No. 21-5667

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

DAVID LOCKMILLER — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAVID LOCKMILLER
(Your Name)

860 24TH AVENUE, APT. 2
(Address)

SAN FRANCISCO, CA 94121
(City, State, Zip Code)

(415) 386-8581
(Phone Number)

Questions Presented to the Justices of the United States Supreme Court

First Question: Given the fact that the Constitution of the United States, Amendment I reads in pertinent part that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for redress of grievances," what gives Congress the authority to legislatively interfere and prohibitively limit, by provisions of Federal Tort Claims Act (FTCA) § 2678, any and every citizen's right to freely negotiate a contingency fee arrangement with an attorney of plaintiff's choice in a FTCA lawsuit?

Second Question: In strict compliance with the U. S. Supreme Court precedent in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009), was it not an abuse of discretion for the federal Ninth Circuit Court of Appeals to refuse to consider newly found and specifically relevant dispositive evidence completely discrediting the invalid syllogism of fact and law created by the Magistrate Judge in the Screening Order which led directly to the unjust dismissal of Petitioner's legitimate FTCA lawsuit?

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Opinions Below

The decision by the Ninth Circuit Court of Appeals denying Petitioner's direct appeal is unreported. The Ninth Circuit Court of Appeals en Banc denied Lockmiller's petition for rehearing.

Jurisdiction

The United States Court of Appeals decided Petitioner's case on February 23, 2021. A timely petition for rehearing was denied by the United States Court of Appeals en Banc on May 28, 2021. A copy of the order denying rehearing appears at Appendix D.

The jurisdiction of the U. S. Supreme Court is invoked under 28 U. S. C. § 1254(1).

Petition for Writ of Certiorari

Petitioner Lockmiller respectfully petitions this court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Petition for Writ of Certiorari

First Question - Reasons for Writ Allowance, with key controlling precedent: Given the fact that the Constitution of the United States, Amendment I reads in pertinent part that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for redress of grievances," what gives Congress the authority to legislatively interfere and prohibitively limit, by provisions of Federal Tort Claims Act (FTCA) § 2678, any and every citizen's right to freely negotiate a contingency fee arrangement with an attorney of plaintiff's choice in a FTCA lawsuit?

In *Jackson v. United States*, 881 F.2d 707, 710-11, (1989), a unanimous Ninth Circuit Federal Court of Appeals implicitly ruled that Congress does not have the constitutional authority to enact this legislation. Three justices of this federal Court of Appeals created in dictum a constitutional signpost on the constitutional right of a FTCA plaintiff to negotiate a contingency fee arrangement. Ninth Circuit Court of Appeals Judge Charles E. Wiggins, formerly a U. S. Representative, wrote the opinion for the unanimous court. In ruling on a FTCA § 2678 case, not directly involving this particular First Amendment constitutional issue, the Court implicitly recognized the First Amendment constitutional right of a plaintiff to be able to hire an attorney by means of a contingency fee arrangement to "speak" in court in the plaintiff's behalf:

> Other courts, like the district court below, have treated this standing problem differently. But we cannot accept the rationale of these cases, which rests on a fiction that the "government has an interest in seeing that funds it owes to litigants are disbursed properly," *Allen v. United States*, 606 F.2d 432, 434 (4th Cir. 1979), "even though . . . the fee does not decrease the funds in the Treasury," *Freeman v. Ryan*, 408 F.2d 1204, 1206 (D.C. Cir. 1968); accord *Wyatt v. United States*, 783 F.2d 45, 46 (6th Cir. 1986) (government had standing to challenge contingency fee agreement that violated § 2678 of the FTCA). Quite simply, these cases fail to explain adequately what interest the government has in ensuring that the opposing parties' attorney does not collect an excessive fee.
>
> Undoubtedly the "injury" under circumstances such as these is to the clients of the offending attorney; they are the ones who must compensate their attorney more than he is purportedly entitled. One might argue that the government suffers an injury derivative of the clients' because the excessive fee makes them unwilling to settle the case for a lesser amount, thereby effectively increasing the government's ultimate liability. . . . The only other theory that is even remotely persuasive is that the government has an actual interest in ensuring that federal entitlement

programs are not subverted by attorneys who wrestle congressionally appropriated funds from proper claimants.

According to the LexisNexis United States Code Service – Lawyers Edition (including May, 2019 Cumulative Supplement), at 28 USCS Judiciary and Judicial Procedure § 2678, this particular section of federal law has never been challenged in a federal lawsuit as a violation of the United States Constitution since the Federal Tort Claims Act was enacted in 1946. Fittingly, the United States Supreme Court will be the "court of first impression" on this critically important constitutional question for the vast majority of low and middle-income future Federal Tort Claims Act litigants in cases a lawyer will be needed to present a claimant's FTCA case in court.

Federal Tort Claims Act (FTCA) § 2678 reads in its entirety:

> No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.
>
> Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.
>
> (June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 89–506, § 4, July 18, 1966, 80 Stat. 307.)

Significantly, an attorney would only be able to contest the constitutionality of § 2678 of the FTCA by actually accepting a contingency fee arrangement for more than 25 percent of the compensatory damages settlement. The attorney would then be at risk of a year in prison plus a fine for the FTCA § 2678 violation. Petitioner is unaware of any such pertinent case law.

Thus, Congress has written a provision into law, Federal Tort Claims Act § 2678, to the effect, that if a FTCA low or middle income plaintiff cannot find an attorney willing to accept a "charity" rate 25 percent contingency fee arrangement, the legitimate FTCA plaintiff is left with no choice but to "speak" in court as the attorney pro se, or forfeit the case. Petitioner chose to "speak" in court as the attorney pro se.

The United States Supreme Court, in *Legal Services v. Velazquez*, 531 U.S. 533 (2001), from the viewpoint of the courts, warned all courts to beware similar such legislated First Amendment constitutional violations enacted by Congress: "[T]he enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." Id. 545. "The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." Id. 548.

Petitioner presented the same First Amendment constitutional arguments to both the District Court and the Federal Court of Appeals, supported by relevant FTCA judicial precedents.

The Ninth Circuit Court of Appeals concluded in its tersely-worded Memorandum affirming the District Court's Order of Case Dismissal: "We reject as *without merit* Lockmiller's contention that the FTCA's limitations on attorney's fees violated his First Amendment rights." [Emphasis added.] [Supreme Court – Exhibit A.]

Federal Tort Claims Act (FTCA) § 2678 – First Amendment Violation Argument

An attorney "speaking" in court on behalf of the FTCA client is a First Amendment right of the claimant when exercised by means of a contingency fee arrangement. By the enactment of § 2678, Congress has effectively negated this constitutional right of a FTCA claimant to "speak" in court by means of competent legal representation regarding the Federal Tort Claims Act claim. FTCA § 2678 is therefore unconstitutional. [District Court Amended Complaint, p. 13; Appellant's Informal Opening Brief, p. 16 .]

In *Joe v. United States*, 772 F.2d 1535, 1536-1537(11th Cir. 1985) the United States Court of Appeals illuminated the history, provisions, and stated purpose of § 2678:

> The FTCA does not expressly provide for attorneys' fees against the United States. The only mention of attorneys' fees within the FTCA occurs in Section 2678, which prohibits an attorney from charging fees in excess of 25 percent of the judgment. Section 2678 was amended in 1966,

> at which time Congress raised that limit on attorneys' fees from 20 percent to the present level of 25 percent. The legislative history of that amendment indicates that its purpose was to 'assure competent representation and reasonable compensation' in matters litigated under the FTCA. S.Rep. No. 1327, 89th Cong., 2d Sess. (1966) U.S. Conde Cong. Ad.News 2515, 2520. The increase was intended to bring attorneys' fees under the act "more nearly in line with those prevailing in private practice." (Amended Complaint, page 11, paragraph 5, lines 1-12.)
>
> If Congress had intended at the time of the 1966 amendment to encourage attorneys to bring FTCA claims not by increasing the percentage of the judgment available to attorneys but, instead, by providing for an award of attorneys' fees from the United States, Congress could easily have done so. However, the legislative history implies that Congress viewed FTCA claims as typically involving contingent fee arrangements. The 1966 amendment was designed to bring the permissible contingent fee more nearly in line with that which prevailed in tort claims against private parties. The FTCA does not contain the express waiver of sovereign immunity necessary to permit a court to award attorneys' fees against the United States directly under that act. (Amended Complaint, page 11, paragraph 5, lines 13-20.)

Thus, the legislative history of that amendment to Section 2678 shows that its purpose was to "assure competent representation and reasonable compensation" in matters litigated under the FTCA. And, as the Joe court prominently noted: "Congress viewed FTCA claims as typically involving contingent fee arrangements." (Amended Complaint, page 11, paragraph 6, lines 21-24.)

The following are the additional arguments on the constitutionality of Section 2678 question made directly to the district court:

> For plaintiff and all other low-income FTCA plaintiffs, and quite possibly, the vast majority of middle-income FTCA plaintiffs, past and future, a negotiated contingency fee arrangement with an attorney of choice remains the only realistic option to obtain competent and experienced FTCA legal counsel and representation in this type of federal court litigation. In 1966, Congress raised the limit for the maximum percentage contingency fee arrangement permitted by FTCA § 2678 legislation to 25 percent. This maximum permitted limit imposed by Congress has remained the same for the last 53 years. Even in 1966, the Senate Judiciary Committee Report No. 1327 at 2520 acknowledged that the increase to 25 percent at that time only brought "the fees more nearly in line with those prevailing in private practice." (Amended Complaint, pages 11-12, paragraph 7.)
>
> The FTCA provides the exclusive remedy for claims based upon the negligent or wrongful acts of government employees, 28 USCS § 2679(a). By statute, 28 USCS § 1346(b) grants exclusive jurisdiction in the district courts over tort claims against the government. Punitive or exemplary damages are not available against the government. Furthermore, no allowance is permitted by the FTCA to cover the plaintiff's legal fees and expenses, such as expert witness fees. The sole

remedy available to plaintiff under the FTCA is compensatory money damages, intended to make the plaintiff whole once again. (Amended Complaint, page 12, paragraph 8.)

Following the receipt of the Form 95 tort claim (in compliance with FTCA § 2675) denial by the Veterans Administration in February 2019, plaintiff engaged in a subsequent six month search for competent legal counsel. During this entire process, plaintiff was unaware of the 25 percent maximum contingency fee limitation imposed by Congress in the FTCA § 2678 legislation. Plaintiff had settled in his own mind that 40 percent would have been an acceptable maximum limit for a contingency fee arrangement. Plaintiff reasoned at the time that 60 percent of a compensatory damages award (an amount intended to make plaintiff "whole" once again) would be much better for plaintiff than 100 percent of nothing. Plaintiff was willing to offer an attorney 40 percent of his compensatory damages award on a contingency fee basis. (Amended Complaint, page 12, paragraph 9.)

Unbeknownst to plaintiff at the time, every FTCA attorney who plaintiff contacted to present his case was bound by the provisions of FTCA § 2678(a), as enforced by the draconian terms of § 2678(b) upon wayward attorneys. Despite strenuous efforts, plaintiff could not obtain FTCA legal representation in the six months permitted by the statute to do so. And, plaintiff was left only with the option of either not receiving any compensatory damages for the negligent or wrongful actions of Government employees or filing this FTCA lawsuit in pro per. Plaintiff filed this FTCA lawsuit in pro per on August 6, 2019. (Amended Complaint, page 12, paragraph 10.)

Plaintiff now has standing to bring this as-applied constitutional challenge to Federal Tort Claims Act § 2678. An as-applied challenge is retrospective because it seeks to redress a constitutional violation that has already occurred. At any time in the six-month period that plaintiff searched for a competent and experienced FTCA attorney, plaintiff would have been willing to offer 40 percent of his compensatory damages award on a contingency fee basis in exchange for legal representation. (Amended Complaint, page 13, paragraph 11.)

It should be noted by any reviewing court that the Federal Government is the Defendant in all Federal Tort Claims Act (FTCA) lawsuits and the Federal Government clearly stands to benefit by this restrictive contingency fee legislation substantially limiting plaintiff's ability to obtain competent and experienced legal counsel. (Amended Complaint, page 13, paragraph 12.)

The math is simple; a contingency fee arrangement even 1 percent above 25 percent maximum level permitted by this act of Congress subjects a recalcitrant attorney to one year imprisonment, a $2,000 fine, or both. And the consequences for low and middle income FTCA plaintiff-litigants is catastrophic in that many would-be plaintiffs are simply not able to obtain FTCA legal representation because of the detrimental provisions of § 2678 regarding contingency fee arrangements with an attorney and must either file a lawsuit in pro per or relinquish meritorious FTCA claims forever. (Amended Complaint, page 14, paragraph 15.)

Thus, with the right hand, Congress permitted "it possible for a person injured through the negligence or wrongful act of a Government employee to file suit against the United States for damages resulting from the injury when the employee was acting within his scope of employment." And, then, with the left hand, Congress prohibited any contingency fee arrangements exceeding 25 percent, which is several percentage points lower than the current

prevailing market rates for contingency fee arrangements in similar private tort claims cases. (Amended Complaint, page 14, paragraph 17.)

Even now, after all of the time, work, and effort that plaintiff has put into this project, plaintiff would be willing to enter into a 40 percent contingency fee arrangement with a competent and experienced FTCA attorney to counsel and represent plaintiff to the conclusion of this Federal Tort Claims Act (FTCA) lawsuit. However, Federal Tort Claims Act § 2678 effectively prevents plaintiff from offering to legal counsel of plaintiff's choice a percentage contingency arrangement greater than 25 percent. (Amended Complaint, page 14, paragraph 18.)

This Congressional "effective prohibition" of the right of a citizen to obtain legal counsel is unconstitutional and should not continue!!!!!!!!! (Amended Complaint, page 14, paragraph 19.)

Case Facts [from Appellant's Informal Opening Brief, pages 7-8]

The case facts are the same as Appellant reported on the VA Form 95 tort claim that is required by the Federal Tort Claims Act § 2675. And thereafter, the same case facts were reported in both Appellant's federal district court Original Complaint and Amended Complaint.

The incident took place in the San Francisco VA Hospital Emergency Room on October 5, 2017. The diagnosing and treating physician, Dr. Harry Han, failed to report my case as a food borne illness to the local health authorities as required by California Code of Regulations, Title 17 Public Health § 2500 Reporting to the Local Health Authority.

In fact, Dr. Han and Emergency Room nurse Debra Waite, RN did everything that they could possibly do wrong in order NOT to report my condition as a food borne illness. A food borne illness is defined in § 2500(a)(13) as an "illness suspected by a health care provider to have resulted from consuming a contaminated food."

I purchased a tainted lamb roast at Bryan's Market in San Francisco. The next day, I barbequed and consumed the meat on the night of October 3, 2017. Within hours of going to bed, I woke up and immediately knew that I must get to the bathroom to vomit. As soon as my feet touched the floor, I realized that I had paralysis (loss of muscle function) in both legs.

I staggered to the bathroom and vomited for the next one and a half to two hours what I thought at the time was the entire contents of my stomach. I vomited on two more occasions from my bed thereafter with the last session emptying my stomach of vile-tasting bile. At one point in the early morning hours of Wednesday, October 4, I felt so terribly bad that I thought if I closed my eyes and fell asleep, that I might not wake up again. And, so I forced myself to stay awake for quite some time.

I could not afford an ambulance and waited to call the Nurse Aide hotline on Thursday, October 5 and reported my symptoms and condition. I was told to get into the VA Hospital as soon as possible. I called my neighbor, who had my spare key to the apartment.

He helped me to his car and brought with us to the Emergency Room a large sample of the vomitus in order to identify the cause of my foodborne illness and thereby direct my medical treatment. [District Court Exhibit A; Supreme Court Appendix E - Neighbor's Statement.]

As noted in the official medical records, I arrived in a wheelchair. The admitting nurse wrote: "Patient states he thinks he had food poisoning." However, my neighbor was told by the Emergency Room admitting nurse, Debra Waite, RN, to dispose of the vomitus sample before an Emergency Room physician had even seen me and considered the possibility of ordering specific laboratory testing corresponding to the symptoms of my illness.

I now believe that the cause of my illness was Bacillus cereus of the emetic toxin type. According to FoodSafety.gov, "Bacillus cereus is a type of bacteria that produces toxins that can cause two types of illness: one type characterized by diarrhea and the other, called emetic toxin, by nausea and vomiting. [Supreme Court Appendix F – FoodSafety.gov]

Onset of this disease is within approximately 6 hours and duration of the illness is 24 hours, which is consistent with my experience. I had severe vomiting (but no diarrhea). Bacillus cereus is also highly heat resistant according to medical literature on the subject. This would account for the disease causing bacteria not being destroyed by my barbequing the meat.

The Emergency Room treating physician, Harry Han, MD, made no finding of a suspect food borne illness and therefore made no report to the local health authorities as required by state law to do so. Regarding my ability to walk with very great difficulty, Dr. Han wrote in the discharge papers that I was "STRONGLY" advised to consult with my primary care doctor about my "walking difficulties."

No mention is made by Dr. Han in his medical notes that I had reported to him that I had paralysis in both legs as soon as I awoke to vomit in the early morning hours of October 4, 2017 and that I had no trouble walking prior to going to bed that night. I received 2 liters of intravenous fluids and was discharged at the end of the day on October 5, 2017. I left the Emergency Room in a wheelchair because I could not walk on my own.

A medical misdiagnosis can do severe harm to a patient. In this case, plaintiff's opportunity to file a strict liability negligence lawsuit against Bryan's Market for the sale of contaminated meat causing all of plaintiff's medical injuries was foreclosed by physician's misdiagnosis and failure to report plaintiff's suspect food borne illness of Bacillus cereus – emetic type to local health authorities as required by California statute.

Plaintiff's FTCA § 2675 tort claim was denied by the VA. A mandatory federal FTCA lawsuit is the only means permitted by the FTCA legislation to make an appeal of the VA decision.

Unquestionably, the very worst of Petitioner's medical injuries that resulted from this particular foodborne illness incident has been the loss of both senses of taste and smell to the extent of 90 percent or more, in Petitioner's estimation. Petitioner now expects this condition to last the rest of his life.

Second Question – Reason for Writ Allowance: In strict compliance with the U. S. Supreme Court precedent in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009), was it not an abuse of discretion for the federal Ninth Circuit Court of Appeals to refuse to consider newly found and specifically relevant

dispositive evidence completely discrediting the invalid syllogism of fact and law created by the Magistrate Judge in the Screening Order which led directly to the unjust dismissal of Petitioner's legitimate FTCA lawsuit?

The Ninth Circuit Court of Appeals controlling precedent opinion in *Hicks [Golf Caddies] v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (2018) regarding the correct procedure for Rule 12(b)(6) case dismissal reviews by all Ninth Circuit Courts of Appeals was written by Chief Judge Thomas:

> We review de novo the district court's dismissal of the Caddies' complaint under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." *Vega v. United States*, 881 F.3d 1146, 1152 (9th Cir. 2018). "*To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,* to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "*A claim has facial plausibility when the plaintiff pleads factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). Applying this standard is a "context-specific task" that requires drawing on "judicial experience and common sense." Id. at 679, 129 S.Ct. 1937. (Emphasis added.)

Case Dismissal by the District Court

However, the majority opinion in *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) also reads in pertinent part:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *When there are well-pleaded factual allegations, a court should assume their veracity* and then determine whether they plausibly give rise to an entitlement to relief. (Emphasis added.)

In the Screening Order (Supreme Court Appendix C) at page 3 (lines 17-21), the Magistrate Judge noted that she had found a fatal factual flaw within the pleadings made by Plaintiff in the original complaint and created the following syllogism of fact and law to explain her reasoning:

> "[S]ection 2500(j), which provides the list of diseases healthcare providers must report to local health authorities, does not require reporting of either infectious gastroenteritis or "Bacillus cereus" infection. Doctors Han and Garber were therefore (sic) had no duty to report Plaintiff's symptoms and were not negligent in failing to do so. As a consequence, Plaintiff has failed to state a claim against the United States under 28 U.S.C. § 1346(b)."

The Magistrate Judge added in the Conclusion at page 4 (line 8-12):

> Based on the allegations in the current complaint, the Court does not have jurisdiction over this action, and Plaintiff has not sufficiently pleaded any of his claims. Plaintiff may file an amended complaint by September 16, 2019, correcting these problems. Failure to amend the complaint to cure the defects described in this order by September 16, 2019, will result in a recommendation that this action be dismissed.

In the Order Dismissing Amended Complaint, at pages 3– 4, the District Court Judge acknowledged the "factual" dispute of whether or not Bacillus cereus of the emetic toxin type was a reportable foodborne illness under provisions of Title 17. Public Health, Section 2500. Reporting to the Local Health Authority:

> In his amended complaint, plaintiff points to Section 2500(a)(13), which defines "foodborne disease" as illness suspected to have resulted from consuming a contaminated food, non-water beverage, or other ingestible item such as a dietary supplement or herbal remedy." *Plaintiff asserts that "foodborne disease" is a "general term that encompasses a number of specific illnesses with distinctly different causes, and these causes are specifically listed in authoritative medical reference sources available to all Emergency Room physicians"* (Dkt, No. 10 at 15). He thus complains of Judge Kim's analysis and reasserts that defendants had a duty to report his "food borne illness." This order disagrees. [Emphasis added.]
>
> Section 2500(a) merely provides governing definitions for various terms. Those definitions by themselves, do not provide affirmative duties. Thus *only the specific diseases and conditions listed in Section 2500(j) remain relevant to the question of whether Dr. Han had a duty to report plaintiff's symptoms under Section 2500(b).* For the reason stated above, he did not. As such, even assuming that Dr. Han erroneously diagnosed plaintiff's symptoms, he still had no duty to report plaintiff's illness under Section 2500(b). [Emphasis added.]

The published Barclay's Official California Code of Regulations for 17 CCR § 2500 (j) does not list within the alphabetized category titled "Foodborne Disease Giardiasis Gonococcal Infections" the specific Foodborne Diseases that are reportable within this category. And, there is no footnote reference to where this specific information may be located within Barclay's Official California Code of Regulations. [See Supreme Court Appendix H. Section 2500 legislation, page #3, shows the alphabetized listing for Foodborne Diseases and the indicated requirement that a qualifying suspect foodborne illness case must be reported to the local health authority "within one (1) working day" according to the statute, with both civil and criminal penalties for failures to comply. Every day unreported is considered a separate offense.]

Plaintiff, in his amended complaint, by means of Exhibit F, attempted to forestall the erroneous conclusion of law that District Court Judge Alsup subsequently reached regarding the legislated duty of a diagnosing physician to report a suspect case of a Bacillus cereus – emetic type illness to the San Francisco local health authority. Plaintiff's Exhibit F consists of five pages from the federal Center for Disease Control (CDC) publication titled "Diagnosis and Management of Food Borne Illnesses" and subtitled "A Primer for Physicians and Other Health Care Professionals." (Amended Complaint - page 15, paragraph 3; Appellant's Opening Brief, page 10.) Thus, Plaintiff presented to both the district court and the appellate court unequivocal evidence that the CDC considered Bacillus cereus toxin infections to be a very serious foodborne illness nationwide. [Supreme Court Appendix G – CDC's "Diagnosis of Foodborne Illnesses."}

Nonetheless, District Court Judge William H. Alsup doubled down on Magistrate Judge Kim's invalid syllogism of fact and law. The District Judge wrote in conclusion that "even assuming that Dr. Han erroneously diagnosed plaintiff's symptoms, he still had no duty to report plaintiff's illness under Section 2500(b)." (Order Dismissing Amended Complaint, page 4, lines 1-2.)

However, after the issuance of Judge Alsup's Order Dismissing Amended Complaint, Petitioner found by chance on the California Department of Public Health's website, an official California Department of Public Health form titled FOODBORNE DISEASE OUTBREAK REPORT. Within section 14.1 ETIOLOGY #1 – DETAILS (PRIMARY CASES ONLY), there is a list of reportable foodborne diseases in checkbox format from which the reporting health care provider can select. The first specific disease checkbox option listed is "Bacillus cereus toxin!" [Ninth Circuit Form 27: Motion for Taking Judicial Notice to Supplement Record. See Supreme Court Appendix H.]

It is now a "fact" that Bacillus cereus – emetic type was a reportable foodborne disease according to the California Department of Public Health, the state agency administratively responsible for the state's uniform food safety law, the California Retail Food Code. This *now* indisputable "fact" also constitutes

incontrovertible proof that U. S. District Court Judge Alsup's conclusion of law that "even assuming that Dr. Han erroneously diagnosed plaintiff's symptoms, he still had no duty to report plaintiff's illness under Section 2500(b)," is unequivocally incorrect. And, now, Magistrate Judge Kim's invalid syllogism of fact and law in her Screening Order has been proven to be based upon her factually-incorrect syllogism premise:

> "[S]ection 2500(j), which provides the list of diseases healthcare providers must report to local health authorities, does not require reporting of either infectious gastroenteritis or "Bacillus cereus" infection. Doctors Han and Garber were therefore (sic) had no duty to report Plaintiff's symptoms and were not negligent in failing to do so. As a consequence, Plaintiff has failed to state a claim against the United States under 28 U.S.C. § 1346(b)."

Thus, Magistrate Judge Kim's erroneous conclusion of law that "Plaintiff has failed to state a claim against the United States under 28 U.S.C. § 1346(b)," is now also shown to be indisputably wrong. The false statement of "fact" made by the Magistrate Judge in the Screening Order was ultimately the sole basis of Petitioner's case dismissal by the federal district court judge. The "Motion for Taking Judicial Notice to Supplement Case Record," definitively demonstrates that the District Court's finding of fact that Plaintiff's alleged reportable foodborne illness, Bacillus cereus – emetic type, was NOT a reportable foodborne illness to local health authorities as required by the relevant state law, 17 CCR § 2500, to be indisputably wrong.

Case Dismissal Affirmed by the Court of Appeals

> "The district court *properly dismissed* Lockmiller's negligence claim against the United States because Lockmiller failed to allege facts sufficient to state a plausible claim. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged.") *Lam v. United States*, 979 F.3d 665, 672 (9th Cir. 2020) (setting forth elements of a FTCA claim.)" Ninth Circuit Court of Appeals MEMORANDUM [Emphasis added.]

The Court of Appeals "denied" without any explanation Petitioner's Form 27 – "Motion for Taking Judicial Notice to Supplement Case Record." The Motion definitively demonstrates that the District Court's finding of fact that Plaintiff's alleged reportable foodborne illness, Bacillus cereus – emetic type, was NOT a

reportable foodborne illness to local health authorities as required by the relevant state law, to be indisputably wrong. However, it is eminently unclear if the Motion was both read and considered by the members of the Court of Appeals. The Court of Appeals wrote simply: "All pending motions are denied."

Justice Gorsuch of the United States Supreme Court recently wrote in a dissenting opinion from the denial of certiorari in *Shkelzen Berisha v. Guy Lawson*, Et Al, 594 U. S. ____ (2021):

> At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But *none of that meant publishers could defame people, ruining careers or lives, without consequence.* Rather, *those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused.* [Emphasis added.]

Justice Gorsuch's moral aphorism would seem also to apply in some manner to all members of the judiciary regarding their judicial duty and "responsibility to try to get the facts right," especially when one erroneous "fact" alone in a Screening Order by a Magistrate Judge might well lead directly to an unjust dismissal of a legitimate plaintiff's FTCA lawsuit.

Abraham Lincoln, before he became President, faced a quite similar situation to that which Petitioner now faces. Lincoln wrote a letter to the editor of the Illinois Gazette, making a moral argument regarding persons who assert an important "fact," without actually knowing whether the "fact" is true or false:

> If Mr. Woodward has given such assurance of my character as your correspondent asserts, I can still suppose him to be a worthy man; he may have believed what he said; but there is, even in that charitable view of his case, one lesson in morals which he might, not without profit, learn of even me – and that is, *never to add the weight of his character to a charge against his fellow man, without knowing it to be true. I believe it is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him.* This maxim ought to be particularly held in view, when we contemplate an attack upon the reputation of our neighbor. [Emphasis added.]
>
> (From a letter to editor of the Illinois Gazette; Springfield, Illinois, August 11, 1846. Basler, Roy A. "Personal Recollections of Abraham Lincoln." Cleveland: World Publishing Co., 1946, p. 187.)

The United States Supreme Court has declared itself on the subject of "facial plausibility":

> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (citing *Twombly*, 550 U.S. at 556.)

Plaintiff's Amended Complaint (page 17 of 17, lines 4-13) regarding the "facial plausibility" of the First, Second, and Third Claims reads as follows:

> Plaintiff's Federal Tort Claims Act injury was due to the negligence of San Francisco VA Hospital ER diagnosing and treating physician, Dr. Harry Han, acting within the scope of his employment on October 5, 2017. In failing to correctly diagnose plaintiff's food borne illness as Bacillus cereus – emetic type and his consequential failure to report plaintiff's suspect case to the local health authorities in mandatory compliance with California Code of Regulations, Title 17, Sec. 2500(b), plaintiff may have lost all possibility to hold Defendant Bryan's Market, the retail food establishment that sold to plaintiff the tainted meat actually causing Plaintiff's medical injuries, strictly liable for negligence in state court. Dr. Garber, Head of the VA Hospital Emergency Room, was negligent in not meeting his statutory duty under section 2500(c) to establish procedures to assure reporting compliance.

It is now a proven "fact" that Petitioner's alleged food borne illness, Bacillus cereus – emetic type, is a mandatory reportable foodborne illness to local health authorities in California under California Code of Regulations, Title 17, Sec. 2500(b).

The question now before the Justices of the United States Supreme Court to decide is:

> "In strict compliance with the U. S. Supreme Court precedent in Ashcroft v. Iqbal, 556 U.S. 662, 678-679 (2009), was it not an abuse of discretion for the federal Ninth Circuit Court of Appeals to refuse to consider newly found and specifically relevant dispositive evidence completely discrediting the invalid syllogism of "fact" and law created by the Magistrate Judge in the Screening Order which led directly to the unjust dismissal of Plaintiff's legitimate FTCA lawsuit?"

Altogether, it does not appear that Petitioner's Rule 12(b)(6) case dismissal review by the Ninth Circuit Court of Appeals was conducted in accordance with the binding authority precedent of the Ninth Circuit Court of Appeals in *Hicks [Golf Caddies] v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (2018).

Reasons for Writ Allowance – FTCA § 2678 and *Ashcroft v. Iqbal* Historical Perspectives

The Second Question posed to the Justices of the U. S. Supreme Court would never have become an issue but for the unconstitutionality of FTCA § 2678. A competent and experienced FTCA attorney would not

have accepted a medical malpractice lawsuit on a contingency fee basis without first obtaining a supporting preliminary medical expert opinion upon which to base his or her decision to accept.

Congress considered passage of legislation such as the Federal Tort Claims Act (FTCA) for more than twenty years. Then, a tragic event occurred in 1945 that brought the Congress to legislative action.

> The Federal Tort Claims Act was passed following the 1945 B-25 Empire State Building crash, where a bomber piloted in thick fog by a U. S. [military officer] crashed into the north side of the Empire State Building. Eight months after the crash, the U.S. government offered money to families of the victims. Some accepted, but others initiated a lawsuit that resulted in landmark legislation. The Federal Tort Claims Act of 1946, for the first time, gave American citizens the right to sue the federal government. Although the crash was not the initial catalyst for the bill, which had been pending in Congress for more than two decades, the statute was made retroactive to 1945 in order to allow victims of that crash to seek recovery. (Source: Wikipedia - FTCA)
>
> The FTCA provides the exclusive remedy for claims based upon the negligent or wrongful acts of government employees, 28 USCS § 2679(a). By statute, 28 USCS § 1346(b) grants exclusive jurisdiction in the district courts over tort claims against the government. Punitive or exemplary damages are not available against the government. Furthermore, no allowance is permitted by the FTCA to cover the plaintiff's legal fees and expenses, such as expert witness fees. The sole remedy available to plaintiff under the FTCA is compensatory money damages, intended to make the plaintiff whole once again. (*Supra*, at 4-5.)

Thus, for the first time in the history of this democracy, Congress grudgingly yielded a measure of sovereign immunity in granting to every citizen the right to recover compensatory damages only for claims based upon the negligent or wrongful acts of government employees. This long-delayed legislated act of simple justice was accomplished by means of the Federal Tort Claims Act.

In *Perry v. United States*, 294 U.S. 330, 353 (1935), the Supreme Court previously acknowledged this important legislative prerogative of Congress: the "right to make binding obligations is a competence attaching to sovereignty." In 1935, the *Perry* Supreme Court, however, added an important caveat as a form of constitutional warning for Congress to bear in mind. In expressing agreement with the message of Alexander Hamilton to the Senate in 1795, the Supreme Court thus forewarned and cautioned the Congress of a prospective constitutional boundary to the legislative powers of Congress (*Id.* at 379-380.):

> These words of Alexander Hamilton ought not to be forgotten: "[Congress's] promises may be justly considered as excepted out of its power to legislate, *unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges with a power to make a law which can vary the effect of it.*" (3 Hamilton's Works 518-519.) (Emphasis added.)

But, only eleven years later, this is exactly what Congress did do by means of the § 2678 FTCA legislation. Congress legislatively "var[ied] the effect" of the obliging promise made to all citizens seeking justice with the inclusion of § 2678 as an integral part of the 1946 FTCA legislation. This legislative inequity was explained in detail by Petitioner to both the district court and the Court of Appeals (*Supra*, pages 4-5):

> It should be noted by any reviewing court that the Federal Government is the Defendant in all Federal Tort Claims Act (FTCA) lawsuits and the Federal Government clearly stands to benefit by this restrictive contingency fee legislation substantially limiting plaintiff's ability to obtain competent and experienced legal counsel. (Amended Complaint, page 13, paragraph 12.)
>
> The math is simple; a contingency fee arrangement even 1 percent above 25 percent maximum level permitted by this act of Congress subjects a recalcitrant attorney to one year imprisonment, a $2,000 fine, or both. And the consequences for low and middle income FTCA plaintiff-litigants is catastrophic in that many would-be plaintiffs are simply not able to obtain FTCA legal representation because of the detrimental provisions of § 2678 regarding contingency fee arrangements with an attorney and must either file a lawsuit in pro per or relinquish meritorious FTCA claims forever. (Amended Complaint, page 14, paragraph 15.)
>
> Thus, with the right hand, Congress permitted "it possible for a person injured through the negligence or wrongful act of a Government employee to file suit against the United States for damages resulting from the injury when the employee was acting within his scope of employment." And, then, with the left hand, Congress prohibited any contingency fee arrangements exceeding 25 percent, which is several percentage points lower than the current prevailing market rates for contingency fee arrangements in similar private tort claims cases. (Amended Complaint, page 14, paragraph 17.)

For six months following the § 2675 VA claim denial, Petitioner sought in vain to retain legal counsel and representation in court based on a contingency fee arrangement. Petitioner was unaware that § 2678 of the FTCA prohibited every attorney to whom he presented his case to a maximum "charity rate" of 25 percent. Petitioner had settled in his own mind that 40 percent would be an acceptable maximum limit, based on his own logical thinking that 60 percent of something is much better than 100 percent of nothing.

In the eyes of the *Perry* Supreme Court, Congress would have been viewed as having unconstitutionally "varied the effect" of the obliging promise made by Congress to all citizens. Following the Supreme Court precedent in *Perry v. United States*, this Supreme Court should declare FTCA § 2678 to be unconstitutional.

Regarding the Second Question, Justice Gorsuch's moral aphorism must apply to all members of the judiciary regarding their judicial duty and "responsibility to try to get the facts right," especially when one erroneous "fact" alone in a Screening Order by a Magistrate Judge might well lead directly to an unjust dismissal of a legitimate plaintiff's FTCA lawsuit. As previously stated, regarding the duty of publishers "to get the facts right," Justice Gorsuch wrote in dissent from a recent denial of certiorari (*Shkelzen Berisha*):

> [N]one of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right—or, *like anyone else*, answer in tort for the injuries they caused. (Emphasis added.)

The Second Question presented in this Petition for Writ of Certiorari reads:

> In strict compliance with the U. S. Supreme Court precedent in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009), was it not an abuse of discretion for the federal Ninth Circuit Court of Appeals to refuse to consider newly found and specifically relevant dispositive evidence completely discrediting the invalid syllogism of fact and law created by the Magistrate Judge in the Screening Order which led directly to the unjust dismissal of Petitioner's legitimate FTCA lawsuit?

The Magistrate Judge made the "factual" mistake that directly resulted in the dismissal of Petitioner's legitimate FTCA lawsuit. Plaintiff's statement of "fact" in the complaint regarding statute-mandated reporting of Bacillus cereus foodborne illnesses was correct. The Supreme Court in *Ashcroft* wrote:

> "*To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true*, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). . . . "*When there are well-pleaded factual allegations, a court should assume their veracity* and then determine whether they plausibly give rise to an entitlement to relief." (*Id.* at 679.) (Emphasis added.)

Conclusion: Petitioner Lockmiller respectfully requests that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Date: September 10, 2021 Signature: David Lockmiller