006, Huntress and an Acquest entity bought a second property for development in the Town of Amherst, a 97-acre farm on Transit Road. App.39a. Like many other farms in the area, the Transit farm has some water on it, including (1) a small, man-made pond that contains rainwater, and (2) temporary puddles that result from snow melt or following a few days of heavy rain. App.50a. Huntress leased the property to farmers who farmed this property in the same way that had been done for a hundred years.

C. Tensions increase

In response to the EPA's "Special Case" designation, Huntress sued the EPA and the Army Corps, seeking a declaration that the Wehrle land was exempt from Clean Water Act wetlands regulation. App.38a. The district court ultimately dismissed the complaint for lack of subject-matter jurisdiction, concluding there was no final agency action under the Administrative Procedures Act. App.38a.

In the same lawsuit, Huntress sued the Town of Amherst, seeking a declaration that the unrecorded, 50-year development-moratorium agreement with the EPA resulted in an unconstitutional taking without compensation. App.38a–39a. The district court dismissed that claim as unripe because Huntress had not pursued his state remedies. App.39a. So, Huntress sued in state court and ultimately obtained a favorable jury verdict and payment of $3.94 million for the illegal termination of the office-park project Huntress and Acquest planned for the Wehrle land. App.39a.

By then, the EPA had enough of William Huntress; it sued him and Acquest in two civil lawsuits, alleging Clean Water Act violations at both the Wehrle and Transit lands. App.39a. And when Huntress and Acquest refused to capitulate, the EPA retaliated by criminally indicting them both. App.39a. Neither the civil complaints nor criminal indictments alleged that Petitioners had harmed or even threatened to harm the environment. App.34a–35a. But these actions were consistent with comments made by an EPA Region 6 administrator the year before the first criminal indictment, who suggested that the EPA use enforcement tactics similar to the Roman army's: crucify "the first five guys [you] see" and the rest will be "really easy to manage." App. 73a.

D. The 2011 criminal indictment

In November 2011, the EPA indicted Huntress and Acquest in *United States* v. *Acquest Development, LLC and William L. Huntress*, W.D.N.Y. No. 1:11-CR-00347. App.70a. The indictment was premised on alleged acts and omissions that the Government claimed were illegal solely because of the EPA's Clean Water Act jurisdiction over the Transit property. App.48a–49a. To satisfy the jurisdictional prerequisite, the indictment alleged that the Transit land contained "wetlands" that constituted "navigable waters" encompassed by the Clean Water Act's undefined reference to "waters of the United States." 33 U.S.C. 1362(7). In support of that allegation, the indictment pointed primarily to a 2005 wetlands "discount" on the purchase price (though in fact a purchase-agreement amendment removed any credit for wetlands because the seller did not agree that the property was subject to the Clean Water Act)—with no explanation of how any wetlands abutted navigable waters.

At the time of the first indictment, this Court had already made clear that not all wetlands are "jurisdictional wetlands," *i.e.*, part of "the waters of the United States." App.50a. The controlling authority was this Court's decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), a dispute that similarly involved alleged wetlands that were not abutting and miles from navigable waters. But the Justices were unable to reach a majority rationale.

In short, the indictment rested squarely on a jurisdictional theory that this Court had rejected in *Rapanos*.

But the EPA's officials didn't care. At a settlement conference involving the civil actions, Huntress, Acquest, and their legal counsel sat down in New York City with various EPA officials including Walter Mudgan, the EPA's former Regional Counsel for EPA Region 2 and, at the time this lawsuit was filed, the EPA's Director of the Emergency and Remedial Response Division. App.60a–61a. The EPA said it would only allow Huntress to develop the Wehrle land if he and Acquest paid the federal government $2 million. App.61a. Otherwise, Huntress and Acquest would have to pay a $400,000 fine with no right to develop the property. App.61a. Huntress and Acquest's counsel explained that the EPA could not establish Clean Water Act jurisdiction over the Wehrle property. App.61a. At that, Mudgan became agitated and, when reference was made to this Court's decision in *Rapanos*, Mudgan declared: "Let the Chief Justice try to enforce it!" App.61a.

Mudgan's intransigence can hardly be brushed aside as an aberrant remark by a single EPA malcontent. App.61a. Mudgan held a high-level position in the EPA. App.61a. The fact that the EPA's rule-making in this context mirrored Mudgan's statement suggests he was merely expressing a widely held sentiment at the agency. App.62a. And it was Mudgan himself who ultimately referred Huntress and Acquest to the EPA's Criminal Investigative Division for indictment. App.61a. Yet when pressed about these circumstances at his deposition, Mudgan demurred because, *despite his position as Regional Counsel*, he was not a criminal-law or criminal-environmental-law expert, he was not a Clean Water Act expert, and he was not an expert on the Clean Water Act's wetlands provisions. App.63a.

As the complaint in the instant action alleges, "pursuant to Fed. R. Civ. Proc. 11(b)(3)," "it is probable that evidence will be developed after a reasonable opportunity for further investigation and discovery, showing that those indictments were procured with the assistance and complicity of a number of EPA employees." App.62a. Indeed, EPA officials have already exposed their goal to simply grind Huntress and Acquest into the ground with litigation. Months before the first indictment was returned, the EPA suggested that Huntress could avoid jail time simply by kowtowing to the EPA's demands in the Transit civil case. App.68a–69a. And in a separate conversation with Acquest's general counsel, Phyllis Feinmark, the EPA's Branch Chief, Water and General Law Branch, Office of Regional Counsel in New York City, caustically explained: "The government does not care about money or time; Bill Huntress does." App.65a.

E. The 2013 re-indictment

The EPA's initial indictment was dismissed in early 2013 based on the EPA's interference with the grand jury. *United States* v. *Acquest Dev., LLC*, 932 F. Supp. 2d 453 (W.D.N.Y. 2013). So, in September 2013, the EPA re-indicted Petitioners in *United States* v. *Acquest Development, LLC and William L. Huntress*, W.D.N.Y. No. 1:13-CR-00199. App.9a. This time, the EPA asserted its Clean Water Act jurisdiction by characterizing the Transit property as having "potential wetlands." App.50a.

Between the 2011 indictment and the 2013 re-indictment, this Court decided *Sackett* v. *E.P.A.*, 566 U.S. 120 (2012). There, the Court was again confronted with the EPA's questionable assertion of jurisdiction on account of wetlands. And Justice Scalia, writing for a unanimous court, emphasized that although "no one rationale commanded a majority," the Court answered "no" to the question of "whether a wetland not adjacent to navigable-in-fact waters fell within the scope of the [Clean Water] Act." *Id.* at 123–24. And in a concurrence, Justice Alito described the dangerous philosophy that brought another wetlands case back to the Court: "Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act," and "if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy." *Id.* at 132 (Alito, J., concurring). A prophetic prediction indeed.

Despite all this, the EPA tightened the press on Huntress and Acquest by re-indicting them. On March 10, 2016, all the 2013 re-indictment's charges against Petitioners were dismissed. App.70a.

F. The costs of the EPA's bullying

The EPA effectively prevented the Wehrle property from being developed for more than a decade. And the EPA's announcement that William Huntress and his company were felons effectively destroyed their ability to conduct business and exposed Huntress to potential incarceration in a federal penitentiary. App.71a. The EPA's campaign also cost Huntress millions of dollars in legal and expert witness fees. App.64a.

G. Proceedings below

In April 2018, Huntress and Acquest filed this action under the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, and 28 U.S.C. 1346(b)(1), against the United States, seeking damages for malicious prosecution, intentional infliction of emotional distress, and abuse of process. App.10a. Consistent with the Act's law-enforcement proviso, Huntress and Acquest claimed that the bad acts were perpetrated by numerous "investigative or law enforcement officers" as defined in 28 U.S.C. 2680(h). App.25a.

The United States moved to dismiss the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted under Rule 12(b)(6). The district court granted the motion under Rule 12(b)(1), holding that the conduct of the EPA's officials fell within the discretionary-function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). App.7a. In so holding the court noted the circuit conflict over the discretionary-function exception and the Federal Tort Claims Act's law-enforcement proviso in 28 U.S.C. 2680(h), and the court aligned itself with the circuits that have held that the discretionary-function exception nullifies the law-enforcement proviso:

> Section 2680(h) bars claims against the Government 'arising out of,' among other things, 'malicious prosecution[and] abuse of process . . . [.]' but has a proviso that waives immunity for these torts when committed by 'law enforcement officers.' 28 U.S.C. § 2680(h). Circuit courts appear to disagree over whether claims listed in the law-enforcement proviso would be barred if they are based on

> the performance of discretionary functions within the meaning of § 2680(a). *Compare Medina v. United States*, 259 F.3d 220, 224–26 (4th Cir. 2001), *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994), *and Gray* [v. *Bell*], 712 F.2d [490,] 507–08 [D.C. Cir. 1983], *with Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009), *and Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987).
>
> The Court agrees with the majority of these Circuits that Plaintiffs 'must clear the § 2680(a) discretionary function hurdle' before they can proceed on their intentional torts claims arising from law enforcement officers' misconduct under § 2680(h). Indeed, the Second Circuit has relied on the discretionary function exception to dismiss false arrest and malicious prosecutions claims arising from law enforcement officers' alleged misconduct brought against the Government under the FTCA, without requiring the Government to overcome the hurdle of the law-enforcement-officer proviso to § 2680(h). *Wang v. United States*, 61 F. App'x 757, 758–59 (2d Cir. 2003). [App.20a–21a n.7.]

"[B]ecause the discretionary function exception shields the Government from any causes of action that Plaintiffs have asserted in their Complaint," concluded the district court, "the Complaint must be dismissed for lack of subject matter jurisdiction." App.20a. The Second Circuit affirmed in a summary order with no additional substantive analysis. App.1a–6a.

H. Postscript

On June 22, 2020, the EPA finalized a clarified definition of "waters of the United States" under the Clean Water Act. The rule finally capitulated to what this Court had said all along in *Rapanos* and *Sackett*, namely, that the EPA lacks jurisdiction over wetlands unless they "abut a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water; are inundated by flooding" from such a water; "are physically separated from" such a water "only by a natural berm, bank, dune, or similar natural feature" or by "an artificial dike, barrier, or similar artificial structure [if] that structure allows for a direct hydrological surface connection to" such a water. *The Navigable Waters Protection Rule: Definition of 'Waters of the United States*, 85 Fed. Reg. 22250, 22251 (Apr. 21, 2020).

The practical effect of this Rule is an EPA admission of precisely what Huntress and Acquest claimed from the beginning: that the EPA lacked Clean Water Act jurisdiction over either the Wehrle or Transit properties. Yet if the Federal Tort Claims Act's discretionary-function exception nullifies the law-enforcement proviso, as the EPA successfully argued to the lower courts in this case, Huntress and Acquest will be deprived of discovery and the opportunity to prove that the EPA's criminal actions against them were unlawful from the get-go.

REASONS FOR GRANTING THE PETITION

As recent national events have emphasized, law-enforcement officials have great power to protect community safety and the public good. But that power can be abused. Without an avenue to pursue a remedy in such cases, citizens are left at the mercy of officials who sometimes choose to use their vast power and leviathan-like resources to subdue those they are supposed to defend and protect.

Congress saw this problem and addressed it by enacting the law-enforcement proviso in the Federal Tort Claims Act. 28 U.S.C. 2680(h). The proviso's plain language "extends the waiver of sovereign immunity" to "any" claim against federal law enforcement officers for abuse of process or malicious prosecution. *Millbrook* v. *United States*, 569 U.S. 50, 52–53 (2013). "Nothing in the text [of the proviso] further qualifies the category of 'acts or omissions' that may trigger FTCA liability." *Id.* at 55.

The problem is that the federal courts of appeals have "struggled" in deciding the "unsettled" question of "whether and how to apply the [discretionary function] exception in cases brought under the" law-enforcement proviso. *Medina*, 259 F.3d at 224. Accord, *e.g.*, *Garling* v. *EPA*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017) ("recogniz[ing] the disagreement"); App. 20a–21a n.7 (cataloguing the disagreement between the Fourth, Fifth, and D.C. Circuits on the one hand, and the Fifth and the Eleventh Circuits on the other).

The circuits are now hopelessly split into four camps. One circuit—the Eleventh—categorically holds that the law-enforcement proviso applies "regardless of whether the acts giving rise to it involve a discretionary function," *Nguyen* v. *United States*, 556 F.3d 1244, 1256–57 (11th Cir. 2009).

The Second Circuit reached that same conclusion regarding claims involving arrests and detentions. *Caban* v. *United States*, 671 F.2d 1230 (2d Cir. 1982). But it failed to apply it to this case involving alleged abuse of process and malicious prosecution by EPA officials, summarily affirming the district court and its reliance on the Second Circuit's unpublished decision in *Wang* v. *United States*, 61 Fed. App'x 757, 758–59 (2d Cir. 2003).

Three circuits—the D.C., the Fourth, and the Ninth—take the opposite approach, holding that the law-enforcement proviso is swallowed whole by the discretionary-function exception. *Gray* v. *Bell*, 712 F.2d 490 (D.C. Cir. 1983); *Medina* v. *United States*, 259 F.3d 220, 224 (4th Cir. 2001); *Gasho* v. *United States*, 39 F.3d 1420 (9th Cir. 1994).

And one additional circuit—the Fifth—holds that the two provisions "must be read together," such that only a narrow subset of claims go forward: those alleging egregious, intentional misconduct along the lines of the Collinsville raids and in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Investigation*, 403 U.S. 388 (1971). *Campos* v. *United States*, 888 F.3d 724, 736–38 (5th Cir. 2018).

This Court should grant the petition, adopt the Eleventh Circuit's approach, hold that the discretionary-function exception has no application to unconstitutional acts and the six torts listed in the law-enforcement proviso, and reverse and remand.

I. The Second Circuit's decision exacerbates a deep and mature circuit split.

Seven years ago, in *Millbrook* v. *United States*, 569 U.S. 50 (2013), the Government acknowledged the circuit split over the interplay between the Federal Tort Claims Act's discretionary-function exception and law-enforcement proviso. Three years ago, the Tenth Circuit became the most recent circuit to "recognize the disagreement." *Garling* v. *EPA*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017). The Second Circuit's decision here exacerbates the conflict, which now involves four differing approaches. This Court's review is sorely needed.

1. In the first camp is the Eleventh Circuit, which applies a categorical rule that the discretionary-function exception yields to the law-enforcement proviso. In that court's words, "sovereign immunity does not bar a claim that falls within the proviso to subsection (h), *regardless of whether the acts giving rise to it involve a discretionary function*." *Nguyen*, 556 F.3d at 1256–57 (emphasis added). So, "if a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event." *Id.* at 1257.

In *Nguyen*, the Eleventh Circuit rejected the argument that the discretionary-function exception protected agents involved in a DEA investigation of the plaintiff's medical practice that resulted in claims for false arrest, false imprisonment, and malicious prosecution. Although such an investigation necessarily involves judgment calls, "to the extent of any overlap and conflict between [the law-enforcement] proviso and [the discretionary-function exception], the proviso wins." *Id.* at 1252–53.

The Eleventh Circuit reached that result based on "[t]wo fundamental canons of statutory construction, as well as the clear Congressional purpose behind the" law-enforcement proviso. 556 F.3d at 1252. First, the law-enforcement proviso "is more specific than the discretionary function exception." *Id.* at 1253. Second, the law-enforcement proviso was amended after the discretionary-function exception's enactment, and "[w]hen subsections battle, the contest goes to the younger one." *Id.* Given the law-enforcement proviso's text and purpose, there is no excuse for "rewriting the words 'any claim' in the proviso to mean only claims based on the performance of non-discretionary functions." *Id.* at 1256.

There is no dispute that if the EPA had pursued its unlawful indictment and re-indictment against Huntress and Acquest in the Eleventh Circuit, their suit under the law-enforcement proviso would have been allowed to proceed.

2. In the second camp are the D.C., Fourth, and Ninth Circuits, holding that the discretionary-function exception nullifies the law-enforcement proviso. *Gray*, 712 F.2d at 508 (a plaintiff "must clear the 'discretionary function' hurdle *and* satisfy the 'investigative or law enforcement officer' limitation to sustain" a Federal Tort Claims Act claim); *Medina*, 259 F.3d at 224 (plaintiff's tort claims, each enumerated in the law-enforcement proviso, were barred by the discretionary-function exception); *Gasho* v. *United States*, 39 F.3d at 1433 (when there is "interplay" between the law-enforcement proviso and the other § 2680 exceptions, the other exceptions control, even though this "effectively bars any remedy" for some of the claims the law-enforcement proviso authorizes).

3. The Fifth Circuit is the sole member of the third camp. It refuses to adopt a "categorical[ ]" rule and instead holds that the two provisions "must be read together." *Campos*, 888 F.3d at 731, 737. If the law-enforcement proviso applies, then a district court should determine whether the alleged misconduct is along the lines of the Collinsville raids and in *Bivens*. *Id.* at 736–38. Collinsville was one of the locales where government agents engaged in "abusive, illegal, and unconstitutional 'no-knock' raids" that caused Congress to enact the law-enforcement proviso in the first place. *Sutton*, 819 F.2d at 1295 (quoting S. Rep. 93-588, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789, 2790).

4. And that brings us to the last camp, the Second Circuit. In a previous case that involved arrests and detentions, the court essentially applied the same categorical rule as the Eleventh Circuit. *Caban*, 671 F.2d at 1233. On the one hand, the court said that "the activities of the INS agents who detained appellant do not fall within the purview of [the discretionary-function exception] because the activities are not the kind that involve weighing important policy choices." *Ibid.* On the other, the court acknowledged that INS officials *exercised judgment* in deciding who met detention criteria but concluded that characterizing those acts as discretionary would "jeopardize a primary purpose for enacting" the law-enforcement proviso. *Id.* at 1234. Because Congress intended the law-enforcement proviso to include "the decision of a narcotics agent as to whether there is probable cause to search, seize, or arrest," *id.* at 1235, "a fortiori" courts should interpret the proviso to waive sovereign immunity when INS agents make the same kind of decision, *ibid.*

Here, too, EPA officials exercised judgment in deciding to criminally indict Huntress and Acquest. But if the law-enforcement proviso is to have any meaning, it cannot be negated by the discretionary-function exception. Yet the lower courts did not follow *Caban*'s rule or reasoning. The district court examined the circuit split, sided with the D.C., Fourth, and Ninth Circuits' categorical rules and the Second Circuit's unpublished decision in *Wang*, and held that the discretionary-function exception engulfs the law-enforcement proviso. App.20a–21a n.7. And a Second Circuit panel summarily affirmed, citing *Wang* and the D.C. Circuit's *Gray* decision while cursorily concluding that courts "have uniformly found" allegations like those Huntress and Acquest make against the EPA to be "quintessential examples of governmental discretion" and thus "immune under the discretionary function exception." App.5a (quoting *Gray*, 712 F.2d at 513). The Second Circuit denied rehearing *en banc*. App.22a.

In sum, any hope that the Second Circuit would bring some semblance of order to the multi-circuit split is gone. And the conflict is outcome determinative. If Huntress and Acquest's action arose in the Eleventh Circuit, they would now be taking discovery. If it arose in the Fifth Circuit, they could at least argue that the EPA's alleged acts were so abusive (given their unconstitutionality) that the acts warranted further investigation. Even in the Second Circuit, Huntress and Acquest might have had a chance if their claims had involved arrests or detentions. But though their claims were based on much worse government conduct—criminal felony indictments—they were never given an opportunity to prove their damage claims. This Court should grant review and resolve the circuit conflict.

II. The Second Circuit's decision makes a hash of the Federal Tort Claims Act's text and effectively writes the law-enforcement proviso out of the Act.

At first glance, it is understandable why courts have struggled to reconcile the law-enforcement proviso and the discretionary-function exception. After all, the word "any" means of every kind. *E.g.*, *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 218–19, 228 (2008). And § 2680(a) *excludes* "[a]ny claim" involving a discretionary function, while § 2680(h) *includes* "any claim" based on the listed torts.

But as the Eleventh Circuit explains, reconciliation is not difficult. The law-enforcement proviso is limited to "six specified claims arising from acts of two specified types of government officers." *Nguyen*, 556 F.3d at 1253. In contrast, the discretionary-function exception "applies generally to claims arising from discretionary functions or duties of federal agencies or employees." *Ibid.* In that situation, the "specific statutory provision trumps [the] general one." *Ibid.* (citations omitted). Accord, *e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) (citations omitted); *Bloate* v. *United* States, 559 U.S. 196, 207 (2010) (a statute's "specific provision" "controls" provisions "of more general application").

Indeed, the "most common example of irreconcilable conflict—and the easiest to deal with—involves a general prohibition that is contradicted by a specific permission." Scalia, *Reading Law* at 183. And that is the very situation presented here. The discretionary-function exception, enacted in 1946, involves a general prohibition on suing the Government arising out of its officials' discretionary acts. Added as a

Federal Tort Claims Act amendment in 1974, the law-enforcement proviso gives a specific permission: federal jurisdiction and waiver of sovereign immunity to pursue six enumerated tort claims against "investigative or law enforcement officers of the United States." 28 U.S.C. § 2680(h). Given a conflict before the discretionary-function exception's general prohibition and the law-enforcement proviso's specific permission, the law-enforcement "proviso wins." *Nguyen*, 556 F.3d at 1253.

Temporal consideration of the two provisions' enactment dates reinforces that conclusion. A later-enacted statute generally controls over an earlier-enacted statute on the same topic. Scalia, *Reading Law* at 186. And that result is "particularly" true when "the scope of the earlier statute is broad but the subsequent statute[ ] more specifically address[es] the topic at hand." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Here, the discretionary-function exception broadly prohibits any lawsuits involving a discretionary act. The later-enacted law-enforcement proviso specifically addresses only six specific torts that should always go forward. In such a situation, the later and more specific law-enforcement proviso controls. See *Brown & Williamson*, 529 U.S. at 143.

That result is also the one that best comports with Congressional intent. The 1974 amendment that added the law-enforcement proviso was a major change in U.S. sovereign immunity. Until then, subsection (h)—which Congress enacted in 1946 without the proviso—ensured that sovereign immunity remained for eleven, listed torts. *Gibson* v. *United States*, 457 F.2d 1391, 1395–96 (3d Cir. 1972).

Then came the infamous raids by federal agents on innocent families' homes in Collinsville, Illinois. See S. Rep. No. 93-588 (1974), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2790. The agents conducted the raids based on mistaken information and without warrants, leaving terrified family members and broken personal property in their wake. Yet under then-existing § 2680(h), those innocent victims could not recover damages from the federal government because of sovereign immunity. 1974 U.S.C.C.A.N. at 2790 ("There is no effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which the Collinsville families have been subjected."). Congress added the law-enforcement proviso to correct that wrong: "The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process." *Id.* at 2789–91.

So, to hold "that the discretionary function exception in subsection (a) trumps the specific provision in subsection (h) would defeat what we know to be the clear purpose of the 1974 amendment." *Nguyen*, 556 F.3d at 1256. Accord, *e.g.*, *Sutton*, 819 F.2d at 1297 ("[I]f the law enforcement proviso is to be more than an illusory—now you see it, now you don't—remedy, the discretionary function exception cannot be an absolute bar which one must clear to proceed under § 2680(h)."). And doing so would effectively negate § 2680(h) or, at minimum, eliminate the words "any claim" at the beginning of the proviso "to mean only claims based on the performance of non-discretionary

functions," contrary to this Court's well-established canons of construction. *Nguyen*, 556 F.3d at 1256 (citing *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (interpreting § 2680(c) so as not to eliminate or rewrite the word "any")), and *Artuz* v. *Bennett*, 531 U.S. 4, 10 (2000), among others).

As noted above, other circuits disagree with this conclusion. But as the Eleventh Circuit highlighted, "[n]one of those decisions addresses the war between the 'anys' in § 2680(a) and (h)." *Nguyen*, 556 F.3d at 1257. "None of them applies the canons of statutory construction under which a more specific and more recently enacted provision trumps a more general and earlier one." *Ibid.* And "[n]one of them comes to grips with the clear congressional purpose behind the enactment of the [law-enforcement] proviso to subsection (h)." *Ibid.* Only this Court's review can resolve that conflict.

III. The discretionary-function exception does not shield federal law-enforcement officers from acting without jurisdiction.

Long ago, this Court announced that governments lack "discretion" to violate the law. *Owen* v. *City of Indep.*, 445 U.S. 622, 649 (1980). That is why the Court has limited the "range of choices" protected by the discretionary-function exception to those that comply with "federal policy and law." *Berkovitz* v. *United States*, 486 U.S. 531, 538 (1988). Actions outside that range do not qualify for the discretionary-function exception; the clause "insulates the Government from liability [only] if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 537. Accord, *e.g., United States* v. *Gaubert*, 499 U.S. 315, 325 (1991) (government acts

qualify for the law-enforcement exception only when involving "judgment as to which of a range of permissible courses is the wisest."). That is why six circuits recognize, for example, that the exception does not except "actions that are unauthorized because they are unconstitutional." *Thames Shipyard & Repair Co.* v. *United States*, 350 F.3d 247, 254–55 (1st Cir. 2003). Accord *Myers & Myers Inc.* v. *U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975); *U.S. Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 130 (3d Cir. 1988); *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Raz* v. *United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nurse* v. *United States*, 226 F.3d 996, 1002–03 (9th Cir. 2000).

Yet the lower courts here ignored Huntress and Acquest's repeated arguments that the EPA lacked jurisdiction over the Transit land. After *Rapanos*—and certainly after *Sackett*—EPA officials were on notice that their Clean Water Act jurisdiction required them to show that any wetlands on the Transit property abutted navigable waters. But the lower courts disregarded that this crucial connection did not exist. The district court said that because "[t]he EPA is charged with the responsibility and the authority to enforce the" Act, "[o]nce the EPA had determined that the Transit Property was subject to the" Clean Water Act, "it had the discretionary authority to faithfully enforce" the Act and ensure Petitioners' compliance with it. App.18a–19a. This analysis was backward; the district court never considered whether the EPA had acted unlawfully by not only ignoring but thumbing its nose at this Court's decision in *Rapanos*.

The Second Circuit panel's decision was likewise backward. Spurning Huntress and Acquest's arguments as mere "tautology," the panel concluded that the complaint "fail[ed] to provide factual allegations that would permit the Court to find that the alleged conduct fell outside the scope of the discretionary function exception" on the ground that "the allegedly wrongful conduct, as described in Plaintiffs' complaint, involved an exercise of discretion and was susceptible to policy analysis." App.6a.

It is difficult to understand that conclusion. The indictment and re-indictment both involved the Transit property, and Huntress and Acquest alleged that the "characteristics of the land at issue in *Rapanos* are the characteristics of the Transit Road land." App.52a. Yet the EPA's officials "simply ignored the *Rapanos* decision and used the agencies' interpretation" of the Clean Water Act (that this Court rejected) to issue the indictment and the re-indictment. App.55a. "What was clear when the government indicted [William] Huntress and his company is that the indictments were unlawful." App.57a.

If those allegations are taken as true—as they must be on a Rule 12(b)(1) motion (Huntress and Acquest have never been given the opportunity to take discovery and make that showing)—then the EPA lacked Clean Water Act jurisdiction over the property from the get go, and its actions to prosecute and punish Huntress and Acquest were unlawful, i.e., not in the range of policy choices that federal law would allow. For that additional reason, this Court should grant the petition, reverse, and instruct the lower courts that a discretionary-conduct-exception inquiry requires a legal determination that government officials acted in accord with the law.

IV. This case is an ideal vehicle to resolve the circuit conflict.

This petition is not the first to raise the circuit conflict involving the discretionary-function exception and the law-enforcement proviso. The Government successfully resisted two petitions as not properly preserving the question. Br. in Opp'n 13, *Castro* v. *United States*, 562 U.S. 1168 (2011) (No. 10-309); Br. in Opp'n 14, *Welch* v. *United States*, 546 U.S. 1214 (2006) (No. 05-529). It successfully opposed the third by downplaying the conceded circuit split and arguing the merits. Br. in Opp'n 36–41, *Campos* v. *United States*, 139 S. Ct. 1317 (2019) (No. 18-234). But no such arguments warrant denial here.

To begin, the issue is fully preserved. In rejecting Petitioners' arguments, the district court recognized the circuit split and sided with "the majority," concluding that the discretionary-function exception nullifies the law-enforcement proviso. App.20a–21a n.7. Huntress and Acquest highlighted that conflict in both their opening and reply briefs filed with the Second Circuit, quoting at considerable length the Eleventh Circuit's analysis in *Nguyen* and raising the sympathetic language in the Second Circuit's own *Caban* decision. Appellants' Opening Br. 29–32; Appellants' Reply Br. 23–26. But the panel gave that argument the back of its hand in its summary order, citing *Gray* and the unpublished *Wang* decision, App.5a, thus exacerbating the circuit conflict.

In addition, the record cleanly frames the question presented. The facts are not disputed because the district court granted the Government's motion to dismiss under Rule 12(b)(1), which requires that all alleged facts be accepted as true. And those facts state a claim under the law-enforcement proviso.

Next, this Court's resolution of the question presented will be outcome determinative. If the Court adopts the Eleventh Circuit or Fifth Circuit approach, Petitioners' case will move forward. If not, they will never have their day in court.

This Court's intervention is also crucial to vindicate Congressional intent. If the Fifth and Eleventh Circuits are correct, a circuit majority has effectively written the law-enforcement proviso out of the Federal Torts Claim Act. That is contrary to the context and purpose of the amendment that added the proviso, to say nothing of the separation of powers.

Moreover, as the deepening circuit split and the numerous previous petitions demonstrate, this is a mature conflict that will not go away. Further percolation is not warranted because there is no foreseeable path by which the circuits will resolve the three-way split on their own. Either victims of Government misconduct are being deprived of their day in court in the Second, Fourth, Ninth, and D.C. Circuits, or the Government is improperly being denied sovereign immunity in the Fifth and Eleventh Circuits. Either way, the Court should immediately intervene and settle the question.

What's more, Petitioners' lawsuit against the EPA is an ideal context to consider the interplay of the discretionary-function exception and the law-enforcement proviso. Cases brought under the proviso often involve arrests and use of force that can cause heated political passions, pitting law enforcement officials against individual rights. Petitioners' complaint involves the EPA's abuse of its white-collar criminal authority in the context of officials who thumbed their noses at this Court's precedents.

Conversely, the petition does *not* present other, collateral issues that would complicate a future petition if the Court decided to wait. These include but are not limited to: (1) the Federal Tort Claims Act's denial of a jury trial, contrary to the Seventh Amendment; (2) the Act's inflexible and possibly unlawful limitation on legal fees, see 28 U.S.C. 2678; and (3) whether, under a proper understanding of our country's history, the United States should enjoy sovereign immunity at all from tort suits, see *Al Shiari* v. *CACI Premier Tech.*, 368 F. Supp. 3d 935, 944–58 (E.D. Va. 2018) (comprehensively reviewing the transformation of sovereign immunity from a doctrine founded on feudal principles to one endorsed by American common law). So, this vehicle is not only suitable but clean.

Finally, this Court has recognized that "felony" is "as bad a word as you can give to man or thing." *Morissette* v. *United States*, 342 U.S. 246, 260 (1952) (citing 2 Frederick Pollock & Frederic Maitland, *The History of the English Law* 465 (2d ed. 1899)). Yet that is the word the EPA branded on William Huntress and his companies, causing incalculable losses and public humiliation. This is precisely the type of governmental abuse that Congress sought to remedy by enacting the law-enforcement proviso. Only this Court can undo the erasing of the causes of action Congress intended to provide and give Petitioners what the court of appeals denied them: their rightful day in court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

GEORGE ROBERT BLAKEY
WILLIAM J. & DOROTHY K. O'NEILL
PROFESSOR OF LAW EMERITUS,
NOTRE DAME LAW SCHOOL*
8630 East Monterosa Avenue
Scottsdale, AZ 85251
(574) 514-8220

GARY T. CORNWELL
THE CORNWELL LAW FIRM
900 NORTH RAINBOW RANCH ROAD
WIMBERLY, TX 78676
(409) 659-7788

BRADLEY R. CAHOON
DURHAM JONES & PINEGAR
111 South Main Street, Suite 2400
Salt Lake City, UT 84111
(801) 415-3000

SEPTEMBER 2020 *Counsel for Petitioners*

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* For identification only

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of April, two thousand twenty.

PRESENT:

GUIDO CALABRESI,
RICHARD C. WESLEY,
RICHARD J. SULLIVAN,
Circuit Judges.

William L. Huntress, Acquest Development, LLC,

Plaintiffs-Appellants,

v. No. 19-1147

United States of America,

Defendant-Appellee.

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[2]

FOR PLAINTIFFS-APPELLANTS:	MICHAEL B. SMITH (Jonathan D. Lupkin, *on the brief*), Lupkin PLLC, New York, NY. Bradley R. Cahoon, Durham Jones & Pinegar, P.C., Salt Lake City, UT. Gary T. Cornwell, The Cornwell Law Firm, Wimberley, TX.
FOR DEFENDANT-APPELLEE:	CHARLES S. JACOB, Assistant United States Attorney (Christopher Connolly, Assistant United States Attorney, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, NY.

Appeal from the United States District Court for the Southern District of New York (Oetken, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiffs-Appellants William Huntress and Acquest Development, LLC (collectively, "Plaintiffs") appeal from an order of the district court (Oetken, *J.*) dismissing their complaint against the United States for lack of subject matter [3] jurisdiction. On appeal, Plaintiffs argue that the district court erred in concluding that their claims, which allege that the government wrongfully prosecuted Plaintiffs, were foreclosed by the discretionary function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). *See* 28 U.S.C. § 2680(a). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

When considering the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(1), "we review factual findings for clear error and legal conclusions *de novo*." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000) (internal quotation marks omitted). "A case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." *Id.* The "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.*

Plaintiffs brought their complaint under the FTCA, which provides jurisdiction in the federal courts and waives the sovereign immunity of the United States in claims involving injuries "caused by the negligent or wrongful act[s] or [4] omission[s]" of government employees, subject to certain exceptions.

28 U.S.C. § 1346(b)(1). One such exception is found in 28 U.S.C. § 2680(a), known as the "discretionary function exception," which exempts from the FTCA's grant of jurisdiction "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a). Accordingly, courts must dismiss claims based on the performance of discretionary functions for lack of subject matter jurisdiction. *See, e.g., Fazi v. United States,* 935 F.2d 535, 539 (2d Cir. 1991).

The discretionary function exception applies when two conditions are met. First, the challenged acts must "involve[] an element of judgment or choice." *Berkovitz v. United States,* 486 U.S. 531, 536 (1988). Second, the judgment must be "of the kind that the discretionary function exception was designed to shield," meaning the conduct is a "governmental action[]" or "decision[] based on considerations of public policy" or susceptible to policy analysis. *Id.* at 536–37; *see also United States v. Gaubert,* 499 U.S. 315, 325 (1991). "[T]he purpose of the exception is to prevent judicial second-guessing of legislative and administrative [5] decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert,* 499 U.S. at 323 (internal quotation marks and citation omitted).

On its face, the gravamen of Plaintiffs' complaint is that EPA agents wrongfully procured and prosecuted indictments against Plaintiffs. *See, e.g.,* App'x at 13 ("The *government's* conduct in indicting Bill Huntress and Acquest . . . *was* unlawful."); App'x at 31 ("Not once, but twice, the EPA procured indictments of Bill Huntress and his company based on [its

allegedly unconstitutional] ‘interpretation’” of the federal Clean Water Act); App’x at 48 (“By this Complaint Plaintiffs respectfully allege that the EPA’s act of ‘making an example’ of Bill Huntress, and ‘hitting him as hard as possible’ – by indicting him, publicly accusing him of being a felon, destroying his ability to conduct his business, and subjecting him to possible incarceration in a federal penitentiary – even though a step down from crucifixion, is a Constitutionally unacceptable means for the EPA to make the populace ‘*really easy to manage*.’”). These allegations, which are grounded in “an agency’s decision . . . to prosecute or enforce, whether through civil or criminal process,” clearly involved “decision[s] generally committed to an [6] agency’s absolute discretion.” *Heckler v. Chaney,* 470 U.S. 821, 831 (1985). “[C]ourts have uniformly found” such “quintessential examples of governmental discretion . . . to be immune under the discretionary function exception.” *Gray v. Bell,* 712 F.2d 490, 513 (D.C. Cir. 1983); *see also Wang v. United States,* 61 F. App’x 757, 759 (2d Cir. 2003) (summary order) (“Conduct taken by law enforcement agents involving an element of discretion . . . is bulletproof from liability under the operative discretionary function exception.”).

Plaintiffs contend that the discretionary function provision nevertheless should not apply to bar claims alleging unconstitutional or illegal conduct, because such conduct is necessarily outside the “permissible” exercise of judgment. Plaintiffs’ Br. at 22–23. To be sure, as the district court recognized, “[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.” App’x at 64 (quoting *Myers & Myers, Inc. v. U.S. Postal Serv.,* 527 F.2d 1252, 1261 (2d Cir. 1975)). But mere conclusory assertions of

unconstitutionality cannot carry Plaintiffs' burden of establishing jurisdiction. Here, Plaintiffs' complaint, construed in the light most favorable to Plaintiffs, fails to provide [7] factual allegations that would permit the Court to find that the alleged conduct fell outside the scope of the discretionary function exception. We therefore find that the allegedly wrongful conduct, as described in Plaintiffs' complaint, involved an exercise of discretion and was susceptible to policy analysis. Accordingly, the district court did not err in holding that Plaintiffs' claims were foreclosed by the discretionary function exception to the FTCA.

Conclusion

We have reviewed the remainder of Plaintiffs' arguments – including that Plaintiffs' claims fall within and are specifically authorized by the law enforcement proviso of the intentional tort exception – and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM L. HUNTRESS, et al., Plaintiffs, -v- UNITED STATES, Defendant.	18-CV-2974 (JPO) OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Plaintiffs William L. Huntress and Acquest Development, LLC ("Acquest") (collectively, "Plaintiffs") bring this action against Defendant the United States ("the Government") under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.,* alleging malicious prosecution, intentional infliction of emotional distress, and abuse of process by agents of the Environmental Protection Agency ("EPA"). (Dkt. No. 1 ("Compl.").) The Government moves to dismiss the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted under Rule 12(b)(6). (Dkt. No. 15.) For the reasons that follow, the Government's motion is granted pursuant to Rule 12(b)(1).

I. Background

The following facts are drawn primarily from the allegations in Plaintiffs' Complaint, which are presumed true for purposes of deciding this motion, as

well as from prior judicial opinions of which this Court may take judicial notice.[1]

[2] Huntress is the President and Sole Managing Member of Acquest, a limited liability company in New York. (Compl. at 2.) Acquest owns two pieces of property in Amhert, New York—one on Wehrle Drive (the "Wehrle Property"), and the other on Transit Road (the "Transit Property"). (Compl. at 11, 14.)

In January 2009, the Government commenced a civil action against Acquest Transit LLC ("Acquest Transit")[2] for violations of the Clean Water Act ("CWA") on the Transit Property. *United States v. Acquest Transit LLC,* No. 09 Civ. 055S, 2009 WL 2157005, at *1 (W.D.N.Y. July 15, 2009). In light of Acquest Transit's failures to comply with the EPA's cease and desist orders, the court granted the Government's motion for a preliminary injunction and enjoined Acquest Transit from "performing any additional earthmoving work at the" Transit Property.

[1] "A district court reviewing a motion to dismiss may also consider documents of which it may take judicial notice, including pleadings and prior decisions in related lawsuits." *Gertskis v. U.S. E.E.O.C.,* No. 11 Civ. 5830, 2013 WL 1148924, at *1 (S.D.N.Y. Mar. 20, 2013). Here, the Court takes judicial notice of the decisions in *United States v. Acquest Transit LLC,* No. 09 Civ. 055S, 2009 WL 2157005 (W.D.N.Y. July 15, 2009), *United States v. Acquest Dev., LLC,* 932 F. Supp. 2d 453 (W.D.N.Y. 2013), *United States v. Huntress,* No. 13 Cr. 199, 2015 WL 631976 (W.D.N.Y. Feb. 13, 2015), and *United States v. Acquest Wehrle, LLC,* No. 09 Civ. 637, 2017 WL 6387801 (W.D.N.Y. Nov. 1, 2017).

[2] Acquest Transit LLC appears to be a company managed by Huntress. *Compare United States v. Acquest Transit LLC,* No. 09 Civ. 055S, 2009 WL 2157005, at *1 (W.D.N.Y. July 15, 2009) *with* Compl. at 14.

Acquest Transit LLC, 2009 WL 2157005, at *10–11. That lawsuit is still pending. (Compl. at 14.)

Also in 2009, the Government filed another civil action against Plaintiffs and Acquest Wehrle, LLC, for CWA violations on the Wehrle Property. (Compl. at 14.) The Government later voluntarily dismissed this action with prejudice in 2017. *United States v. Acquest Wehrle, LLC,* No. 09 Civ. 637, 2017 WL 6387801, at *1 (W.D.N.Y. Nov. 1, 2017).

Later in 2011, the Government procured a seven-count indictment against Plaintiffs and Acquest Transit accusing them of various crimes, "including conspiracy, obstruction of justice, concealment of material facts, and violations of the Clean Water Act." *United States v. Acquest Dev., LLC,* 932 F. Supp. 2d 453, 456 (W.D.N.Y. 2013). This indictment was eventually [3] dismissed without prejudice on the ground that the Government had interfered with the grand jury's independence. *Id.* at 463. The dismissing court allowed the Government leave "to seek another indictment before a different grand jury." *Id.*

Subsequently, a new grand jury returned a five-count indictment against Plaintiffs and Acquest Transit in 2013. (Compl. at 38.) Plaintiffs and Acquest Transit moved to dismiss the indictment, but the court denied their motion. *United States v. Huntress,* No. 13 Cr. 199, 2015 WL 631976, at *1 (W.D.N.Y. Feb. 13, 2015).[3] Acquest Transit later entered into a plea agreement with the Government, under which it agreed to plead guilty to the criminal contempt charge and pay a $500,000 fine. *See United States v.*

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[3] The Westlaw database misstates this case's docket number. Instead of No. 13 Civ. 199S, the correct case number is No. 13 Cr. 199.

Huntress, No. 13 Cr. 199 (W.D.N.Y. Nov. 5, 2015), Dkt. No. 77 at 1. The Government subsequently dismissed the rest of the charges against Acquest Transit and Plaintiffs. *See United States v. Huntress,* No. 13 Cr. 199 (W.D.N.Y. Mar. 11, 2016), Dkt. No. 85.

On April 4, 2018, Plaintiffs commenced this lawsuit against the Government under the FTCA for its employees' alleged wrongdoing in connection with the issuance of these two criminal indictments. (Dkt. No. 1.) Specifically, Plaintiffs allege that that [*sic*] the EPA agents responsible for Plaintiffs' prosecution improperly "procure[d the] two indictments" against them. (Compl. at 42.) Plaintiffs assert three causes of action in connection with the EPA agents' alleged improper conduct: (1) malicious prosecution, (2) intentional infliction of emotional distress, and (3) abuse of process. (Compl. at 42–45.)

[4] The Government now moves to dismiss the Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). (Dkt. No. 15.) With briefing now completed (Dkt. Nos. 23, 26), the motion is ripe for resolution.

II. Legal Standards

"Generally, a claim may be properly dismissed for lack of subject matter jurisdiction where a district court lacks constitutional or statutory power to adjudicate it." *Kingsley v. BMW of N. Am. LLC,* No. 12 Civ. 234, No. 12 Civ. 350, 2012 WL 1605054, at *2 (S.D.N.Y. May 8, 2012). "In resolving a motion to dismiss under Rule 12(b)(1)" based solely on a facial challenge to the sufficiency of a pleading, "the district court must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences

in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.,* 752 F.3d 239, 243 (2d Cir. 2014). If, however, "jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." *Id.* (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL,* 671 F.3d 140, 145 (2d Cir. 2011) (per curiam)). The party asserting subject matter jurisdiction bears "the burden of proving by a preponderance of the evidence that it exists." *Id.* (quoting *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000)).

To survive a motion to dismiss for failure to state a claim, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads facts that would allow "the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "The Court must accept as true all well-pleaded factual allegations in the complaint, and 'draw [ ] all inferences in the plaintiff's favor.'" *Goonan v. Fed. Reserve Bank of N.Y.,* 916 F. Supp. 2d 470, 478 (S.D.N.Y. 2013) (alteration in original) (quoting *Allaire* [5] *Corp. v. Okumus,* 433 F.3d 248, 249–50 (2d Cir. 2006)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678.

III. Discussion

As a threshold matter, the Court must consider whether it has the statutory or constitutional power to adjudicate this case. The Government argues,

among other things, that the Court does not have subject matter jurisdiction to hear this case because all of Plaintiffs' claims are based on alleged misconduct of the EPA agents that falls within the FTCA's discretionary function exception. (Dkt. No. 16 at 7–11.) Plaintiffs contend that the discretionary function exception does not apply. (Dkt. No. 23 at 2–6.)

The FTCA waives the sovereign immunity of the United States from suits for negligent or wrongful conducts of government employees subject to several exceptions. *See* 28 U.S.C. §§ 2671–80. Under the discretionary function exception, the Government is not liable for any claim based upon the exercise or failure to exercise "a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a).

The Supreme Court has laid out a two-part test to evaluate whether a government employee's conduct falls within the discretionary function exception. First, the alleged misconduct must involve an "element of judgment or choice" and not be compelled by statute or regulation. *Berkovitz v. United States,* 486 U.S. 531, 536 (1988); *see also United States v. Gaubert,* 499 U.S. 315, 322 (1991). Second, the alleged misconduct must be "based on considerations of public policy." *Berkovitz,* 486 U.S. at 537; *see also Gaubert,* 499 U.S. at 323. This latter requirement is meant to prevent courts from engaging in the "'second-guessing' of [6] legislative and administrative decisions grounded in social, economic, and political policy." *Gaubert,* 499 U.S. at 323 (quoting *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814 (1984)). Thus, the relevant inquiry is "whether the [government] decision is susceptible to

policy analysis." *In re Joint E. & S. Dists. Asbestos Litig.,* 891 F.2d 31, 37 (2d Cir. 1989) (quoting *U.S. Fid. & Guar. Co. v. United States,* 837 F.2d 116, 121 (3d Cir. 1988).

Before engaging in the *Berkovitz-Gaubert* test to evaluate whether the discretionary function exception applies, the Court first needs to determine what the alleged government misconduct is. Apparent inconsistencies between Plaintiffs' allegations in the Complaint and their opposition briefing render this analysis somewhat more difficult than it otherwise would be. Plaintiffs' Complaint appears to base their FTCA malicious prosecution claims against the Government on their allegations that the EPA agents "procure[d] two indictments of Bill Huntress and Acquest," and that "[t]he agents and employees of the EPA . . . [brought] and/or [continued] those prosecutions" with malice. (Compl. at 42.) Plaintiffs' two other claims—intentional infliction of emotional distress and abuse of process—also appear to be based on the procurement of these two indictments. (Compl. 43–45.) But in their opposition brief, Plaintiffs appear to move away from this basis for their claims, and instead assert that "the Complaint is not based on 'prosecutorial decisions . . . ,' or a 'decision to prosecute,' . . . or even a claim against a [law enforcement officer] who merely *aided* 'in the investigation to determine whether to prosecute.'" (Dkt. No. 23 at 5 n.1 (emphasis in original).) In sum, Plaintiffs assert in their brief that their claims actually "rest[] on conduct of federal law enforcement officers . . . [who] generally [do not] have absolute immunity." *Id.*

[7] This new position that Plaintiffs take seems irreconcilable with their Complaint, which again,

relies entirely on the Government's alleged procurement and prosecution of the two indictments against Plaintiffs. (*See generally* Compl. at 42–46.)[4] Still, in light of Plaintiffs' retraction of its reliance on any "prosecutorial decisions" (Dkt. No. 23 at 5 n.1), and "draw[ing] all reasonable inferences in favor of [Plaintiffs]," *Tandon,* 752 F.3d at 243, the Court is willing to adopt Plaintiffs' construction of their allegations. In doing so, the only conduct alleged in the Complaint that appears to provide a basis for Plaintiffs' claims is the conduct of EPA agent Walter Mugdan, who was responsible for the referral of Plaintiffs' CWA violations "to the Criminal Investigative Division . . . for indictment." (Compl. at 31.)

The Court turns now to consider whether the discretionary function exception applies to this alleged conduct, and concludes that both prongs of the *Berkovitz-Gaubert* test are satisfied, and that the discretionary function exception of the FTCA bars Plaintiffs' claims against the Government. First, Mugdan's conduct in referring Plaintiffs to the Criminal Investigative Division ("CID") appears to have involved "an element of judgment or choice," and Plaintiffs do not point to any "federal statute, regulation, or policy [that] specifically prescribes a course of

[4] To the extent that Plaintiffs challenge the decision to institute prosecution against them, their FTCA claims must be dismissed because "[p]rosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception." *Gray v. Bell,* 712 F.2d 490, 513 (D.C. Cir. 1983); *see also Wang v. United States,* No. 01 Civ. 1326, 2001 WL 1297793, at *4 (S.D.N.Y. Oct. 25, 2001) (holding that prosecutorial decisions fall within the discretionary function exception).

action" Mugdan was required to follow in making a referral recommendation to the Criminal Investigative Division ("CID"). *Berkovitz,* 486 U.S. at 536–37. The decision to refer Plaintiffs' particular case for further criminal investigation was therefore within the discretion of Mugdan, because "all the components of [that] determination–whether, when, whom and how–reflect the [8] decision-maker's judgment of how best to enforce compliance and to deter misconduct in others." *K.W. Thompson Tool Co. v. United States,* 836 F.2d 721, 729 (1st Cir. 1988) (dismissing a malicious prosecution claim brought against the United States arising from a criminal prosecution brought by EPA agents pursuant to the discretionary function exception). Thus, the first prong of the *Berkovitz-Gaubert* test is met because the decision to refer Plaintiffs' violations to the CID is quintessentially discretionary. *See Valdez v. United States,* No. 08 Civ. 4424, 2009 WL 2365549, at *7 (S.D.N.Y. July 31, 2009) ("[D]ecisions about how to conduct investigations fall squarely within the discretionary function exception.").

The second prong of the *Berkovitz-Gaubert* test is also satisfied, because Mugdan's decision to refer Plaintiffs' alleged CWA violations to the CID involved policy considerations "that the discretionary function exception was designed to shield." *Berkovitz,* 486 U.S. at 536. As the Government argues, this sort of referral, which reflects "a judgment on whether and how to investigate," is a quintessentially discretionary function. (Dkt. No. 16 at 10.) Indeed, in determining whether to refer Plaintiffs' alleged CWA violations to the CID, Mugdan was inevitably called upon to make policy judgments regarding the seriousness of Plaintiffs' CWA violations, which in turn required his balancing of "the need to maximize compliance with

[the CWA], and the efficient allocation of agency resources." *Berkovitz,* 486 U.S. at 538 (quoting *Varig Airlines,* 467 U.S. at 820). In balancing these factors, Mugdan was essentially making an "administrative decision[] grounded in social, economic, and political policy," one which this Court cannot and will not second-guess. *Varig Airlines,* 467 U.S. at 814; *see also Valdez,* 2009 WL 2365549, at *6 ("The judgments made as to what acts to perform in a federal investigation of criminal activity are the kinds of policy decisions that the discretionary function exception[] seeks to protect.") (collecting cases).

[9] Nevertheless, Plaintiffs contend that the discretionary function exception does not apply here because the [*sic*] Mugdan's conduct as an agent of the EPA "was *illegal, unconstitutional, and . . . outside of the scope of the EPA's jurisdiction,"* and "was designed and carried out merely to *coerce* compliance . . . with *EPA demands that the EPA had no jurisdiction* to make." (Dkt. No. 23 at 6.)

"It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority." *Myers & Myers, Inc. v. U.S. Postal Serv.,* 527 F.2d 1252, 1261 (2d Cir. 1975). The Court thus agrees with Plaintiffs that the discretionary function exception does not shield official conduct that is either unconstitutional or clearly outside the scope of a Government agent or agency's properly delegated authority, at least where that agent or agency "was acting so far beyond its authority that it could not have been exercising a function which could in any proper sense be called 'discretionary.'" *Birnbaum v. United States,* 588 F.2d 319, 329–33 (2d Cir. 1978) (internal quotation marks omitted) (holding that the discretionary function

exception did not apply to the CIA's collection of intelligence with respect to domestic security matters because the CIA's statutory mandate was limited to collecting foreign intelligence), *partial abrogation recognized by Hurwitz v. United States,* 884 F.2d 684 (2d Cir. 1989); *see also Watson v. United States,* 179 F. Supp. 3d 251, 272 (E.D.N.Y. 2016) (holding that the discretionary function exception did not apply to ICE's arrest and detention of a U.S. citizen because the ICE's statutory authority to arrest and detain was limited to aliens).

Here, Plaintiffs fail to show that the EPA agent's conduct was "so far beyond its authority that it could not have been exercising a function which could in any proper sense be called 'discretionary.'" *Birnbaum,* 588 F.2d at 332 (citing *Hatahley v. United States,* 351 U.S. 173, 181 [10] (1956)). Plaintiffs allege that in light of the Supreme Court decision in *Rapanos v. United States,* 547 U.S. 715 (2006), the state of the law surrounding the CWA "*prior to and during* the time of the alleged wrongful conduct [was too vague to have] *clearly provided* that the EPA had jurisdiction" over Plaintiffs' land. (Compl. at 27–31.) Accordingly, Plaintiffs argue that the EPA agents' conduct was unlawful and beyond the scope of their delegated authority because the CWA was so vague such that the EPA's assertion of jurisdiction lacked any basis in law. (Dkt. No. 23 at 5–6; *see also* Compl. at 28 ("When the law is unclear, there is, in effect, no law; and 'the rule of men' fills the void.").

Plaintiffs' argument is unpersuasive. As an initial matter, Plaintiffs' suggestion that *Rapanos* left the outer boundaries of CWA jurisdiction open to interpretation does not establish that the CWA as a whole thereby became unconstitutionally vague such

that its conferral of jurisdiction over waters of the United States to the EPA became void. In fact, even in the wake of the *Rapanos* decision, federal courts have uniformly upheld enforcement of the CWA in circumstances where defendants have some knowledge of the possibility that their properties contain waters of the United States. *See, e.g., United States v. Lucas,* 516 F.3d 316, 327–28 (5th Cir. 2008); *United States v. Robertson,* 875 F.3d 1281, 1292–93 (9th Cir. 2017). Here, Plaintiffs were on clear notice that the Transit Property was subject to the CWA: The EPA had issued at least two cease and desist orders to Plaintiffs advising them of possible CWA violations on the Transit Property before initiating any of the criminal lawsuits giving rise to their tort claims. *See, e.g., Acquest Transit LLC,* 2009 WL 2157005, at *10. For all of their emphasis of the ambiguity surrounding the CWA following *Rapanos,* Plaintiffs fail to point to any authority holding that the EPA's enforcement of the CWA following *Rapanos* was a categorically unconstitutional exercise of authority.

[11] Having determined that the CWA was not void for vagueness, the Court now asks whether the EPA's assertion of jurisdiction over the Transit Property and its subsequent enforcement actions was a proper exercise of its delegated CWA authority. The CWA prohibits the discharge of any pollutant into "the waters of the United States." 33 U.S.C. §§ 1311(a), 1362(7), (12). The EPA is charged with the responsibility and the authority to enforce the CWA. *See id.* § 1319. The EPA was thus acting within its statutory mandate when determining whether the Transit Property contained a body of water that was part of the "water of the United States." Once the EPA had determined that the Transit Property was subject to

the CWA, it had the discretionary authority to faithfully enforce the CWA and to ensure Plaintiffs' compliance with the CWA. As such, the referral of Plaintiffs' CWA violations to CID for further investigation was a proper exercise of the EPA's statutory authority.[5]

Finally, a key premise of Plaintiffs' argument, namely that the EPA's jurisdictional determinations in the wake of *Rapanos* necessarily entailed complicated decision-making in an area of regulatory uncertainty, if accept [*sic*] as true, serves only to undermine Plaintiffs' contention that the EPA clearly acted outside the scope of its authority in a manner sufficient to defeat the Government's reliance on the discretionary function exception. Indeed, the difficult regulatory decision of delineating the extent of CWA enforcement to pursue following *Rapanos* confirms the extent to which the EPA's decision making was "grounded in social, economic, and political [12] policy," which is precisely what the discretionary function exception intends to shield.[6] *Varig Airlines,* 467 U.S. at 814.

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[5] Indeed, at least one court to have reviewed the EPA's conclusion that the Transit Property was subject to the CWA in the wake of *Rapanos* concluded that EPA had acted within the scope of its CWA enforcement authority, and held that at least for purposes of a preliminary injunction, Acquest Transit had "failed to meet its burden of demonstrating that the Clean Water Act's provisions do not apply to [the Transit] Property." *Acquest Transit LLC,* 2009 WL 2157005, at *11. This court's holding at the very least buttresses the conclusion that the EPA did not so clearly step outside the bounds of its statutory authority in enforcing the CWA with respect to the Transit Property such that the discretionary function exception cannot apply here.

[6] Plaintiffs' allegations that the EPA agents had ulterior motives behind their enforcement conduct do not defeat the application of the discretionary function exception, because this "exception

[Footnote continued on next page]

Plaintiffs' conclusory statement that the EPA's jurisdiction is "*not clear*"—without specifying which provision of the Constitution or the CWA that Agent Mugdan's enforcement actions clearly violated—is insufficient to establish that the EPA has acted "so far beyond its authority that it could not have been exercising a function which could in any proper sense be called 'discretionary.'" *Birnbaum,* 588 F.2d 319, 33 (internal quotation marks omitted).

In conclusion, because the discretionary function exception shields the Government from any causes of action that Plaintiffs have asserted in their Complaint, the Complaint must be dismissed for lack of subject matter jurisdiction.[7]

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is indifferent to the Government actor's motivation." *Wang,* 2001 WL 1297793, at *4.

[7] Plaintiffs suggest that applying the discretionary function exception under 28 U.S.C. § 2680(a) would conflict with the law-enforcement-officer proviso to 28 U.S.C. § 2680(h). (Dkt. No. 23 at 2–3.) The Court disagrees.

Section 2680(h) bars claims against the Government "arising out of," among other things, "malicious prosecution[and] abuse of process . . . [,]" but has a proviso that waives immunity for these torts when committed by "law enforcement officers." 28 U.S.C. § 2680(h). Circuit courts appear to disagree over whether claims listed in the law-enforcement-officer proviso would be barred if they are based on the performance of discretionary functions within the meaning of § 2680(a). *Compare Medina v. United States,* 259 F.3d 220, 224–26 (4th Cir. 2001), *Gasho v. United States,* 39 F.3d 1420, 1435 (9th Cir. 1994), *and Gray,* 712 F.2d at 507–08, *with Nguyen v. United States,* 556 F.3d 1244, 1257 (11th Cir. 2009), *and Sutton v. United States,* 819 F.2d 1289, 1297 (5th Cir. 1987).

The Court agrees with the majority of these Circuits that Plaintiffs "must clear the § 2680(a) discretionary function

[Footnote continued on next page]

[13]

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss is GRANTED.

The Clerk of Court is directed to close the motion at Docket Number 15 and to close this case.

SO ORDERED.

Dated: March 29, 2019
New York, New York

J. PAUL OETKEN
United States District Judge

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hurdle" before they can proceed on their intentional torts claims arising from law enforcement officers' misconduct under § 2680(h). *Medina,* 259 F.3d at 226. Indeed, the Second Circuit has relied on the discretionary function exception to dismiss false arrest and malicious prosecutions claims arising from law enforcement officers' alleged misconduct brought against the Government under the FTCA, without requiring the Government to overcome the hurdle of the law-enforcement-officer proviso to § 2680(h). *Wang v. United States,* 61 F. App'x 757, 758–59 (2d Cir. 2003); *see also Valdez,* 2009 WL 2365549, at *4–7. Because the Court has already concluded that Plaintiffs' claims must be dismissed under the discretionary function exception, the Court need not discuss whether the law-enforcement-officer proviso would apply here.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of July, two thousand twenty.

William L. Huntress, Acquest Development, LLC, Plaintiffs - Appellants, v. United States of America, Defendant - Appellee.	**ORDER** Docket No. 19-1147

Appellants, William L. Huntress and Acquest Development, LLC, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM L. HUNTRESS, AND ACQUEST DEVELOPMENT, LLC PLAINTIFFS, V. THE UNITED STATES, DEFENDANT.	§ § § § § §	CIVIL ACTION NO. [1:18-cv-02974]

COMPLAINT

Now come William L. Huntress and Acquest Development, LLC, Plaintiffs, by and through their attorneys, LUPKIN PLLC, THE CORNWELL LAW FIRM, and G. ROBERT BLAKEY, seeking damages pursuant to the Federal Tort Claims Act.

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[2]

I.

PARTIES

1. Acquest Development, LLC is a New York limited liability company (hereinafter, "Acquest").

2. Plaintiff William L. Huntress (referred to herein as, "Bill Huntress") is a resident of the Town of Amherst, N.Y. and the President and Sole Managing Member of Acquest.

3. This Complaint addresses acts committed by employees of federal agencies, including the Environmental Protection Agency ("EPA). However, the only defendant is the United States. No person or governmental agency is named as a Defendant.

II.

NATURE OF CLAIMS, AND JURISDICTION

1. This Complaint against the United States seeks damages pursuant to the Federal Tort Claims Act

(hereinafter, the "FTCA"), 28 U.S.C. § 2671, *et seq*. and 28 U.S.C. § 1346(b)(1). The damages include compensation for economic losses and personal injuries (damages to reputation, emotional distress and mental anguish, humiliation and loss of consortium) caused by the negligent, wrongful and intentional acts and omissions of employees of the United States, while acting within the scope of their offices and employment, under circumstances where the United States, if a private person, would be liable to the Plaintiffs in accordance with the laws of the State of New York.

2. Such employees include EPA employees Walter Mugdan, Phyllis Feinmark, Mary Ann Theising, David Pohle, Douglas McKenna, and Murray Lantner, as well as others whose identities are currently unknown and whose conduct will be the subject of formal discovery, as permitted by Fed. R. Civ. Proc. 11(b)(3).

[3]

3. Because this Complaint includes causes of action in the nature of malicious prosecution and abuse of process, Plaintiffs further allege that, with respect to those causes of action, the negligent, wrongful and intentional acts and omissions were committed by "investigative or law enforcement officers" as defined in 28 U.S.C.A. § 2680(h), specifically, Special Agents of the Criminal Investigation Division of the EPA (hereinafter, "CID agents"), including but not limited to Robert Conway, William V. Lometti, David McLeod, Brian Kelly, and Daniel Lau, assigned to the EPA's New York, NY Reporting Office, EPA Region 2, 290 Broadway, New York, NY 10007.

4. To the extent that other federal agency employees who also participated in causing the malicious prosecution and/or abuse of process were not "investigative or law enforcement officers" as defined in 28 U.S.C.A. § 2680(h), Plaintiffs allege that such employees aided and abetted, conspired with, and acted in concert with "law enforcement agents" in initiating and committing those wrongs, and that their conduct constituted overt acts by conspirators in furtherance of the conspiracy.

III.

VENUE

1. Venue is proper in the Southern District of New York pursuant to 28 U.S.C.A. § 1402(b), in that acts and omissions forming the basis of this Complaint were committed by EPA employees assigned to and working within the EPA's New York City Regional Offices, including acts and omissions by CID agents Robert Conway, William V. Lometti, David McLeod, Brian Kelly, and Daniel Lau, assigned to the EPA's New York Reporting Office, EPA Region 2, 290 Broadway, New York, NY 10007. Such acts include but are not limited to acts and omissions that caused the filing of unfounded felony criminal charges against the [4] Plaintiffs, maliciously and without probable cause, in two successive criminal cases, *The United States of America v. Acquest Development, LLC and William L. Huntress*, Case Number 1:11-CR-00347, filed in the Western District of New York on November 09, 2011, and *The United States of America v. Acquest Development, LLC and William L. Huntress*, Case

Number 1:13-CR-00199, filed in the Western District of New York on September 19, 2013.

IV.

SCOPE OF THE CONSPIRACY

1. By this Complaint, Plaintiffs seek damages proximately caused by the filing of felony criminal charges in those two cases. (Those felony charges will hereinafter be referred to as "the indictments.")

2. The indictments against both Bill Huntress and Acquest were subsequently dismissed.

3. Paragraph II.4 is incorporated by reference herein. Further, pursuant to Fed. R. Civ. Proc. 11(b)(3), Plaintiffs allege that the wrongful conduct that forms the basis of this Complaint may have included conduct by employees of the Army Core [*sic*] of Engineers ("ACOE"), as well as attorneys of the U.S. Department of Justice, and/or the United States Attorney's Office for the Western District of New York (collectively, "DOJ"), who knew or should have known of, and/or recklessly disregarded the Constitutional prohibitions that made the indictments of Bill Huntress and Acquest unlawful. If subsequent discovery produces evidence of this fact, then that conduct by ACOE and/or DOJ employees would constitute relevant and admissible evidence of overt acts of co-conspirators who participated in the wrongful conduct at issue herein.

[5]

4. Relevant times. This Complaint involves events that began in 1997, and government acts and

omissions in connection with those events that have continued to the present date.

V.

CONDITIONS PRECEDENT

1. Plaintiffs have fully complied with all conditions precedent in 28 U.S.C. § 2675 of the Federal Tort Claims Act.

2. This suit has been timely filed, in that Plaintiffs timely served notice of these claims on both The Environmental Protection Agency and The United States Department of Justice on April 3, 2017. Notwithstanding the objectives of 28 U.S.C. § 2675, the EPA and the DOJ have refused to discuss settlement of these claims.

3. Further, no agency of the government denied the claim in writing or otherwise made any final disposition of the claim within six months after the claim was filed, pursuant to 28 U.S.C. § 2675. Thus, the Plaintiffs (claimants) do hereby deem such inaction to be a denial of the claim, and file this Complaint with the Court as permitted by 28 U.S.C. § 2675(a).

4. Damages proximately caused by the conduct at issue are capped by 28 U.S.C. § 2675(b) at the amount of $387,629,459.

VI.

THE FACTS, PART ONE: OVERVIEW

1. The relevant events began in 1997 when Bill Huntress and Acquest bought a small property in Amherst, New York for development. The purchase ultimately led to two civil cases filed by the government in 2009, and two criminal

indictments filed in 2011 and 2013. Eight years later (in 2017), one of the two civil cases was dismissed with prejudice on the government's motion. Four and one half years after the first of the two criminal indictments was filed, all [6] criminal charges against Bill Huntress and Acquest were dismissed. The second of the two civil cases is still ongoing.

2. This Complaint contains three causes of action: malicious prosecution, intentional infliction of emotional distress, and abuse of process, as well as the law of conspiracy.

3. All of the claims for relief arise from government efforts to coerce Bill Huntress – initially, via civil complaints seeking millions of dollars in civil penalties – into accepting the EPA's assertion of jurisdiction over his private land, upon the rationale that the land constituted part of "the waters of the United States" within the meaning of the CWA. When that form of coercion proved to be insufficient, the government twice indicted him, both to increase the pressure and punish him for his temerity in refusing to give in to the EPA's demands, and compel acceptance oftheir [*sic*] assertion of alleged jurisdiction over his private property.

4. This Complaint seeks damages caused to Huntress by the two indictments. Because the malicious prosecution, conspiracy, intentional infliction of emotional distress, and abuse of process causes of action each require that Plaintiffs establish *intentional* conduct on the part of the government, this Complaint provides substantial factual detail of that intent.

5. There was no “probable cause” for the criminal charges because the Constitution of the United States requires that charges of criminal conduct may only be based on clear, unambiguous law that proscribes alleged criminal conduct in writing, and in advance of the occurrence of the conduct. As will be described in detail herein, no such law existed prior to or during the time period that the conduct at issue in the indictments occurred. Thus, the conduct alleged in the two indictments was not “a crime,” and neither Bill Huntress’s nor Acquest’s conduct was unlawful.

[7]

6. The government’s conduct in indicting Bill Huntress and Acquest, however, *was* unlawful. Further, for the reasons described in detail below, the government’s agents intentionally committed that wrongful conduct.

7. In making its decision to indict Bill Huntress and Acquest, the government was not following the objectives of Congress when Congress enacted the CWA. The two indictments of Bill Huntress and Acquest were not a criminal prosecution arising from, or based on, any alleged harm to the environment (and no such harm occurred). Instead, they were criminal prosecutions based on the EPA’s notion that the EPA – whether acting properly, or improperly, or even if acting without jurisdiction – must be obeyed. The EPA’s objective was to compel such obedience, and to punish Bill Huntress and Acquest for perceived disobedience.

8. Bill Huntress was born in 1956 in Rochester, New York. When he was 8 years old, his family moved to the Buffalo/Clarence New York area, where –

except for the 4 years he served in the United States Air Force, from which he was honorably discharged – he has lived ever since. In May, 1981, he graduated from the University of Buffalo with a Bachelor of Science degree in Business. He first worked as a Certified Public Accountant for Price Waterhouse Coopers (until 1985), and then Realmark Properties (a real estate investment/development firm). In August, 1988, Bill Huntress started his company, Acquest. Bill Huntress is the sole member and manager of Acquest. Over the succeeding years, he built (through Acquest and its related, single purpose entities) beautiful commercial [8] buildings for a long list of prominent private companies.[1] He also had a long, amicable and profitable relationship with the federal government, building commercial structures to house federal agencies all across the United States.[2]

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[1] Acquest's private clients included Children's Hospital, Kaleida Health System, Millard Fillmore Hospital, Buffalo Cardiology & Pulmonary, Buffalo General Hospital, Dent Neurologic Institute, Moog, Inc., Flower City Printing, The Mentholatum Company, American Packaging, AT&T, Prudential Securities, American Airlines, Headquarters, Inc., Federal Insurance Company, Liberty Mutual Insurance, Schindler Elevator Corporation, Bathfitter, Red Bull North America, Inc., Sodexho America, LLC, Pilkington North America, Inc., Shred - It USA, Inc., Hobart Corporation, and Security Credit Systems.

[2] Acquest's contracts with federal government agencies included the National Labor Relations Board, the United States Attorney, the U.S. Small Business Administration, the Immigration & Naturalization Services, the U.S. Department of Commerce, the U.S. Drug Enforcement Administration, U.S. Bankruptcy Court, U.S. Food & Drug Administration, the U.S. Department of Labor, the U.S.D.A. National Wildlife Research Center, the U.S.

[Footnote continued on next page]

9. Bill Huntress and his company were forced out of business at the end of 2011 when the first of the two indictments was procured by the EPA, publicly accusing Bill Huntress and his company of being felons.

10. By this Complaint, Plaintiffs do not seek to diminish the necessary and proper scope of the jurisdiction granted by Congress to the Executive Branch for the protection of our environment. Bill Huntress, as a husband, a father, and a creator of beautiful buildings, understands and supports the Congressional decision to entrust the EPA with the power to deter those who would otherwise pollute our environment with hazardous wastes.

11. In the opening section of a previous version of the EPA's own website (now moved to the website archive, at https://archive.epa.gov/epa/aboutepa/epa-history-1970-1985.html), in an article written in 1985 styled, "*EPA History (1970-1985*"), the EPA states:

    [9] When the U.S. Environmental Protection Agency [was] formed some fifteen years

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Department of Health and Human Services, the U.S. Public Defender, the U.S. General Services Administration, the Social Security/Office of Hearings & Appeals, the Federal Executive Board, the Defense Contract Management Agency, the USGS Ecological Science Center, the U.S.D.A. Animal Plant Health Inspection Service, the U.S. Navy, the Internal Revenue Service, the U.S. Forest Service, the U.S. Department of Veteran's Affairs, the U.S. Customs and Border Protection, the U.S. Treasury Inspector General, the Department of Homeland Security, the U.S. Senator's Office, the Federal Protective Service, the Railroad Retirement Board, the Occupational Safety and Health Administration, the U.S. Department of Transportation, and even the U.S. Environmental Protection Agency (a/k/a, the EPA).

> ago, America had just awakened to the seriousness of its environmental pollution problem. Creation of [the] EPA was part of the response to growing public concern and a grass roots movement to "do something" about the deteriorating conditions of water, air, and land.
>
> For years, raw sewage, industrial and feedlot wastes had been discharged into rivers and lakes without regard for the cumulative effect that made our waters unfit for drinking, swimming, and boating. Smokestack omissions and automobile exhausts made air pollution so bad in certain communities that some people died and many were hospitalized. The land itself was being polluted by indiscriminate dumping of municipal and industrial wastes and some very toxic chemicals that would later come to the fore when their steel drum containers would rust and leak hazardous materials into soil and aquifers.[3]

12. The undeniable need for the EPA was accurately described in the Congressional Declaration of Goals and Policy in 33 U.S.C.A. § 1251. Therein, Congress listed such objectives as the elimination of discharges of pollutants into navigable waters and the ocean; the development of technology necessary to eliminate such discharges; and the protection of water quality for the propagation

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[3] Some may even recall the previous year when, on June 22, 1969, the Cuyahoga River in Cleveland, Ohio, was so polluted it caught fire.

and preservation of fish, shellfish, and wildlife. By this Complaint, Plaintiffs do not intend to denigrate the accomplishments of the EPA in addressing those problems. To the contrary, by this Complaint, Plaintiffs seek to hold the EPA accountable for its radical departure from the mission entrusted to it by Congress.

[10]

13. Over the years, the EPA has garnered justifiable public support whenever it stands tall to stop those who threaten to harm what we all recognize as the increasingly fragile environment in which we live, thereby preserving for us and our posterity a country where healthy foods, clean water, and diverse wildlife will abound.

14. Plaintiffs bring this Complaint because the EPA in this case lost sight of its Congressional mandate, and ignored the Constitutional principles that limit its power as an executive branch administrative agency. The EPA's focus on Bill Huntress was not the Congressional focus when Congress created the EPA or enacted the Clean Water Act. Bill Huntress did not dump poisonous chemicals or toxic waste into the ground, much less into "the waters of the United States." Bill Huntress farmed a piece of land that had been farmed for a hundred years, moved some dirt around, brought some fill dirt onto the land, and built an access road onto the land. Nowhere in its multiple civil complaints, or in the criminal indictments that the EPA procured against Bill Huntress and his company, did the EPA ever

allege that Bill Huntress had harmed or even threatened to harm the environment.[4]

15. The EPA's objective was not to secure an indictment of someone who had violated the law, for the EPA had no probable cause to believe that Huntress or Acquest had violated the law. Instead, the totality of the circumstances described herein, the actual government conduct at issue, and the *actual words* of EPA employees responsible for that conduct, evidence an abuse of the EPA's powers in an effort to coerce and punish what the EPA considered to be a recalcitrant landowner who refused to kowtow to the EPA's edicts; a belief by agents of the EPA that the end justifies the means; and a conviction that, above all else, the EPA *must be obeyed*.

[11] VII.

THE FACTS PART TWO: CHRONOLOGY OF THE EVENTS

1. In 1997, Acquest bought a 20-acre commercially zoned property on Wehrle Drive in the Town of Amherst. It was a purchase that began with hope and great expectations for Bill Huntress. It was a property that should have (and otherwise would have) produced the same high quality commercial

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[4] This case is much like the Vidrine case (*Hubert P. Vidrine, et al v. United States of America,* 2012 WL 253124 (W.D. La. 1/26/2012, no appeal)), as well as others across the United States, in which, even though no harm to the environment occurred or was even threatened, and no actual crime was committed, the EPA brought criminal charges to serve its own administrative interest in increasing its power, and/or merely satisfying the personal interests or egos of one or more of its employees. The government conduct at issue in this case produced only a mindless waste of public and private resources, and senseless harm to a law abiding citizen of our country.

development for the Town of Amherst that Acquest routinely built for private companies and governmental agencies across the United States.

2. It was not an investment that Bill Huntress made naively, or out of a lack of experience in developing commercial property. To the contrary, Bill Huntress purchased the Wehrle land with a clear understanding of the need (and the investigation necessary) to determine legal restrictions applicable to such developments, including applicable environmental laws and regulations. It was, however, a project that did not present – and should have *never come to involve* – any insurmountable environmental obstacles.

3. At the time of Acquest's purchase of the Wehrle land, there was an existing ACOE Nationwide Permit allowing the previous owner to fill .99 acres of an alleged 2.6 acre "isolated wetland" on the property (a permit that ran with the land). The Wehrle land was isolated from any traditional navigable waterways, and in 2001, Bill Huntress obtained from the ACOE a (clearly correct) jurisdictional determination that the Wehrle land contained only "isolated wetlands" *not subject to regulation* under the Clean Water Act.

4. In August, 2000 (approximately three years after purchasing the land), Bill Huntress learned that the property was subject to an *unrecorded* 50-year development moratorium that, years before, had been required by the EPA as a condition of an EPA monetary grant to the Town of Amherst for sewer improvements.

[12]

5. The agreement between the EPA and the Town of Amherst was styled "Grant and Moratorium Agreement." It memorialized the EPA's agreement to pay the Town $5.8 million for sewer improvements in exchange for the Town's agreement to prevent certain properties from tapping into portions of the Town's new sewer system.

6. The property Acquest purchased on Wehrle Drive was subject to the Grant and Moratorium Agreement, but the Agreement had never been properly recorded in the County Clerk's Office, or in the manner required by New York state law in the State Environmental Quality Review Act, so individual property owners (including Bill Huntress) never received notice of the Grant and Moratorium Agreement.

7. Under the Grant and Moratorium Agreement, the EPA and the Town had arbitrarily, and without any legal justification, labeled the Wehrle land as "environmentally sensitive." The EPA/Amherst agreement thus effected an unconstitutional taking of the Wehrle land without just compensation.

8. On November 21, 2002, the EPA issued a determination that the Wehrle land constituted a "Special Case" – an unusual and rarely used procedure. The EPA took this step in order to take control away from the ACOE and reverse the ACOE's legally correct determination from the year before (in 2001), that the small isolated spot of "wetlands" was not within ACOE or EPA jurisdiction.

[13]

9. The EPA's "special case" designation violated a 1989 EPA and ACOE Memorandum of Agreement that made the ACOE determination binding on the federal government. *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016).[5]

10. The EPA's "special case" assertion was the first in a series of acts taken by the EPA with the apparent objective of showing Bill Huntress that the EPA possessed great power to dictate what, if anything, Bill Huntress could do with his private property, and to deter him from challenging the EPA's edicts, or its alleged authority to issue them.

11. Huntress sued the EPA and the ACOE in federal court, claiming that the Wehrle land was exempt from wetlands regulation under the CWA. On June 20, 2008, the District Court issued a decision dismissing the complaint against the federal defendants for lack of subject matter jurisdiction on the ground that the EPA's wetlands designation and the ACOE's rescission of plaintiff's provisional work permit did not constitute final agency action within the meaning of the Administrative Procedures Act.

12. In the same suit, Huntress had also sued The Town of Amherst seeking a judgment declaring

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[5] ACOE jurisdictional determinations "are binding for five years on both the Corps and the Environmental Protection Agency, which share authority to enforce the Clean Water Act. See 33 U.S.C. §§ 1319, 1344(s); 33 CFR pt. 331, App. C; EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act § VI-A (1989)."

that the 50 year sewer moratorium agreement entered in 1983 between the Town and the EPA has resulted in an unconstitutional taking of property without just compensation. The federal court also dismissed that claim, holding that the Court lacked jurisdiction because the claim was not ripe, since Huntress had not unsuccessfully attempted to obtain just compensation through available state procedures. Subsequently, Huntress sued the Town of Amherst in state court, and in June of 2016, following a series of appeals from the jury [14] verdict in that case, the Town of Amherst paid Acquest $3.94 million for illegally terminating Acquest's office-park project planned for the Wehrle land.

13. But Huntress still could not move forward with the development of the Wehrle land, because Huntress's problems with the EPA continued. And what began with the Wehrle land in August, 2000, continued when Huntress purchased a 97-acre farm on Transit Road in Amherst in 2006 (hereinafter referred to as the "Transit Road land").

14. Ultimately, in 2009, the EPA sued Bill Huntress and Acquest in two civil cases, alleging Clean Water Act violations at both the Wehrle and Transit Road sites.

15. When the threat of the massive civil penalties that the EPA sought in those two cases did not achieve sufficient coercive effect, in 2011 and 2013 the EPA procured not one, but two criminal indictments of Bill Huntress and Acquest.

16. As will be described in greater detail below, the two indictments – which were procured in substantial part at the urging of Walter Mugdan, a

senior official in the EPA's New York Office – were both defective. The first was dismissed by the Court due to prosecutorial misconduct committed during the grand jury proceedings; and both the first and second indictments rested on conduct that was *not prohibited conduct under the law* because *the EPA had no jurisdiction* over the Transit Road land. All charges against Huntress and Acquest were finally dismissed in 2016.

17. On September 25, 2017, the government filed a motion to dismiss the Wehrle civil case with prejudice; and on November 1, 2017, the Court granted the motion. The Transit Road civil case is still ongoing.

[15] VIII.

THE FACTS. PART THREE: AVOIDING THE RULE OF LAW

1. At its heart, this Complaint involves two fundamental concepts on which our country, and our Constitution, rest. The first is the due process principle that the lives, freedoms and property of the citizens of this country cannot be taken away at the whim of those who hold government power. Such governmental takings are only permitted for clear wrongdoing which is proscribed in unambiguous, understandable, written terms before the conduct occurs.

2. The second concept is that of separation of powers. Recognizing that power corrupts, our forefathers acted to create a government devoid of general, undefined, amorphous powers, whereby each branch and each entity within each branch of the government might determine the scope of its own

power.[6] Under our system, those who are entrusted with the power to run federal agencies may not determine the scope of their own powers – the jurisdiction of federal agencies is determined solely by Congress (as construed, of course, by the federal courts, if necessary and if possible, when a statute is unclear).

3. Our country is based on the rule of law, as contrasted with totalitarian regimes around the world that tolerate "the rule of men." Our adherence to due process and a separation of [16] powers thus preserves the "freedom" that we are perhaps most proud of the United States – the freedom from fear of our own government.

4. By this Complaint, Plaintiffs seek damages caused by the EPA's rejection of those principles; its efforts to define its own jurisdiction; and its determination to exercise its great power at its

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[6] Credit for the phrase "Power tends to corrupt, and absolute power corrupts absolutely," is often given to John Dalberg-Acton (a/k/a, The Right Honourable The Lord Acton), as contained in his letter to Bishop Mandell Creighton, April 5, 1887. (See, Historical Essays and Studies, edited by J. N. Figgis and R. V. Laurence, London: Macmillan, 1907.) However, the basic concept was clearly part of the much earlier thinking of our country's founding fathers. *See, e.g.,* Jay, John; Hamilton, Alexander; Madison, James. *The Federalist Papers*. Unique Classics. Kindle Edition at 809-810. ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.") See also, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* – Alexander Hamilton or James Madison, February 8, 1788. The Federalist Papers. Unique Classics. Kindle Edition at 4591.

whim over privately owned land and upon those who own the land.

5. In this case, the EPA took those actions even *after it had attempted and failed* to convince the United States Supreme Court that Congress (via the CWA) had given it jurisdiction over land like that owned by Bill Huntress.

6. The EPA thereby rejected the rule of law, and assumed the role of a despot.

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * [T]he fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, *so that . . . the government . . . 'may be a government of laws and not of men.'* For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

Yick Wo v. Hopkins, 118 U.S. 356, 369-370 (1886)(emphasis added).

IX.

THE CONSTITUTIONAL REQUIREMENT OF CLEAR NOTICE

1. Our Constitution prohibits the government from charging a citizen of the United States with committing "a crime" that is *not clearly defined by law* as "a crime" *prior to the time* the conduct at issue occurred. Constitution of the United States, Article I, section 9, and Fifth and Fourteenth Amendments.[7]

2. This is commonly referred to as the "void for vagueness" doctrine. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Clearly defined means that a statute (on its face, or as it has been construed by federal courts) must "define the criminal offense with sufficient definiteness that *ordinary people* can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

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[7] *See, also, Calder v. Bull 3 Dall. 386,* 389-90 (1798); *Frank v. Mangum,* 237 U.S. 309, 344 (1915); *United States v. Harriss,* 347 U.S. 612, 617 (1954)("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939)("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."); *Bouie v. City of Columbia,* 378 U.S. 347, 351 (1964).

enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)(emphasis added).

3. This principle was summarized by the Supreme Court in *U.S. v. Lanier,* 520 U.S. 259 (1997), in this way:

> There are three related manifestations of the fair warning requirement. *First,* the vagueness doctrine *bars enforcement of "a statute which either forbids or requires* the doing of an act in terms so vague that *men of common intelligence must necessarily guess at its meaning and differ as to its application.*" * * * *Second,* as a sort of "junior version of the vagueness doctrine," H. Packer, The Limits of the Criminal Sanction 95 (1968), *the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.* * * * *Third,* although clarity at the requisite level may be supplied by judicial gloss on an *otherwise uncertain statute, . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its* [18] *scope.* * * * In each of these guises, *the touchstone is whether the statute, either standing alone or as construed,* made it reasonably *clear at the relevant time* that the defendant's conduct was criminal.

520 U.S. at 266-267 (Emphasis added. Internal citations omitted.)

See also, U.S. v. Santos, 553 U.S. 507 (2008), wherein the Court affirmed the dismissal of the defendant's criminal conviction because there were two equally plausible interpretations of a criminal statute, stating, "Under a long line of our decisions, *the tie must go to the defendant.* The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."

4. In *FCC v. Fox Television Stations, Inc,* 567 U.S. 239 (2012),the Supreme Court provided a brief history of the Court's recognition of these fundamental principles:

> A fundamental principle in our legal system is that laws which regulate persons or entities must **give fair notice of conduct that is** forbidden or **required.** *See Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926) ("[**A**] **statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess** at its meaning **and differ** as to its application, violates the first essential of due process of law"); *Papachristou v. Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) ("Living **under a rule of law** entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939) (alteration in original))). This **requirement of clarity**

> **in regulation** is essential to the protections provided by the Due Process Clause of the Fifth Amendment. *See United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or **punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.**" Ibid. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. *See id.* at 306, 128 S.Ct. 1830. (Emphasis added.)

567 U.S. at 253 (emphasis added)

[19]

5. Finally, federal agencies, just like federal courts, must have *jurisdiction* in order to exercise their delegated powers – jurisdiction granted by the Constitution, or the legislature.[8]

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[8] *See, e.g., U.S. v Hudson and Goodwin,* 11 U.S. (7 Cranch) 32, 34 (1820)(Congress must specify the crime, and the punishment, and designate a court with jurisdiction); and *US v Bevans,* 16 U.S. (3 Wheat) 336 (1818)(Marshall J.)(a murder in the Boston Harbor not prosecutable even though within the general jurisdiction of the United States because Congress had not designated a Court to try it).

6. A helpful summary as to this last principle was recently provided by Circuit Judge Newman in his dissenting opinion in *Return Mail, Inc. v. United States Postal Service,* 868 F.3d 1350, at 1371-1372 (Fed. Cir. 2017):

    > This court has an independent obligation to ascertain its own jurisdiction and that of the tribunal below. *See Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review."). Although the foregoing concerns a court's review of a lower court's jurisdiction, *the same principle applies to review of an agency's jurisdiction. See, e.g., Da Cruz v. INS,* 4 F.3d 721, 722 (9th Cir. 1993) (considering, *sua sponte,* whether the BIA lacked jurisdiction). This inquiry cannot be waived. It is a "judicial function," and not that of an agency, to decide the limits of the agency's statutory powers. *Social Sec. Bd. v. Nierotko,* 327 U.S. 358, 369, 66 S.Ct. 637, 90 L.Ed. 718 (1946).
    >
    > "An agency is but a creature of statute. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress." *Killip v. Office of Pers. Mgmt.,* 991 F.2d 1564, 1569 (Fed. Cir. 1993). *See also Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 993 (CCPA 1981) ("Any authority delegated or granted to an administrative agency is

necessarily limited to the terms of the delegating statute."); *Gibas v. Saginaw Mining Co.,* 748 F.2d 1112, 1117 (6th Cir. 1984) (administrative agencies are vested only with the authority given to them by Congress); *Atchison, Topeka & Santa Fe Ry. Co. v. Interstate Commerce Comm'n*, 607 F.2d 1199, 1203 (7th Cir. 1979) (same).

7. Given the requirements of both *fair notice* and actual *jurisdiction,* it is clearly unlawful for an agency to cause someone to be indicted for violating its regulations when the law is so unclear that *no one can know* whether the agency even has jurisdiction over the person or [20] his property, *i.e.,* whether *the statute* the agency purports to be enforcing *even applies* to the property and/or conduct at issue.

X.

APPLYING THE CONSTITUTIONAL PRINCIPLES TO THIS CASE

1. The application of these Constitutional principles to the facts of this case is simple, easy and clear. This Court need not rely on Bill Huntress's assertion of lack of clear notice.

2. Both of the indictments at issue were premised on acts and omissions that were allegedly illegal solely because of the EPA's alleged jurisdiction over the Transit Road land. Therefore, the allegedly wrongful acts and omissions could only have been unlawful if the EPA *actually had jurisdiction* over the Transit Road land – *i.e.*, it was necessary that the CWA clearly applied to land *such as the Transit Road land.*

3. The CWA statute, on its face, applies only to "navigable waters," which the statute defines as "the waters of the United States." Thus, for the government to have lawfully indicted Bill Huntress and Acquest, it was constitutionally required that the Transit Road land, as a matter of law, was clearly part of "the waters of the United States."

4. In enacting the CWA, Congress first described the statute as covering the country's "navigable waters," but then defined "navigable waters" as "the waters of the United States."

5. The application of the CWA to certain bodies of water (like the Niagra River) has been clear, and without dispute. The Supreme Court also has determined that certain "wetlands" are part of "the waters of the United States."

6. The Supreme Court has determined that other bodies of water (such as isolated ponds) are not covered by the CWA because they are not part of "the waters of the United States." (*See,* [21] *e.g.*, *Solid Waste Agency of Northern Cook CTY. v. Army Corps of Engineers*, 531 U.S. 159, 173 (2001))

7. However, at no point in time, prior to or during the conduct at issue in the two indictments (2005-2010), or even since then, has the Supreme Court ever been able to determine whether lands like the Transit Road land are part of "the waters of the United States." More specifically, *due to the vagueness of the CWA, the Supreme Court has tried, but been unable to* determine whether land like the Transit land constitutes a "water of the United States."

8. The Transit Road land looks much like the many other farm lands in the area. It has no standing surface water except for one small pond that contains rain water, and puddles that last for a few days after a heavy rain, or in the spring during snow melt when the ground is still frozen.

9. During the years Bill Huntress owned the land, crops were grown on the land.

10. During 2005-2010, the law *was clear* that *not all* wetlands are "jurisdictional wetlands," *i.e.*, not all wetlands are part of "the waters of the United States."

11. For land such as the Transit Road land to be part of "the waters of the United States," the first requirement is that the land be a "wetland," and both indictments thus contained allegations to that effect.

12. In its first indictment, the government alleged that the Transit Road land was "wetlands."

13. In its second indictment, the government repeatedly referred to the Transit Road land as containing "*potential wetlands*." *That* new phrasing was at least a tacit admission that even the first requirement of the criminal charge was, in this case, unclear. *That ambiguity alone* made the indictment unlawful.

[22]

14. But the ambiguities only begin with that first basic requirement that the Transit Road land be a "wetland." The scope of the ambiguities and uncertainties explodes with the larger and ultimate issue of whether the land is a "jurisdictional wetland," *i.e.* is part of "the waters of the U.S."

15. As to that issue, not even the United States Supreme Court, when it considered the issue, was able to determine whether land such as the Transit Road land was part of “the waters of the United States,” and thus, whether or not the CWA applies to such land.

16. The allegedly wrongful conduct, as specified in the two indictments, occurred between June of 2005 and May 25, 2010. During that time period, the controlling Supreme Court jurisprudence on this issue was *Rapanos v. U.S.*, 547 U.S. 715 (2006).

17. At issue in *Rapanos* were alleged wetlands that are located remotely from traditional navigable waters, that only lie *near* ditches (such as the roadside ditch that lies outside of and runs parallel to the west end of the Transit Road land); that are *not adjacent to* any navigable water (such as the Niagra River); that *do not abut* any navigable water; and that contain no permanent, standing or continuously flowing body of water, such as a stream, ocean, river, or lake, but only an isolated pond, or puddles of water lasting for a few days after a big rain or while snow is melting in the early spring, and rain water ditches through which water flows intermittently or ephemerally, providing drainage for rainfall.

18. Also at issue in *Rapanos*, as identified in the opinions of at least some of the Justices, was the importance, if any, of “boundary-drawing” clarity. As described by Justice Scalia, that issue exists whenever (as with the Transit Road land) the alleged wetlands are located near a roadside ditch which might be part of “the waters of the United States,” and any surface [23] water covering the “wetlands” does (or does not) create difficulty in

determining the boundary between the wetlands and the nearby "waters of the United States." Some of the Justices in *Rapanos* believed that when there is no "boundary-drawing problem" caused by a continuous surface water connection with a water body that is part of "the waters of the United States" in its own right, such a wetland is not part of "the waters of the Unites [sic] States." Other justices disagreed.

19. The characteristics of the land at issue in *Rapanos* are the characteristics of the Transit Road land.

20. When the Supreme Court in *Rapanos* attempted to answer the question of whether such wetlands (or *potential* wetlands) are part of "the waters of the United States," the Court *was not able to answer the question*. The *Rapanos* opinion was 63 pages long (547 U.S. at 749 to 812), and contained five (5) quite distinct and differing sets of views on this issue, one opinion by Justices Scalia, Roberts, Thomas, and Alito, a second concurring opinion by Chief Justice Roberts, a third opinion (concurring *only* in the judgment) by Justice Kennedy, a fourth opinion by Justice Stevens (in which Souter, Ginsburg and Breyer joined, dissenting), and a fifth opinion by Justice Breyer. There was no majority opinion, and thus *no decision – no answer* by the Court to the critical question.

21. Left undecided, and thus unclear as a matter of law, was even which factor, or factors, discussed in the various opinions of the various Justices, individually, or in combination, were material, much less which factors were critical, in determining whether alleged wetlands of the general nature at issue might be part of "the waters of the United States."

[24]

22. Not only was the applicability of the CWA to such land indisputably unclear after the *Rapanos* decision was issued in 2006, it has remained unclear to date, because Congress has enacted no amendments clarifying the CWA, and neither the EPA nor the ACOE has promulgated any lawfully enacted, new, final administrative rule of law (C.F.R. provision) removing the ambiguity.[9]

23. There had been no clarification even by the time of Justice Alito's *reminder* of the "notorious" lack of clarity in the CWA in the *Sackett* case in 2012:

> "The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be

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[9] A "lawfully promulgated" regulation, often called a "legislative rule" must be within the scope of the rulemaking authority conferred on the agency by Congress, **and** must be enacted in compliance with the procedures prescribed by the APA. *Sweet v. Sheahan,* 235 F.3d 80 (2nd Cir. 2000). The EPA did not issue any such new rule "defining waters of the U.S." between the date of the *Rapanos* decision, and May, 2010, which was the last date of any allegedly "illegal" conduct by Bill Huntress.

> fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order)."

Sackett v. E.P.A., 566 U.S. 120, 132 (2012)

Nor has there been any clarification since the date of those comments.

24. That is what this case is all about. Bill Huntress spent years and millions of dollars in legal fees resisting the EPA's assertions of jurisdiction over his land because the law – including both the CWA statute itself, and the duly promulgated EPA regulations – was indecipherably [25] vague and ambiguous. Bill Huntress simply could not know – nor, for that matter, could the EPA know – whether or not the CWA applied to his land.

25. The EPA not only punished Bill Huntress for what he could not know, it did so under the guise of having jurisdiction over his property *after it had argued its interpretation of its jurisdiction to the Supreme Court, and the Supreme Court had declined to adopt* the EPA's interpretation.

26. Not once, but twice, the EPA procured indictments of Bill Huntress and his company based on the EPA and ACOE's "interpretation" that the CWA applied to land like the Transit Road land – the very interpretation of the CWA that the Solicitor General (on behalf of EPA and ACOE) had presented to (and been rejected by) the Supreme Court in *Rapanos,* namely, that the CWA gives those agencies *jurisdiction* over land like the Transit land because such land constitutes a "water of the United States."

27. Throughout *Rapanos,* the Supreme Court discussed whether it could grant "deference" to that

interpretation. The Court's consideration of such deference appears repeatedly throughout the plurality, concurring and dissenting opinions in *Rapanos*. (547 U.S. at 749, 752, 756, 758, 766, 778, 799, 803, 805, 809, 810, 811.)

28. As indicated by the Supreme Court's extensive consideration of the deference issue, the Court had before it all of the EPA's interpretations, regulations and opinions regarding the scope of the EPA's *perceived* jurisdiction. In the end, the Supreme Court declined to grant deference to the agencies' interpretation.

[26]

29. And what did the government do after the *Rapanos* Court found that the CWA was too vague to grant deference to the agencies' interpretation? It simply ignored the *Rapanos* decision, and used the agencies' interpretation to get Bill Huntress indicted – and not once, but twice.

30. The EPA ignored the Constitution, thumbed its nose at the Supreme Court, and sent Bill Huntress a message (in the form of an indictment): "Leave it to the EPA to determine what the law is; it is none of *your* – or for that matter, the Supreme Court's – business."

31. In the context of that government conduct, the changes in the wording of the second of the two indictments is revealing. First, as noted above, there was the change from an allegation of "wetlands" to "*potential* wetlands."

32. In addition, the first indictment contained two "Clean Water Act" counts, Counts 6 and 7, both styled "Unpermitted filling of Wetlands," and both citing to *Title 33,* (specifically, 33 U.S.C. §§

1319(c)(2)(A) and 1311(a)). In the second indictment, those Title 33 Counts were eliminated.

33. Both the changes from wetlands to *potential* wetlands, as well as the deletion of those Title 33 Counts, suggest an effort by the government to cleverly avoid the issue of the "notoriously unclear" provisions of the Clean Water Act. But the effort was ineffective, since *all* of the counts in both indictments arose out of alleged requirements (legal obligations) under *the Clean Water Act.*[10] In fact, both indictments specifically alleged that not only the [27] Title 33 Counts, but also the Title 18 charges rested on numerous provisions of the Clean Water Act. *See, e.g.,* Second indictment, ¶'s 4-10 at pages 2-4, under the

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[10] Count I in both indictments asserted a conspiracy involving efforts "[t]o defraud the United States, that is, to hamper, hinder, impede, impair, and obstruct by craft, trickery, deceit, and dishonest means, *the lawful and legitimate functions of the EPA and the Corps in enforcing federal environmental laws and regulations.* Similarly, Count 2 of both indictments charged a violation of 18 U.S.C. 1519 based on an alleged "intent to impede, obstruct, and influence the investigation and proper administration of a determination by the U.S. Environmental Protection Agency (EPA) as to the applicability of the Clean Water Act to the Site." The same fatal defect was present for the charges under 18 U.S.C. § 1001 in Counts 3 and 4 of both indictments, which rested on alleged false statements made to the EPA regarding a "wetlands determination" and use of the land for agricultural purposes. Thus, the elimination in the second indictment of the two Title 33 (Clean Water Act) charges failed to cure the jurisdictional defect. All of the felony charges in both indictments rested on alleged jurisdiction of the EPA over the Transit Road land, jurisdiction which simply did not exist under the CWA in any clear, unambiguous manner, as constitutionally required to support the felony charges in the indictment.

heading, Authority of the Environmental Protection Agency over the Clean Water Act.

34. The Constitutional issue in the context of those indictments is not whether the EPA "had jurisdiction" over land like the Transit Road land, but whether the law *prior to and during* the time of the alleged wrongful conduct *clearly provided* that the EPA had jurisdiction. If it was *not clear* that the EPA, via the CWA, had *actual authority* over the Transit Road land, then it was equally *not clear* that Bill Huntress's *conduct* was illegal.

35. As the Supreme Court noted in *FCC v. Fox Television Stations, Inc., supra,* "punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide *a person of ordinary intelligence* fair notice of what is prohibited." Since not even men and women of extraordinary intelligence (the Justices of the United States Supreme Court) could determine whether land such as the Transit Road land was part of "the waters of the United States," *ipso facto,* persons of ordinary intelligence had no fair notice.

36. What *was clear* when the government indicted Bill Huntress and his company is that the indictments were unlawful.

[28] XI.

INTENT, PART ONE: USING VAGUENESS AS A TOOL

1. The EPA's efforts to sanction Bill Huntress for not kowtowing to the edicts it issued to him were *deliberately* lawless, because those edicts rested on EPA assertions of "jurisdiction" over him and his land which the Supreme Court had refused to accept.

2. The use and abuse of such vagueness is a tool that EPA has come to rely on in its "enforcement" activities – a pattern of *choosing vagueness* over "fair notice" in its own regulations.

3. One example illustrating the point is the latest definition of "the waters of the United States" promulgated by the EPA in 2015 and published as 33 C.F.R. § 328.3 and 40 C.F.R. § 230.3 (identical language), a *definition* which is 2,218 words long, and is a model of unconstitutional vagueness and incomprehensible ambiguity. Therein, the EPA even unabashedly proclaims that "the term waters of the United States" means "All waters in paragraphs (a)(7)(I) through (v) of this section where they are *determined, on a case-specific basis,* to have *a significant nexus* to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(I) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus *analysis.*"

4. Within § 328.3 (at § 328.3(c)(5)) there is also another similarly vague definition, a definition of "significant nexus." No one – at least no citizen in our country – should be forced to risk a prison term on his guess as to how the EPA might interpret and apply the words *significant nexus* in any given case.

5. The EPA's long standing practice of employing such ambiguity in its rule making process evidences a deliberate choice – an intent to prevent *mere citizens* from being able *to know* [29] what "the law" requires, and thereby preserve the EPA's flexibility to punish those who refuse to accept its unilateral interpretations of the law by

subjecting the recalcitrants to millions of dollars in fines, and even criminal indictment.

6. This kind of government conduct is not at all uncommon where the rule of law does not exist. The EPA says the ambiguity means one thing; the landowner says it means another. And the EPA wins the argument for the simple reason that most landowners do not have the resources to fight; and those who do will be indicted if they persist in not *allowing* the EPA to win. That is what happened to Bill Huntress.

7. When the law is unclear, there is, in effect, no law; and "the rule of men" fills the void. That is what Bill Huntress faced in this case.

8. By perpetuating vagueness, and eschewing fair notice, the EPA preserves its ability to wield its massive resources at will, "on a case by case basis." By *citing its interpretations in justification of* its edicts, the EPA performs a clever slight-of-hand. It is a *facade;* it is the rule of men masquerading as the rule of law: the law is what the EPA says it is.

9. The EPA's historical use of vagueness to achieve its objectives has now been officially renounced by the executive branch of our government. The President, and the heads of the EPA and ACOE have now publicly denounced the "rule of men" within the EPA and ACOE, and ordered it to stop in the Executive Order of February 28, 2017, titled "Restoring the Rule of Law." It was then confirmed by the EPA and ACOE in their March 6, 2017 Federal Register Notice, wherein both agencies explicitly recognized that, "It is important that stakeholders and the public at large have

certainty as to how the CWA applies to their [30] activities." Whether that newly proclaimed official *policy* will become actual EPA *practice,* or how long it may take if it does, remains unclear.[11]

XII.

INTENT, PART TWO: A DISDAIN FOR THE CONSTITUTION AND SUPREME COURT

1. We briefly discussed above the concerns that led our founding fathers to create a separation of federal government powers in order to prevent the abuse of power.

2. The indictment of Bill Huntress and his company that occurred in this case represents the kind of abuse of power by despotic monarchs that our founding fathers sought to exclude from government in our country. Both those events *and the words* of the EPA's senior management suggest a disdain within the EPA for those Constitutional principles.

3. This disdain was openly expressed by the EPA's former Regional Counsel for EPA Region 2, now the EPA's Director of the Emergency and Remedial Response Division, Walter Mugdan, of the EPA's regional office in New York City.

4. At a conference held in New York City on July 27, 2007, involving Bill Huntress, two of his corporate

[11] Long standing EPA practices tend to persist, as illustrated by the EPA's refusal *to even discuss* a possible settlement of this case after these claims were administratively filed in early April of this year, notwithstanding the clear Congressional objective or promoting early, informal resolution of federal tort claims by requiring that, as a condition precedent to filing a lawsuit, an Administrative Claim be filed. (See ¶ V.2, pg. 4 above.)

officers, and representatives of the EPA, the EPA said it would only allow Huntress to develop some of the Wehrle land if they paid $2,000,000 to the government, and that *otherwise* they would have to pay $400,000 and could never develop the Wehrle property. In response, the General Counsel of Acquest Wehrle stated that he did not believe the EPA could demonstrate that it had any jurisdiction over the Wehrle land under the Clean Water Act. Mr. Mugdan became very agitated, and making reference to the Supreme Court [31] decision in *Rapanos v. U.S.,* 547 U.S. 715 (2006), in which Chief Justice Roberts joined the opinion of Justice Scalia and wrote a separate opinion of his own criticizing ACOE's and EPA's essentially boundless views of the scope of their powers, Mr. Mugdan then asserted, "Let the Chief Justice try to enforce it!"

5. Mr. Mugdan's view that the EPA *makes its own* law – notwithstanding our constitutional system to the contrary – illustrates and explains the EPA's overall conduct toward Bill Huntress and Acquest in this case, from the initial confrontations over the Wehrle land; through its malicious criminal prosecution of Bill Huntress and Acquest; and continuing thereafter in the Transit Road civil litigation.

6. What Mr. Mugdan said cannot be simply excused or discarded as an aberrant remark by an isolated EPA malcontent. Mugdan held a high level position in the EPA, and it was Mugdan who referred Huntress's challenge of the EPA's assertions of jurisdiction over his property to the Criminal Investigative Division (CID) for indictment.

7. Given the EPA's proven addiction to vagueness in its own rulemaking, it is probable that Mugdan was expressing a widely held sentiment within the EPA.

8. What happened to Bill Huntress should not happen to any citizen in our country. Further, it is unlikely that such an indictment of a prominent law-abiding citizen could have been procured through the efforts of only one or two EPA employees, secretly, in a vacuum.

9. Thus, Plaintiffs allege pursuant to Fed. R. Civ. Proc. 11(b)(3) that it is probable that evidence will be developed after a reasonable opportunity for further investigation and discovery, showing that those indictments were procured with the assistance and complicity of a [32] number of EPA employees who, without objection, acquiesced in, and thereby assisted in procuring the indictments.

10. Thus, Plaintiffs allege as permitted by Fed. R. Civ. Proc. 11(b)(3), that discovery will likely produce evidence that Mugdan's disdain for our constitutional system of law – just as the EPA's deliberate use of vague regulations – represents a widely held ethic within the EPA.

11. Plaintiffs further allege, as permitted by Fed.R.Civ.Proc 11(b)(3), that discovery will likely produce evidence that this ethos of lawlessness made those who procured the indictments of Bill Huntress feel comfortable with what they did, *in tune* with and encouraged by a management policy of turning a blind eye to constitutional, congressional and judicial constraints, and leaving its agents free to "make examples" of anyone who,

like Bill Huntress, might challenge the EPA's "interpretations" of the scope of its power.

12. Walter Mugdan's views also exude an arrogance, a cavalier attitude, and a malicious indifference to the rights of Bill Huntress, all of which are beyond inappropriate in a matter as serious as a referral for criminal indictment. Mr. Mugdan readily admitted in his deposition in the Transit civil case that he had referred the Huntress case to the CID Division for criminal prosecution, stating, "I advised members of my team that we should bring this matter to the attention of the criminal investigation division." Yet, when pressed on *the reasons* for that criminal referral he cavalierly stated, "I am not an expert in criminal law or criminal environmental law;" and multiple times during his deposition also stated he was not an expert on the Clean Water Act, or the wetlands portion of the Clean Water Act.

[33]

13. While there are, undoubtedly, law abiding people working for the EPA, the deliberately lawless conduct that produced the indictments of Bill Huntress reflects that the EPA lost its focus, and became a run-away train – in this case, a train that jumped its track.

XIII.

INTENT, PART THREE: ADDITIONAL FACTS SHOWING MALICIOUSNESS

The *Rapanos* Decision was Not a Secret

1. Given the significance to the EPA of the Supreme Court's inability in *Rapanos* to give deference to EPA's interpretation that the CWA applied to

land such as the Transit Road land, there is no doubt that those within the EPA who procured the indictments of Bill Huntress and Acquest knew of the *Rapanos* case. (Walter Mudgan, as noted above, even referenced it as bearing – to his dislike – on the Huntress case.)

2. In short, the EPA knew that *the law* upon which those indictments rested was unconstitutionally vague and ambiguous, and that the indictment of Bill Huntress was therefore unlawful. The deliberate decision to ignore that knowledge, *alone* establishes a wilful and malicious intent in bringing those indictments. But there is more.

<u>The Length of the EPA's Campaign Evidences Malicious Intent</u>

3. The number of years dedicated by the EPA to the Wehrle and Transit Road civil cases – without even an allegation of harm to the environment – demonstrates the EPA's malicious intentions toward Bill Huntress and his companies. It was an obsessive quest for punishment, bearing no reasonable relationship to any concerns for the environment – a campaign that started with claims for millions of dollars in civil penalties; by the end of 2017 had cost Huntress millions of dollars in legal and expert witness fees; included two indictments, both [34] ultimately dismissed; and is not over yet, for the second of the two civil lawsuits is still ongoing.

4. It appears that the EPA's campaign consumed the American public's taxpayer dollars in an amount at least as large as what Bill Huntress spent, as evidenced in part by the very large number of EPA employees who participated in the campaign.

5. For the EPA to cause such a huge waste of time and resources without even an allegation of harm to the environment, is so outrageous that it lacks any credible explanation other than as being a product of maliciousness.

6. Further, and once again, it is not just the EPA's *conduct* that reflects the EPA's malicious intent; that intent was openly expressed by another high level EPA manager, Phyllis Feinmark, the Branch Chief, Water and General Law Branch, Office of Regional Counsel for EPA in New York City, when, in January 2005, she stated to Acquest's General Counsel, Louis Fessard, "The government does not care about money or time; Bill Huntress does."

7. Obviously, the EPA considers the *deliberate waste* of a targeted victim's money and time to be a *legitimate weapon* to coerce obedience – a tactic easily used, no matter what it costs the taxpayers. The creation of such waste is just another "tool in the EPA's toolbox."

<u>The EPA's View of Its Right to Freedom from Interference or Restraints</u>

8. The EPA's maliciousness is also evidenced by the EPA's routine resistance to any questioning of its powers (*i.e.,* its asserted jurisdiction) – even questioning by the federal judiciary of the EPA's perceived *right* to apply *its own interpretations* of the CWA, as well as the regulations it adopts related to the CWA.

[35]

9. In *Sackett v. E.P.A.,* 566 U.S. 120 (2012), for example, the EPA actually asserted that, because "Congress gave the EPA the choice between a

judicial proceeding and an administrative action, it would undermine the Act to allow judicial review" of the EPA's administrative actions. In other words, the EPA actually claimed that it was *solely within the discretion of the EPA to determine* if (or when) a federal court was permitted to determine whether the EPA even had jurisdiction to issue administrative orders and otherwise take control of private property.

10. The Supreme Court unanimously rejected the EPA's assertion of such absolute power, stating in part that there was "no reason to think that the Clean Water Act was uniquely designed to enable *the strong-arming of regulated parties* into 'voluntary compliance' without the opportunity for judicial review – *even judicial review of the question whether the regulated party is within the EPA's jurisdiction.*" *Id.* at 130-131 (emphasis added).

11. Here is more of what Justice Alito had to say:

> *The position taken in this case by the Federal Government* – a position that the Court now squarely rejects – *would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.*
>
> *The reach of the Clean Water Act is notoriously unclear.* Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the

> requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. *If the owners do not do the EPA's bidding,* they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it [36] wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable. (*Id.,* emphasis added.)

12. Justice Kennedy, in a concurring opinion in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.,* 136 S.Ct. 1807, 1817 (2016), similarly noted that the Clean Water Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."

13. Those criticisms of the EPA's views of what the EPA considers to be its unfettered powers lie at the heart of this case: a regulatory agency infected by the notion that it has absolute power; the right to exercise that power in *its* sole discretion; and a willingness to abuse that power *as a means* to

dissuade anyone, especially private citizens, from challenging the scope of its powers.

14. This Complaint focuses on EPA conduct that was even worse than the conduct at issue in *Sackett;* this case involves not merely the threat of devastating civil fines to deter challenges to its jurisdiction, but an effort to impose criminal penalties including incarceration in a federal penitentiary to achieve that objective. Here, the EPA maliciously caused criminal felony charges to be filed against Bill Huntress and his company – and just as in *Sackett* – without concern for whether or not the EPA *actually had jurisdiction* over his land.

<u>The EPA's Determined Efforts to Quiet Its Challengers</u>

15. When Bill Huntress did not do the EPA's bidding, and the threat of millions of dollars in civil fines did not deter his willingness to continue his challenge of the EPA's edicts, the EPA simply increased the pressure: it got him indicted.

[37]

16. It was not an act hastily taken in panic or fear that Huntress was about to cause devastating harm to the environment; not an emergency effort to stop him from dumping barrels of toxic waste into the Niagra River.

17. There was indeed no hurry; it was just the next step in an escalating effort to compel obedience. It was a methodical application of its essentially unlimited resources to get what it wanted.

18. The EPA had actually threatened Huntress with indictment for months before the first indictment was returned, suggesting to him that he could

avoid jail by simply kowtowing to the EPA's demands in the Transit Road civil case.

19. It was just as a Senior Trial Attorney of the DOJ's Environmental Defense Section of the Environmental and Natural Resources Division, stated, in a threatening manner, directly to Bill Huntress on November 29, 2006 – and, subsequently stated on December 9, 2008, to Louis C. Fessard, Acquest's General Counsel: "We have a lot of tools in our box."

20. Indicting Bill Huntress was simply another tool in the EPA's toolbox.

21. It was a tool that the EPA thought was appropriate to quiet those who might question the EPA's (unfounded) assertions of jurisdiction – a tool chosen and used in a conscious, deliberate and intentional effort to make an example of Bill Huntress by hitting him as hard as possible.

[38]

22. And the EPA's determination did not even wane after the Court dismissed the first indictment for prosecutorial misconduct; the EPA simply got him indicted again six months later.

23. Before the EPA finally gave up on its strategy, Bill Huntress and his company had remained under indictment for 4 years – actually, from start to finish, 4 ½ years, from the Fall of 2011 until the Spring of 2016, with a six month gap in the middle:

    - On November 9, 2011, Bill Huntress and Acquest were indicted in the Western District of New York (Case number 1:11-cr-00347) on felony charges of Conspiracy

(18 U.S.C. § 371), Obstruction of Justice (18 U.S.C. §§ 1519 and 2), Concealing Material Facts (18 U.S.C. §§ 1001(a)(1) and (2), False Statement (18 U.S.C. §§ 1001(a)(2) and 2), as well as Criminal Contempt (18 U.S.C. §§ 401(3) and 2), and two counts of Unpermitted Filling of Wetlands (33 U.S.C. §§ 1319(c)(2)(A) and 1311(a), and 18 U.S.C. § 2). (Copy attached hereto as Exhibit A.)

  - On March 13, 2013, all of those charges were dismissed by the federal court because of prosecutorial misconduct.

- On September 19, 2013, Bill Huntress and Acquest were again indicted in the Western District of New York (Case number 1:13-cr-00199), on felony charges of Conspiracy (18 U.S.C. § 371), Obstruction of Justice (18 U.S.C. §§ 1519 and 2), Concealing Material Facts (18 U.S.C. §§ 1001(a)(1) and 2), False Statement (18 U.S.C. §§ 1001(a)(2) and 2), and Criminal Contempt (18 U.S.C. §§ 401(3) and 2. (Copy attached hereto as Exhibit B.)
  - On March 10, 2016, all of those charges were dismissed.

[39]

<u>It Was Overkill (Even Had the EPA Possessed Jurisdiction; and Especially Since It Did Not)</u>

24. It is not surprising that neither indictment contained any allegation that Bill Huntress or Acquest had harmed or were threatening to harm the environment. Not only had no such harm or threat of harm occurred; but protecting the environment was not the focus of the EPA's efforts.

What the EPA wanted (and what it got) was somewhat akin to the medieval practice of locking the accused's head and arms in a pilory in the public square. The EPA wanted to send a message – not only to Huntress; but to the public as well – about what happens if you question the EPA.

25. So the EPA publicly announced that Bill Huntress and his company were felons, thereby destroying his and his company's ability to conduct business, and exposing him to incarceration in a federal penitentiary. In the considered judgment of the EPA, that was all quite acceptable punishment for someone who resists the EPA's assertion of jurisdiction over their private property.

26. And it was easy. Most of the intended result was automatic, as such results are when our federal government publicly announces that a prominent citizen is a felon. No harm to the environment needed to be proved; no validity to the charges was required; no conviction needed to be obtained. A conviction, and incarceration in a federal penitentiary, would merely have been icing on the cake.

27. Even a judgment granting the relief sought in this Complaint will not take back the EPA's success, anymore than the dismissal of the felony charges filed against Huntress and Acquest erased the impact of the devastating allegations that were made.

[40]

28. However, what can be done, should be done. The Plaintiffs thus ask this Court to hold the EPA *accountable* for its unlawfully procured success.

Accountability

29. Accountability is essential to our legal system. Thus, federal agencies should seek to hold accountable those who violate the law. But that is not what the EPA sought to do in this case; and it is not what happened.

30. Bill Huntress's and Acquest's conduct was not unlawful. Only *the EPA* acted unlawfully, by seeking indictments of Bill Huntress and Acquest to punish them for refusing to accept the EPA's asserted jurisdiction over the Transit Road land (jurisdiction that the EPA actually did not possess).

31. The unlawfulness of its conduct also evidences the EPA's maliciousness; it demonstrates a belief within the EPA that the EPA can, with impunity, simply ignore the law. The indictments of Huntress and Acquest were the product of intentional decisions to ignore the Supreme Court's *Rapanos* case, the CWA, and the Constitution – just as if none of that law applied to the EPA.

32. Just as citizens who violate the law should be held accountable, federal regulatory agencies must be held accountable when they harm citizens by acting outside of the law. Accountability for wrongdoing is not, as the EPA believes, a one-way street, to be applied only *by* the EPA, and only *to* its subjects.

33. Accountability for federal agency wrongdoing lies at the heart of the Congressional decision to waive governmental immunity by enacting the FTCA.

[41]

34. The FTCA is the most effective, existing means to preserve our freedom from fear of our own government – the freedom that perhaps most distinguishes us from the totalitarian regimes of the world. Thus, holding the government accountable for the EPA's abuse of its power is not only important for Bill Huntress, it is important for our country.

35. What the EPA did to Bill Huntress is shockingly consistent with the EPA enforcement philosophy described by EPA Region 6 Administrator Al Armendariz in 2010 (the year before Bill Huntress was indicted) – a disturbing philosophy that generally thrives only when there is no accountability.

36. Mr. Armendariz's description of the EPA's enforcement philosophy (at *least* in Region 6) was secretly caught on film and then posted on YouTube. Therein Mr. Armendariz suggests the appropriateness of EPA's use of enforcement tactics similar to that of the Romans' method for securing a compliant populace. He described the Romans' tactic of simply going into a little town, stopping the first five guys they see, and crucifying them. He then noted the obvious result: "And then you know that town was *really easy to manage* for the next few years:"

    > "I was in a meeting once and I gave an analogy to my staff about my philosophy of enforcement, and I think it was probably a little crude and maybe not appropriate for the meeting but I'll go ahead and tell you what I said. It was kind of like

> how the Romans used to conquer little villages in the Mediterranean. They'd go into a little Turkish town somewhere, they'd find the first five guys they saw and they would crucify them. And then you know that town was really easy to manage for the next few years. And so you make examples out of people who are in this case not compliant with the law. Find people who are *not compliant with the law,* and **you hit them as hard as you can and you make examples out of them, and there is a deterrent effect there."**

www.youtube.com/watch?v=ze3GB_b7Nuo

[42]

37. While Mr. Armendariz did suggest that the Romans' approach be applied to people who are "not compliant with the law," the rub is that the EPA – as it did to Bill Huntress – "makes examples" of people who have not violated any actual "law," but who have merely been "not compliant" with EPA *interpretations* of vague statutes and regulations. In our country, such *interpretations* are not "the law."

38. By this Complaint Plaintiffs respectfully allege that the EPA's act of "making an example" of Bill Huntress, and "hitting him as hard as possible" – by indicting him, publicly accusing him of being a felon, destroying his ability to conduct his business, and subjecting him to possible incarceration in a federal penitentiary – even though a step

down from crucifixion, is a Constitutionally unacceptable means for the EPA to make the populace *"really easy to manage."*

39. The implementation of that strategy against Bill Huntress and his company constituted unlawful government conduct for which the government should now be held accountable.

XIV.

FIRST CLAIM FOR RELIEF – MALICIOUS PROSECUTION

1. Plaintiffs incorporate by reference herein all allegations set forth above.
2. EPA CID agents, together with other officers and agents of the EPA who conspired and acted in concert with those law enforcement agents, acted to procure two indictments of Bill Huntress and Acquest.
3. Those indictments ended and/or were terminated in the Plaintiffs' favor.
4. There was no probable cause to commence and/or to continue those criminal proceedings.
5. The agents and employees of the EPA acted with actual malice in bringing and/or continuing those prosecutions.

[43]

6. These acts and omissions of United States Government employees while acting within the scope of their offices and employment, as set forth above, proximately caused economic damages (lost income) and personal injuries (damages to reputation, emotional distress and mental anguish, humiliation and loss of consortium) emotional anguish and mental distress to

Plaintiffs under circumstances where the United States, if a private person, would be liable to the Plaintiffs in accordance with the laws of the State of New York, in that such negligent and wrongful acts and omissions constitute malicious prosecution by investigative and law enforcement agents of the United States acting within the scope of their employment.

7. The United States Government is liable for all damages caused by such acts, as provided by 28 U.S.C. § 2680(h).

XV.

SECOND CLAIM FOR RELIEF – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

1. Plaintiffs incorporate by reference herein all allegations set forth above.
2. The government conduct described herein was committed by a law enforcement agency of the United States entrusted to enforce the law, and endowed with great resources and power to carry out that public trust.
    a. The conduct at issue was unlawful, and constituted a violation of that public trust.
    b. The conduct was intentional, and was perpetrated for more than four years.
    c. The conduct involved a deliberate disregard for the victims' constitutional rights, by a government entity that possessed the resources to know the law, to fully understand the law, and to ensure that its agents respected and protected the victim's constitutional rights.

[44]

d. The agency failed to utilize its vast resources to train, educate and supervise its agents in order to assure that its agents enforced the law, and did not themselves violate the law.

e. Numerous agents within the agency on numerous other occasions widely violated the constitutional rights of citizens in a similar manner, and the agency condoned – either officially, and/or tacitly – such conduct on this and other occasions.

f. The unlawful conduct at the core of this case was directed at a respected, productive and law abiding citizen of the United States, with no prior criminal record, who had not harmed or even threatened to harm the environment or the public.

g. The unlawful conduct was designed and carried out in an effort to punish the citizen for exercising his lawful right to challenge in Court the government's assertion of jurisdiction over his private property, and to coerce him into abandoning his legal rights to challenge the government in Court.

h. The punishment was intentionally inflicted, and consisted of falsely and publicly labeling the citizen as a felon, depriving him of his livelihood, and threatening to incarcerate him in a federal penitentiary, merely because he had challenged the EPA's assertion of jurisdiction over his private land.

i. Given the context in which this governmental conduct occurred, the duration of the unlawful

conduct, the means used to inflict the punishment and to implement the coercion, this constituted extreme and outrageous conduct of a nature regarded as intolerable in our country.

[45]

3. The government's agents, acting within the scope of their employment, had an intent to cause, or a disregard of a substantial probability of causing, severe emotional distress.
4. There was a causal connection between the conduct and the injury.
5. The conduct proximately caused the victim to suffer severe emotional distress.
6. The United States Government is liable for all damages caused by such acts, as provided by 28 U.S.C. § 1346(b)(1).

XVI.

THIRD CLAIM FOR RELIEF – ABUSE OF PROCESS

1. Plaintiffs incorporate by reference herein all allegations set forth above.
2. The indictments of Bill Huntress and his company were brought in an effort to punish him for his temerity in refusing to accept the EPA's assertions of jurisdiction over his land, and what the EPA considered to be his obstinate defense of the EPA's two civil suits against him, and to gain an advantage over him in those civil cases.
3. The use of the two indictments for such purposes constitutes an abuse of process, in that it involved:
   a. Regularly issued criminal process,

b. An intent to do harm without lawful excuse or justification, and

c. The use of process in a perverted manner to obtain a collateral objective.

4. The United States Government is liable for all damages caused by such acts, as provided by 28 U.S.C. § 2680(h).

XVII.

CONSPIRACY

1. Plaintiffs incorporate by reference herein all allegations set forth above.

[46]

2. The two unlawful, and malicious prosecutions of Bill Huntress and Acquest, as set forth above, involved a conspiracy.

3. The conspiracy involved an agreement between two or more employees of the EPA, including at least one CID agent, and as well as others within the United States Government.

4. The conspirators committed at least one overt act in furtherance of the conspiracy.

5. The conspirators intentionally participated in furtherance of the plan and/or purpose of the conspiracy.

6. The unlawful and unconstitutional acts and omissions of these employees of the United States Government, including the two unlawful indictments of Bill Huntress, while acting within the scope of their offices and employment, as set forth above, proximately caused economic damages (lost income) and personal injuries (damages to

reputation, emotional distress and mental anguish, humiliation and loss of consortium) to Plaintiffs under circumstances where the United States, if a private person, would be liable to the Plaintiffs in accordance with the laws of the State of New York, in that such negligent and wrongful acts and omissions constitute malicious prosecution, abuse of process, and the intentional infliction of emotional distress by investigative and law enforcement agents of the United States acting within the scope of their employment.

7. The United States Government is liable for all damages caused by such acts, as provided by 28 U.S.C. § 2680(h).

[47] XVIII.

DAMAGES, AND PRAYER FOR RELIEF

Plaintiffs suffered the following injuries for which they seek full compensation under the law:

a. Lost income;

b. Attorney fees;

c. Costs incurred in defending the criminal prosecution;

d. Damages to reputation;

e. Emotional distress and mental anguish, humiliation and loss of consortium;

f. Costs, as permitted by 28 U.S.C. 1920; and

g. Such other relief to which Plaintiffs may be entitled.

WHEREFORE, the Plaintiffs are entitled to damages from the United States, and do hereby pray that judgment be entered in their favor and against the

United States government in an amount not to exceed $387,629,459, together with all court costs incurred by Plaintiffs in this civil action, together with such further and additional relief at law or in equity that this Court may deem appropriate or proper.

Respectfully submitted,

LUPKIN PLLC

S/ Jonathan D. Lupkin

Jonathan D. Lupkin (JL-0792)
Michael B. Smith (MB-3281)
80 Broad Street, Suite 1301
New York, New York 10004
Tel: (646) 367-2771
Fax: (646) 219-4870
Email: jlupkin@lupkinpllc.com
msmith@lupkinpllc.com

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THE CORNWELL LAW FIRM
Gary T. Cornwell
Texas Bar No. 04837000
900 N. Rainbow Ranch Road
Wimberley, Texas 78676
Tel: (409) 659-7788
Fax: (713) 583-9020
Email: gtcornwell@gmail.com
Petition for Admission Pro Hac Vice forthcoming

G. Robert Blakey
William J. & Dorothy K. O'Neill
Professor of Law Emeritus,
Notre Dame Law School
7002 E. San Miguel Ave.
Paradise Valley, AZ 85253

Tel: 574-514-8220
E-mail: Blakey.1@nd.edu
Petition for Admission Pro Hac
Vice forthcoming

Lawyers for Plaintiffs