APPENDIX

TABLE OF APPENDICES

Appendix A

United States Court of Appeals
for the Sixth Circuit

No. 17-2101

JAMES KING,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.
Defendants,

DOUGLAS BROWNBACK; TODD ALLEN,
Defendants-Appellees.

On Remand from the United States Supreme Court.
United States District Court for the Western
District of Michigan at Grand Rapids.
No. 1:16-cv-00343—Janet T. Neff, District Judge.

Decided and Filed: September 21, 2022

Before: BOGGS, CLAY, and ROGERS,
Circuit Judges.

Appendix A

COUNSEL

ON BRIEF: Patrick Jaicomo, Anya Bidwell, Keith Neely, INSTITUTE FOR JUSTICE, Arlington, Virginia, D. Andrew Portinga, MILLER JOHNSON, Grand Rapids, Michigan, for Appellant. Michael Shih, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ROGERS, J., delivered the opinion of the court in which BOGGS, J., joined. CLAY, J. (pp. [8a–22a]), delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge. This case dealing with the Federal Tort Claims Act (FTCA) judgment bar is on remand from the Supreme Court, and we must determine whether our published holding in *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), should be overruled based on language in three subsequent Supreme Court cases. We squarely held in *Harris* that the FTCA judgment bar applies to other claims brought in the same action, including claims brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Harris* has not been overruled by later precedent and, as a binding decision of this court, requires that we affirm the district court's dismissal of the plaintiff's remaining claims.

This case arises from plaintiff James King's

erroneous apprehension by plainclothes FBI task force members in July 2014. *See King v. United States*, 917 F.3d 409, 416-18 (6th Cir. 2019). Defendants Allen and Brownback were searching for a felony home invasion suspect, relying on photographs of the suspect, a physical description, and the knowledge that the suspect bought a soft drink from a specific gas station every afternoon. King, who was a college student at the time, was walking in the area near the specific gas station in the afternoon when Allen and Brownback approached him. The parties dispute whether the defendants identified themselves as law enforcement. King initially answered the defendants' questions about his identity and complied with their order to put his hands on his head, and Allen removed a pocketknife and wallet from King's pocket. King, who thought he was being mugged, tried to run away, but Allen tackled him and put him in a chokehold. King claims he briefly lost consciousness, and when he came to, he fought with Allen for over sixty seconds. King bit Allen's arm, and Allen repeatedly punched King on his face and head. A witness who called 911 said that Allen and Brownback were going to "kill this man" and that "they're suffocating him." Defendant Morris responded to the scene and told bystanders to delete their videos of the fight. Prosecutors later charged King, and a jury acquitted him on all counts.

King filed suit in federal district court, asserting a *Bivens* claim against Allen and Brownback for violation of King's Fourth Amendment rights, a 42 U.S.C.

§ 1983 claim against Allen, Brownback, and Morris based on Fourth Amendment violations, and an FTCA claim against the United States. The district court granted the defendants' motion to dismiss all claims on the merits, and did not address the FTCA judgment bar, which provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. King appealed. We held that the FTCA judgment bar did not preclude King's *Bivens* claim "because the district court lacked subject-matter jurisdiction over Plaintiff's FTCA claim," so the FTCA claim was not resolved on the merits and the judgment bar was not triggered. *King*, 917 F.3d at 419. We proceeded to hold that the defendants were not entitled to qualified immunity on the *Bivens* claim. *Id*. at 422.

The United States appealed, and the Supreme Court reversed. The Court held that the district court's order dismissing King's FTCA claim "also went to the merits of the claim and thus could trigger the judgment bar." *Brownback v. King*, 141 S. Ct. 740, 745 (2021). The Court noted the parties' mutual understanding that the judgment on the FTCA claim "must have been a final judgment on the merits to trigger the [judgment] bar." *Id*. at 747. Because the district court's order "hinged" on whether King could establish the elements of an FTCA claim, the court reasoned, the order was on the merits for purposes of

the judgment bar. *See id*. at 748. The Court concluded that its analysis did not change based on the fact that the elements of an FTCA claim also establish whether a district court has subject-matter jurisdiction over that claim. *See id*. at 749. The Court stated that "where, as here, pleading a claim and pleading jurisdiction entirely overlap, a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar." *Id*.

At issue here is a footnote in the opinion that discussed how we should proceed on remand. The Court noted that King had argued "that the judgment bar does not apply to a dismissal of claims raised in the same lawsuit." *Id*. at 747 n.4. But because we had not addressed that argument, the Court declined to address it as well. The Court stated "[w]e leave it to the Sixth Circuit to address King's alternative arguments on remand." On remand, we requested supplemental briefing from the parties on whether the FTCA judgment bar applies to claims in the same lawsuit, which would require the dismissal of King's remaining *Bivens* claim.

Our previous decision in *Harris* compels our affirmance of the district court's dismissal of King's remaining claims. As here, the plaintiff in *Harris* argued that "the judgment bar does not apply where plaintiff has from the outset alleged his *Bivens* claims and sought a jury trial in the same lawsuit alleging FTCA causes of action." *Harris*, 422 F.3d at 334 (internal quotation omitted). We discussed the caselaw,

FTCA statutory history, and equitable principles and proceeded to hold squarely that the FTCA judgment bar applies to other claims brought in the same lawsuit. *Id*. at 334-37. King does not argue that *Harris* is distinguishable on its facts, that the analysis in *Harris* was dictum rather than holding, that *Harris* was somehow inconsistent with previous precedent, or that we are somehow freed from treating our precedent as binding by the fact this case is on remand from the Supreme Court. Instead, King argues solely that three intervening Supreme Court cases warrant our overruling *Harris*. But the language in those three cases is not directly applicable to the issue in this case, as the United States pointed out, and King's reply brief did not further address the issue.

The three Supreme Court cases cited by plaintiff are *Simmons v. Himmelreich,* 578 U.S. 621 (2016), *Will v. Hallock*, 546 U.S. 345 (2006), and *Brownback*, but none of those cases can be considered as having overruled our decision in *Harris*. First, *Brownback* is this very case, and nothing in the Court's opinion can be understood to indicate that the judgment bar cannot apply to claims in the same action. Instead, the Court explicitly left the question open for us to address on remand, *see* 141 S. Ct. at 747 n.4, which it would have been unlikely to have done if it thought its precedent clearly answered the question.

Second, although *Simmons*'s holding took policies into account that could arguably support not applying the FTCA judgment bar, the Court was at pains to distinguish cases that are closer to this one than is

Simmons. *See* 578 U.S. at 629-30. The issue in *Simmons* was whether the FTCA judgment bar applies to claims that are explicitly exempted from the FTCA due to their inclusion in the "Exceptions" section of the statute, 28 U.S.C. § 2680. *Id.* at 623, 626. The Court focused on the plain text of the "Exceptions" section and held that the judgment bar did not apply. *See id.* at 627. Unlike *Simmons*, this case did not involve dismissal under one of the exceptions in § 2680. It is true that the Court noted the "strange result" that would occur if "the viability of a plaintiff's meritorious suit . . . should turn on the order in which the suits are filed." *Id.* at 630-31. The Court reasoned that a dismissal under one of the § 2680 exceptions had "no logical bearing on whether an employee can be held liable instead" of the Government, but explicitly distinguished other types of cases, like this one, in which the plaintiff otherwise failed to prove his claim. *Id.* at 629-30. The Court stated that if the district court had dismissed the FTCA claim on the merits, "it would make little sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employees: [the plaintiff]'s first suit would have given him a fair chance to recover damages for his beating." *Id.* The *Simmons* decision thus cannot be read to overrule our holding in *Harris*, where *Simmons* applied only to the "Exceptions" provision of the FTCA and explicitly distinguished cases such as this one in which the FTCA claim is adjudicated on the merits.

Finally, *Will* also does not call into question our

Harris decision, because the Court in *Will* rejected the doctrinally distinct jurisdictional argument that a district court's rejection of the judgment bar was immediately appealable under the collateral-order doctrine. *See* 546 U.S. at 355. In distinguishing the judgment bar from qualified immunity with respect to interlocutory appealability, the Court indeed noted that "the judgment bar can be raised only after a case under the Tort Claims Act has been resolved in the Government's favor," *id.* at 354, but that is true regardless of whether or not both claims have been litigated in the same action.

For the foregoing reasons, we affirm the judgment of the district court.

Appendix A

DISSENT

CLAY, Circuit Judge, dissenting. Plaintiff James Lee King was walking to his summer job when two strangers brutally attacked him. The two individuals attacked King so violently that onlookers thought King would die. Unfortunately for King, he found out after the fact that his attackers—Todd Allen and Douglas Brownback (collectively "Defendants")—were federal law enforcement officers. Allen and Brownback were allegedly searching for someone whose description they thought matched King's, but they never identified themselves to King as federal agents.

King filed the present action alleging Fourth Amendment violations arising under 42 U.S.C. § 1983 or, alternatively, under the implied right of action set forth in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The district court granted summary judgment on these claims in favor of Defendants. The district court also dismissed King's claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674, for lacking subject matter jurisdiction. On appeal, King only challenged whether the district court erred in granting summary judgment on his *Bivens* claim; he did not appeal the dismissal of his FTCA claim. We reversed the grant of summary judgment. In the process, we held that the dismissal of King's FTCA claim for lack of subject

matter jurisdiction was not on the merits, and therefore, the FTCA's judgment bar did not apply. The Supreme Court reversed and remanded the case back to the Sixth Circuit. In doing so, it held that dismissal of the FTCA claim for lack of subject matter jurisdiction could be sufficient to invoke the judgment bar; but the Court specifically left unanswered the question of whether the FTCA's judgment bar may apply to claims brought in the same action.

We must now decide whether the dismissal of King's FTCA claim bars further proceedings on his contemporaneously filed *Bivens* claim. In *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), we held that the judgment bar can be used to bar claims raised in the same suit. However, *Harris* is now inconsistent with intervening Supreme Court precedent.

Accordingly, for the reasons set forth below, I would reverse and remand the case for further proceedings. Because the majority does otherwise, I dissent.

I. BACKGROUND

Factual Background

On July 18, 2014, Defendants Todd Allen and Douglas Brownback were searching for a criminal suspect named Aaron Davison. Police believed that Davison had committed felony home invasion, and the State of Michigan had issued a warrant for his arrest.

Defendants were members of a "joint fugitive task force between the FBI and the City of Grand Rapids." Officer Allen was a detective with the Grand Rapids Police who had been assigned to work full time on the FBI task force. Officer Brownback was a special agent with the FBI. Both officers were out of uniform and in civilian clothes as they conducted their search, but they were both wearing lanyards with their badges displayed over their plainclothes.

Defendants had a description of Aaron Davison to aid them in their search. They had been told that Davison was a 26-year-old white male between 5′10″ and 6′3″ tall with glasses; short, dark hair; and a thin build. Defendants also knew that Davison had a habit of buying a soft drink from a particular gas station every day between 2:00 p.m. and 4:00 p.m. And Defendants had two photographs of Davison. In the first photograph, the lighting was so dark that Davison appeared as the silhouette of a man playing electric guitar. The second photograph, a driver's license photo, showed Davison's face clearly, but the photo was seven years old at the time of the search.

Around 2:30 p.m., Defendants saw Plaintiff walking down the street in an area near the gas station where Davison was known to buy his daily soft drinks. Although Plaintiff was merely a 21-year-old college student who was walking between his two summer jobs, Defendants decided that Plaintiff might be their suspect because Plaintiff was a young white male between 5′10″ and 6′3″ and was wearing glasses. From their unmarked vehicle, Defendants studied

Plaintiff's face and decided that there was a "good possibility" that he was indeed Davison. Defendants parked near Plaintiff and approached him. The parties dispute whether Defendants identified themselves as law enforcement officers.

Defendants started asking Plaintiff questions. They asked Plaintiff who he was, and Plaintiff truthfully answered that his name was James. Defendants then asked Plaintiff for identification, and Plaintiff said that he had none. Defendants told Plaintiff to put his hands on his head and to face their vehicle. Plaintiff later testified that he complied because Defendants "had small badges around their chest, and [he] assumed [Defendants had] some sort of authority." Defendants asked Plaintiff if he was carrying any weapons, and Plaintiff told them that he had a pocketknife. Officer Allen removed the pocketknife from Plaintiff's pocket, commented on the size of Plaintiff's wallet, and then removed that, too, from Plaintiff's pocket. Plaintiff asked, "Are you mugging me?" and attempted to run away, but Officer Allen tackled him to the ground, grabbed Plaintiff's neck, and pushed him to the ground. Plaintiff then yelled for help and begged passersby to call the police. Officer Allen then put Plaintiff in a chokehold, at which point Plaintiff says that he lost consciousness. Several seconds later, when Plaintiff came to, he bit into Officer Allen's arm. Officer Allen then started punching Plaintiff in the head and face "as hard as [he] could, as fast as [he] could, and as many times as [he] could." Plaintiff variously attempted to escape and to

fight back, eventually releasing his bite, but he could not get away; the fight continued for over sixty seconds.

As Officer Allen continued to punch Plaintiff in the head and face, several bystanders called the police and began filming the incident. Numerous police officers arrived on the scene, one of whom ordered the bystanders to delete their videos on the purported basis that the videos could reveal the identities of undercover FBI agents. Some of the bystanders deleted their videos, and footage of the actual altercation was never recovered. The surviving footage from immediately after the incident includes one bystander who can be heard saying, "I was worried. . . . They were out of control pounding him. . . . They were pounding his fa--head for no reason; they were being brutal." (Ex. 6, Timestamp 0:47–1:11.) In a bystander's call to 911, she tells the operator, "They're gonna kill this man. . . . We can't see the victim now. They're over top of him. They look like they're suffocating him. . . . I understand they have badges on, but I don't see no undercover police cars, no other—backup, no nothing." (Ex. 18, Timestamp 1:43–3:21.)

Plaintiff was transported from the scene to the hospital emergency room, where he received medical treatment. The emergency room doctors concluded that Plaintiff's injuries did not require him to be admitted for further treatment, and they released him with a prescription for painkillers. Upon Plaintiff's discharge, police arrested him and took him to Kent County Jail. Plaintiff spent the weekend in jail before

posting bail and visiting another hospital for further examination. Prosecutors pursued charges against Plaintiff for, among other charges, resisting arrest. A jury acquitted him of all charges.

Procedural Background

On April 4, 2016, Plaintiff brought this suit against Defendants. Relevant to this appeal, King alleged under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), that Defendants violated his clearly established Fourth Amendment rights by conducting an unreasonable seizure and by using excessive force. Plaintiff also asserted a claim against the United States under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2674. The district court found that it lacked subject matter jurisdiction to hear Plaintiff's claim against the United States, and it granted summary judgment for Defendants on the basis that Defendants are entitled to qualified immunity. Plaintiff then appealed only the grant of summary judgment on his *Bivens* claim; he did not appeal the dismissal of his FTCA claim.

On appeal, we reversed the district court. We first held that dismissal of King's FTCA claim for lack of subject matter jurisdiction was proper. To proceed with an FTCA claim, a plaintiff must satisfy six elements. One such element is that the defendants acted tortiously and could be liable. However, we found that under Michigan law, Defendants would be entitled to qualified immunity. Accordingly, King failed to state a claim for which relief could be granted, which, by

extension, deprived federal courts from exercising jurisdiction over King's FTCA claim. Without jurisdiction over his FTCA claim, we held the dismissal of such claim did not amount to a judgment that could give rise to the FTCA's judgment bar. We went on to hold that the district court improperly granted summary judgment on King's *Bivens* claim.

The Supreme Court granted certiorari and reversed.

It held that a dismissal for lack of jurisdiction constituted a judgment for purposes of the FTCA judgment bar. Thus, a dismissal of an FTCA claim for lack of subject matter jurisdiction "could" preclude further claims. However, because the Sixth Circuit had not addressed whether the judgment bar applies to claims raised in the same action, the Supreme Court expressly declined to decide whether King's *Bivens* claim could proceed. The Court remanded King's case back to the Sixth Circuit to answer the limited question of whether the FTCA's judgment bar can be used to preclude claims raised in the same lawsuit.

II. DISCUSSION

Standard of Review

We review the application of the FTCA judgment bar *de novo*. *See United States v. Kuehne*, 547 F.3d 667, 678 (6th Cir. 2008) ("Because this issue is a matter of statutory interpretation, we conduct *de novo*

review." (quoting *United States v. VanHoose*, 437 F.3d 497, 501 (6th Cir. 2006)); *accord Manning v. United States*, 546 F.3d 430, 432 (7th Cir. 2008) (reviewing application of FTCA judgment bar *de novo*).

Analysis

The FTCA provides a limited waiver of federal sovereign immunity, creating jurisdiction for courts to hold the United States liable for certain torts committed by federal employees. 28 U.S.C. §§ 1346(b), 2671–80. The FTCA also contains a judgment bar, which precludes a plaintiff from bringing additional claims concerning the same subject matter as an FTCA claim after judgment is entered on the FTCA claim. § 2676. Section 2676 states in full: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." Pursuant to the Supreme Court's opinion in this case, a judgment has been entered on King's FTCA claim. *Brownback v. King*, 141 S. Ct. 740, 745 (2021). The question before this Court is simply whether the judgment bar applies to King's *Bivens* claim.

Defendants, and the majority, rely primarily on *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), to argue that the preclusive effect of the judgment bar applies to claims raised in the same suit. (*See generally* Appellees' Br. 13–22.) In *Harris*, plaintiff Ronnie Harris commenced an action against the United

States and four federal agents under the FTCA and *Bivens*, respectively, for conduct stemming from his arrest and prosecution at the Cleveland airport. The district court "dismissed the *Bivens* claims against all four individual defendants because they had been filed" improperly, but proceeded to enter a judgment for the United States following a bench trial on Harris' FTCA claim. *Harris*, 422 F.3d at 326. On appeal, Harris argued that the dismissal of his *Bivens* claims was erroneous. Although the Sixth Circuit agreed that the claims were wrongfully dismissed, reversal was not warranted. We held that "[e]ven though the district court incorrectly dismissed Harris' *Bivens* claims, we do not reinstate them because they are barred by the court's adjudication of his FTCA claims." *Id.* at 333. We went on to reject Harris' argument "that the judgment bar does not apply where plaintiff has from the outset alleged his *Bivens* claims and sought a jury trial in the same lawsuit alleging FTCA causes of action." *Id.* at 334 (citation omitted); *see also Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986) ("[I]t is inconsequential that the [FTCA and *Bivens*] claims were tried together in the same suit and that the judgments were entered simultaneously.").

While *Harris* seems to squarely address the issue presented in this case, it is controlling only to the extent that its holding is not inconsistent with subsequent Supreme Court precedent. *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) ("A published prior panel decision 'remains controlling

authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985))). King argues that three cases since *Harris* are inconsistent with *Harris*' holding that the judgment bar applies to claims within the same suit.

The first case on which King relies is *Will v. Hallock*, 546 U.S. 345 (2006). In *Will*, the Supreme Court confronted the question of whether a district court's rejection of the judgment bar as a defense was immediately appealable under the collateral order doctrine. The plaintiffs first sued the United States under the FTCA for a seizure of property that effectively forced them out of business. *Will*, 546 U.S. at 348. While the FTCA case was pending, the plaintiffs initiated a *Bivens* suit against the federal employees; and after the plaintiffs' action against the United States was dismissed, the employee-defendants moved to dismiss the *Bivens* action pursuant to the judgment bar. *Hallock v. Bonner*, 281 F. Supp. 2d 425, 426 (N.D.N.Y. 2003). The district court denied the motion to apply the judgment bar, and the federal employees appealed. The Supreme Court determined that application of the judgment bar was not subject to the collateral order doctrine, like a denial of qualified immunity, because of what it described as "the bar's essential procedural element." *Will*, 546 U.S. at 353. "The closer analogy to the judgment bar, then, is not immunity but the defense of claim preclusion or res

judicata." *Id.* Although recognizing that "the statutory judgment bar is arguably broader than traditional res judicata, it functions in much the same way," and that the concern behind both is avoiding "duplicative litigation." *Id.* Critically, the Supreme Court held that "there will be no possibility of a judgment bar . . . so long as a *Bivens* action against officials and a Tort Claims Act against the Government are pending simultaneously (as they were for a time here)." *Id.* Kings' FTCA claim and *Bivens* claims were pending simultaneously.

The second case on which King relies on is *Simmons v. Himmelreich*, 578 U.S. 621 (2016). The issue presented in that case was whether the "Exceptions" section of the FTCA applied to the judgment bar. In the course of answering this question, the Supreme Court reiterated its sentiment from *Will* that the judgment bar is "analog[ous] to the common-law doctrine of claim preclusion, which prevents duplicative litigation by barring one party from again suing the other over the same underlying facts." *Id.* at 630 n.5. The Court noted that "[t]he judgment bar provision *supplements* common-law claim preclusion by closing a narrow gap: At the time that the FTCA was passed, common-law claim preclusion would have barred a plaintiff from suing the United States after having sued an employee but not vice versa." *Id.* (emphasis added). Additionally, the Court was careful to interpret the judgment bar in such a way as to avoid the prospect of the "strange result" that would occur if "the viability of a plaintiff's meritorious suit against

an individual employee [w]ould turn on . . . the order in which the district court chooses to address motions[]." *Id*. at 630–31.

Finally, King relies on *Brownback*—the Supreme Court's opinion in this case. Again, the Court reiterated that the judgment bar "functions in much the same way as [the common law doctrine of claim preclusion]." *Brownback*, 141 S. Ct. at 747 (alteration in original). Importantly, after years of stating the judgment bar functions the same as claim preclusion, the Court noted that "[c]laim preclusion prevents parties from relitigating the same 'claim' or 'cause of action,' even if certain issues were not litigated in the prior action. Suits involve the same 'claim' or 'cause of action' if *the later suit* 'arises from the same transaction' or involves a 'common nucleus of operative facts.'" *Id*. at 747 n.3 (cleaned up) (emphasis added).

Reading *Will*, *Simmons*, and *Brownback* together leads to the unmistakable conclusion that the FTCA's judgment bar should be applied as would common law claim preclusion accounting for the fact that it closes the above-mentioned "narrow gap," which is not implicated in this case. At common law, claim preclusion "is not appropriate within a single lawsuit so long as it continues to be managed as a single action. Failure to advance all parts of a single claim, or surrender of some part of a single claim as the action progresses, do not defeat the right to pursue the parts that are advanced." 18 Wright & Miller, Fed. Prac. & Proc. Juris § 4401 (3d ed. 2016); *see also* 18 Wright & Miller, Fed. Prac. & Proc. Juris § 4404 (3d ed. 2016) ("Res

judicata applies as between separate actions, not within the confines of a single action on trial or appeal."). Because the holding in *Harris* is the opposite of what common law claim preclusion demands, the case is inconsistent with subsequent Supreme Court instruction that the judgment bar should "function[] in much the same way" as common law claim preclusion. *Will*, 546 U.S. at 353.

Moreover, applying *Harris* causes the "strange result" that the Supreme Court cautioned against in *Simmons*. If dismissal of King's FTCA claim precludes his *Bivens* claims, then King's meritorious suit against Defendants turns on the order in which the district court addresses the motions before it. *See Simmons*, 578 U.S. at 630–31; *cf. Carlson v. Green*, 446 U.S. 14, 20 (1980) ("it [is] crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action").

Because the Supreme Court directs courts to apply the judgment bar like common law claim preclusion, which does not apply to claims within the same suit, *Harris* must not control the outcome of this appeal. To continue to follow *Harris* would be inconsistent with nearly two decades of intervening Supreme Court precedent directing lower courts to interpret the judgment bar consistent with common law claim preclusion doctrine.

Besides the common law concerns, not applying the judgment bar to intra-suit claims also makes practical sense, especially under the facts of this

case. King sought to revive only his *Bivens* claims on appeal. Perhaps he agreed with the district court's determination that his FTCA claim lacked jurisdiction, and thought it would be frivolous to appeal that claim. Regardless of the reason he failed to appeal the dismissal of his FTCA claim, future plaintiffs would be incentivized to always appeal FTCA claims or risk having their entire suit dismissed under the judgment bar. As the Supreme Court noted in *Will*, the concern behind the judgment bar is avoiding "duplicative litigation." 546 U.S. at 353. Under the same logic, incentivizing plaintiffs to appeal FTCA claims as a matter of course, regardless of merit, is an equally absurd waste of judicial resources.

III. CONCLUSION

The majority's holding is a profound and frightening miscarriage of justice. That federal officers who refuse to identify themselves can spontaneously, and unprovoked, beat an individual nearly to death and be entirely free from civil liability simply because the individual chooses *not* to waste judicial resources on a frivolous appeal is not compatible with notions of an ordered and civilized society. Because the majority follows outdated law and dismisses King's claims, I strongly dissent.

Appendix B

SUPREME COURT OF THE UNITED STATES

Syllabus

BROWNBACK, ET AL., *v.* KING

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19—546. Argued November 9, 2020—Decided February 25, 2021

The Federal Tort Claims Act (FTCA) allows a plaintiff to bring certain state-law tort claims against the United States for torts committed by federal employees acting within the scope of their employment, provided that the plaintiff alleges six statutory elements of an actionable claim. See 28 U. S. C. §1346(b). Another provision, known as the judgment bar, provides that "[t]he judgment in an action under section 1346(b)" shall bar "any action by the claimant" involving the same subject matter against the federal employee whose act gave rise to the claim. §2676. Respondent James King sued the United States under the FTCA after a violent encounter with Todd Allen and Douglas Brownback, members of a federal task force. He also sued the officers individually under the implied cause of action recognized by *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388. The District Court dismissed his FTCA claims, holding that the Government was immune because the officers were entitled to qualified immunity under Michigan law, or in the alternative, that King failed to state a

valid claim under Federal Rule of Civil Procedure 12(b)(6). The court also dismissed King's *Bivens* claims, ruling that the officers were entitled to federal qualified immunity. King appealed only the dismissal of his *Bivens* claims. The Sixth Circuit found that the District Court's dismissal of King's FTCA claims did not trigger the judgment bar to block his *Bivens* claims.

Held: The District Court's order was a judgment on the merits of the FTCA claims that can trigger the judgment bar. Pp. [31a–37a].

(a) Similar to common-law claim preclusion, the judgment bar requires a final judgment "'on the merits,'" *Semtek Int'l Inc.* v. *Lockheed Martin Corp.,* 531 U. S. 497, 502. Here, the District Court's summary judgment ruling dismissing King's FTCA claims hinged on a quintessential merits decision: whether the undisputed facts established all the elements of King's FTCA claims. See *Arbaugh* v. *Y & H Corp.,* 546 U. S. 500, 510–511. The court's alternative Rule 12(b)(6) holding also passed on the substance of King's FTCA claims, as a 12(b)(6) ruling concerns the merits. Id., at 506–507. Pp. [31a–34a].

(b) In passing on King's FTCA claims, the District Court also determined that it lacked subject-matter jurisdiction over those claims. In most cases, a plaintiff's failure to state a claim under Rule 12(b)(6) does not deprive a federal court of subject-matter jurisdiction. See *Steel Co.* v. *Citizens for Better Environment,* 523 U. S. 83, 89. Here, however, in the unique context of the FTCA, all elements of a meritorious claim are

also jurisdictional. Thus, even though a plaintiff need not prove a §1346(b)(1) jurisdictional element for a court to maintain subject-matter jurisdiction over his claim, see *FDIC* v. *Meyer*, 510 U. S. 471, 477, because King's FTCA claims failed to survive a Rule 12(b)(6) motion to dismiss, the court also was deprived of subject-matter jurisdiction. Generally, a court may not issue a ruling on the merits when it lacks subject-matter jurisdiction, see *Steel Co.,* 523 U. S., at 101– 102, but where, as here, pleading a claim and pleading jurisdiction entirely overlap, a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that can trigger the judgment bar. Pp. [34a–37a].

917 F. 3d. 409, reversed.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion.

Appendix B

Opinion of the Court

SUPREME COURT OF THE UNITED STATES

No. 19–546

DOUGLAS BROWNBACK, ET AL., PETITIONERS *v.* JAMES KING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February 25, 2021]

JUSTICE THOMAS delivered the opinion of the Court.

The Federal Tort Claims Act (FTCA) allows a plaintiff to bring certain state-law tort suits against the Federal Government. 28 U. S. C. §2674; see also §1346(b). It also includes a provision, known as the judgment bar, which precludes "any action by the [plaintiff], by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim" if a court enters "[t]he judgment in an action under section 1346(b)." §2676. The Sixth Circuit held that the District Court's order dismissing the plaintiff's FTCA claims did not trigger the judgment bar because the plaintiff's failure to establish all elements of his FTCA claims had deprived

the court of subject-matter jurisdiction. We disagree and hold that the District Court's order also went to the merits of the claim and thus could trigger the judgment bar.

I

A

The FTCA streamlined litigation for parties injured by federal employees acting within the scope of their employment. Before 1946, a plaintiff could sue a federal employee directly for damages, but sovereign immunity barred suits against the United States, even if a similarly situated private employer would be liable under principles of vicarious liability. Pfander & Aggarwal, *Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism, 8 U. St. Thomas L. J. 417, 424–425 (2011); see also *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620 (1912). Despite that immunity, the Government often would provide counsel to defendant employees or indemnify them. Pfander, 8 U. St. Thomas L. J., at 425. In addition, Congress passed private bills that awarded compensation to persons injured by Government employees. *Id.,* at 424, n. 39. But by the 1940s, Congress was considering hundreds of such private bills each year. *Ibid.*[1] "Critics worried about the speed and fairness with which Congress disposed of these claims." *Id.,* at 426.

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[1] In 1939 and 1940 the 76th Congress considered 1,763 private bills, of which 315 became law. Pfander, 8 U. St. Thomas L.J., at 424, n. 39.

Appendix B

"In 1946, Congress passed the FTCA, which waived the sovereign immunity of the United States for certain torts committed by federal employees" acting within the scope of their employment. *FDIC* v. *Meyer*, 510 U. S. 471, 475–476 (1994). The Act in effect ended the private bill system by transferring most tort claims to the federal courts. See Pfander, 8 U. St. Thomas. L. J., at 424, n. 39. Plaintiffs were (and are) required to bring claims under the FTCA in federal district court. Federal courts have jurisdiction over these claims if they are "actionable under §1346(b)." *Meyer*, 510 U. S., at 477. A claim is actionable if it alleges the six elements of §1346(b), which are that the claim be:

> "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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." *Ibid.* (quoting §1346(b)).

While waiving sovereign immunity so parties can sue the United States directly for harms caused by its employees, the FTCA made it more difficult to sue the employees themselves by adding a judgment bar provision. That provision states: "The judgment in an action under section 1346(b) of this title shall constitute

a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." §2676. "[O]nce a plaintiff receives a judgment (favorable or not) in an FTCA suit," the bar is triggered, and "he generally cannot proceed with a suit against an individual employee based on the same underlying facts." *Simmons* v. *Himmelreich*, 578 U. S. 621, 625 (2016). The Act thus opened a new path to relief (suits against the United States) while narrowing the earlier one (suits against employees).

B

This case involves a violent encounter between respondent James King and officers Todd Allen and Douglas Brownback, members of a federal task force, who mistook King for a fugitive. King sued the United States under the FTCA, alleging that the officers committed six torts under Michigan law. He also sued the officers individually under the implied cause of action recognized by *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), alleging four violations of his Fourth Amendment rights. The defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. In the alternative, they moved for summary judgment.

The District Court dismissed King's claims. As to his FTCA claims, the court granted the Government's

summary judgment motion.[2] It found that the undisputed facts showed that the officers did not act with malice. The officers thus would have been entitled to state qualified immunity had Michigan tort claims been brought against them. See *Odom* v. *Wayne County*, 482 Mich. 459, 473–474, 760 N. W. 2d 217, 224–225 (2008). The court, following its own precedent, ruled that the Government was immune because it retains the benefit of state-law immunities available to its employees. The court also ruled in the alternative that King's FTCA claims failed under Rule 12(b)(6) because his complaint did not present enough facts to state a plausible claim to relief for any of his six tort claims. The court dismissed King's *Bivens* claims as well, ruling that the defendants were entitled to federal qualified immunity. King appealed only the dismissal of his *Bivens* claims.

As a threshold question, the Sixth Circuit assessed whether the dismissal of King's FTCA claims triggered the judgment bar and thus blocked the parallel *Bivens* claims. See *King* v. *United States*, 917 F. 3d 409, 418–421 (2019). It did not, according to the Sixth Circuit, because "the district court dismissed [King]'s FTCA claim[s] for lack of subject-matter jurisdiction" when it determined that he had not stated a viable

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[2] Like the Sixth Circuit, we construe the District Court's primary ruling on the FTCA claims as a grant of summary judgment for the defendants because its ruling relied on the parties "'Joint Statement of Facts . . . unless otherwise indicated.'" *King* v. *United States*, 917 F. 3d 409, 416, n. 1 (CA6 2019) (quoting ECF Doc. 91, p. 1).

claim and thus "did not reach the merits." *Id.,* at 419; but see *Unus* v. *Kane*, 565 F. 3d 103, 121– 122 (CA4 2009) (holding that summary judgment on the plaintiffs' FTCA claims triggered judgment bar with respect to *Bivens* claims). The Sixth Circuit then held that the defendant officers were not entitled to qualified immunity and reversed the District Court.

We granted certiorari, 589 U. S. ___ (2020), and now reverse.

II

A

The judgment bar provides that "[t]he judgment in an action under section 1346(b)" shall bar "any action by the claimant" involving the same subject matter against the employee of the Federal Government whose act gave rise to the claim. §2676. Here, the District Court entered a "Judgment . . . in favor of Defendants and against Plaintiff." ECF Doc. 92. The parties agree that, at a minimum, this judgment must have been a final judgment on the merits to trigger the bar, given that the "provision functions in much the same way as [the common-law doctrine of claim

preclusion]." *Simmons*, 578 U. S., at 630, n. 5 (internal quotation marks omitted).[3] We agree.[4]

B

This Court has explained that the judgment bar was drafted against the backdrop doctrine of res judicata. See *ibid.*[5] To "trigge[r] the doctrine of res judicata or claim preclusion" a judgment must be "'on the merits.'" *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*,

[3] The terms res judicata and claim preclusion often are used interchangeably. See *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Group*, *Inc.*, 590 U. S. ___, ___ (2020) (slip op., at 6). But res judicata "comprises two distinct doctrines." *Ibid.* The first is issue preclusion, also known as collateral estoppel. *Ibid.* It precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment. *Ibid.* The second doctrine is claim preclusion, sometimes itself called res judicata. *Ibid.* Claim preclusion prevents parties from relitigating the same "claim" or "'cause of action,'" even if certain issues were not litigated in the prior action. *Ibid.* Suits involve the same "claim" or "'cause of action'" if the later suit "'"aris[es] from the same transaction"'" or involves a "'common nucleus of operative facts.'" *Ibid.*

[4] King argues, among other things, that the judgment bar does not apply to a dismissal of claims raised in the same lawsuit because common-law claim preclusion ordinarily "is not appropriate within a single lawsuit." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4401 (3d ed. Supp. 2020). The Sixth Circuit did not address those arguments, and "we are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). We leave it to the Sixth Circuit to address King's alternative arguments on remand.

[5] The parties disagree about how much the judgment bar expanded on common-law preclusion, but those disagreements are not relevant to our decision. See n. 4, *supra*.

531 U. S. 497, 502 (2001). Under that doctrine as it existed in 1946, a judgment is "on the merits" if the underlying decision "actually passes directly on the substance of a particular claim before the court." *Id.*, at 501–502 (cleaned up).[6] Thus, to determine if the District Court's decision is claim preclusive, we must determine if it passed directly on the substance of King's FTCA claims. We conclude that it did.

The District Court's summary judgment ruling hinged on a quintessential merits decision: whether the undisputed facts established all the elements of King's FTCA claims. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 510–511 (2006). The court noted that one element of an FTCA claim is that the plaintiff establish that the Government employee would be liable under state law. The court then explained that Michigan law provides qualified immunity for Government employees who commit intentional torts but act in subjective good faith. See *Odom*, 482 Mich., at 461, 481–482, 760 N. W. 2d, at 218, 229. And it concluded that, because the undisputed facts here showed that the officers would have been entitled to immunity from

[6] We use the term "on the merits" as it was used in 1946, to mean a decision that passed on the substance of a particular claim. "[O]ver the years the meaning of the term 'judgment on the merits' 'has gradually undergone change'" and now encompasses some judgments "that do *not* pass upon the substantive merits of a claim and hence do *not* (in many jurisdictions) entail claim-preclusive effect." *Semtek*, 531 U. S., at 502. Regardless, the FTCA judgment in this case is an "on the merits" decision that passes on the "substance" of King's FTCA claims under the 1946 meaning or present day meaning of those terms.

King's tort claims, the United States, by extension, was not liable under the FTCA.[7]

The court's alternative Rule 12(b)(6) holding also passed on the substance of King's FTCA claims. The District Court ruled that the FTCA count in King's complaint did not state a claim, because even assuming the complaint's veracity, the officers used reasonable force, had probable cause to detain King, and otherwise acted within their authority. "If the judgment determines that the plaintiff has no cause of action" based "on rules of substantive law," then "it is on the merits." Restatement of Judgments §49, Comment *a*, p. 193 (1942). A ruling under Rule 12(b)(6) concerns the merits. Cf. *Arbaugh*, 546 U. S., at 506–507. The District Court evaluated King's six FTCA claims under Rule 12(b)(6) and ruled that they failed for reasons of substantive law.

C

The one complication in this case is that it involves overlapping questions about sovereign immunity and subject-matter jurisdiction. In such cases, the "merits and jurisdiction will sometimes come intertwined," and a court can decide "all . . . of the merits issues" in resolving a jurisdictional question, or vice versa. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne*

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[7] We express no view on the availability of state-law immunities in this context. Compare *Medina* v. *United States*, 259 F. 3d 220, 225, n. 2 (CA4 2001), with *Villafranca* v. *United States*, 587 F. 3d 257, 263, and n. 6 (CA5 2009).

Int'l Drilling Co., 581 U. S. ___, ___ (2017) (slip op., at 7). That occurred here. The District Court passed on the substance of King's FTCA claims and found them implausible. In doing so, the District Court also determined that it lacked jurisdiction. But an on-the-merits judgment can still trigger the judgment bar, even if that determination necessarily deprives the court of subject-matter jurisdiction.

The District Court did lack subject-matter jurisdiction over King's FTCA claims. In most cases, a plaintiff's failure to state a claim under Rule 12(b)(6) does not deprive a federal court of subject-matter jurisdiction. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998). "Dismissal for lack of subject-matter jurisdiction . . . is proper only when the claim is so . . . 'completely devoid of merit as not to involve a federal controversy.'" *Ibid.* However, a plaintiff must plausibly allege all jurisdictional elements. See, *e.g., Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U. S. 81, 89 (2014). And in the unique context of the FTCA, all elements of a meritorious claim are also jurisdictional. *Meyer*, 510 U. S., at 477. So even though a plaintiff need not *prove* a §1346(b)(1) jurisdictional element for a court to maintain subject-matter jurisdiction over his claim, see *ibid.*, a plaintiff must plausibly allege all six FTCA elements not only to state a claim upon which relief can be granted but also for a court to have subject-matter jurisdiction over the claim. That means a plaintiff must plausibly allege that "the United States, if a private person, would be liable to the claimant" under state law both

to survive a merits determination under Rule 12(b)(6) and to establish subject-matter jurisdiction. §1346(b)(1). Because King's tort claims failed to survive a Rule 12(b)(6) motion to dismiss, the United States necessarily retained sovereign immunity, also depriving the court of subject-matter jurisdiction.

Ordinarily, a court cannot issue a ruling on the merits "when it has no jurisdiction" because "to do so is, by very definition, for a court to act ultra vires." *Steel Co.*, 523 U. S., at 101–102. But where, as here, pleading a claim and pleading jurisdiction entirely overlap, a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar.[8] A dismissal for lack of jurisdiction is still a "judgment." See Restatement of Judgments §49, Comment *a*, at 193–194 (discussing "judgment . . . based on the lack of jurisdiction"). And even though the District Court's ruling in effect deprived the court of jurisdiction, the District Court necessarily passed on the substance of King's FTCA claims. See Part II–B, *supra.* Under the common law, judgments were preclusive with respect

[8] In cases such as this one where a plaintiff fails to plausibly allege an element that is both a merit element of a claim and a jurisdictional element, the district court may dismiss the claim under Rule 12(b)(1) or Rule 12(b)(6). Or both. The label does not change the lack of subject-matter jurisdiction, and the claim fails on the merits because it does not state a claim upon which relief can be granted. However, in other cases that overlap between merits and jurisdiction may not exist. In those cases, the court might lack subject-matter jurisdiction for non-merits reasons, in which case it must dismiss the case under just Rule 12(b)(1).

to issues decided as long as the court had the power to decide the issue. See Restatement of Judgments §49, Comment *b*, at 195–196. Because "a federal court always has jurisdiction to determine its own jurisdiction," *United States* v. *Ruiz*, 536 U. S. 622, 628 (2002), a federal court can decide an element of an FTCA claim on the merits if that element is also jurisdictional. The District Court did just that with its Rule 12(b)(6) decision.[9]

* * *

We conclude that the District Court's order was a judgment on the merits of the FTCA claims that can trigger the judgment bar. The judgment of the United States Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

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[9] The District Court did not have the power to issue its summary judgment ruling because that decision was not necessary for the court "to determine its own jurisdiction." *Ruiz*, 536 U. S., at 628. The court should have assessed whether King's FTCA claims plausibly alleged the six elements of §1346(b)(1) as a threshold matter, and then dismissed those claims for lack of subject-matter jurisdiction once it concluded they were not plausibly alleged. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94–95 (1998).

Appendix B

SOTOMAYOR, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 19–546

DOUGLAS BROWNBACK, ET AL., PETITIONERS *v.* JAMES KING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February 25, 2021]

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion because I agree that the District Court dismissed King's Federal Tort Claims Act (FTCA) claims on the merits. Importantly, the Court does not today decide whether an order resolving the merits of an FTCA claim precludes other claims arising out of the same subject matter in the same suit. Although the parties briefed the issue, it was not the basis of the lower court's decision. See *ante,* at 5, n. 4. I write separately to emphasize that, while many lower courts have uncritically held that the FTCA's judgment bar applies to claims brought in the same action, there are reasons to question that conclusion. This issue merits far closer consideration than it has thus far received.

King argues that the judgment bar merely "supplements common-law claim preclusion by closing a narrow gap," preventing plaintiffs from bringing duplicative litigation against first the United States and then its employees. *Simmons* v. *Himmelreich*, 578 U. S. 621, 630, n. 5 (2016); see also *ibid.* ("At the time that the FTCA was passed, common-law claim preclusion would have barred a plaintiff from suing the United States after having sued an employee but not vice versa"). On petitioners' view, however, the judgment bar provides that any order resolving an FTCA claim automatically precludes separate claims brought in the same action and arising from the same common nucleus of facts. This is a significant departure from the normal operation of common-law claim preclusion, which applies only in separate or subsequent suits following a final judgment. See, *e.g., G. & C. Merriam Co.* v. *Saalfield*¸ 241 U. S. 22, 29 (1916) ("Obviously, the rule for decision applies only when the subsequent action has been brought").

King raises a number of reasons to doubt petitioners' reading. Looking first to the text, the FTCA's judgment bar is triggered by "[t]he judgment in an action under section 1346(b)." 28 U. S. C. §2676. A "judgment" is "[a] court's final determination of the rights and obligations of the parties in a case." Black's Law Dictionary 1007 (11th ed. 2019); see also 1 H. Black, Law of Judgments §1, p. 2, n. l (1891) ("'A judgment is the final consideration and determination of a court . . . upon the matters submitted to it'"). Decisions disposing of only some of the claims in a lawsuit are not

"judgments."

Similarly, once the judgment bar is triggered, it precludes "any action by the claimant." §2676. An "action" refers to the whole of the lawsuit. See Black's Law Dictionary, at 37 (defining "action" as a "civil or criminal judicial proceeding"); Black's Law Dictionary 43 (3d ed. 1933) ("The terms 'action' and 'suit' are now nearly, if not entirely, synonymous"). Individual demands for relief within a lawsuit, by contrast, are "claims." See Black's Law Dictionary, at 311 (2019) (defining a "claim" as "the part of a complaint in a civil action specifying what relief the plaintiff asks for"); Black's Law Dictionary, at 333 (1933) (defining a "claim" as "any demand held or asserted as of right" or "cause of action").

Thus, giving the judgment bar's two key terms their traditional meanings, "the judgment in an action under section 1346(b)" that triggers the bar is the final order resolving every claim in a lawsuit that includes FTCA claims. When triggered, the judgment bar precludes later "action[s]," not claims in the same suit. So read, the statutory judgment bar "functions in much the same way" as claim preclusion, "with both rules depending on a prior judgment as a condition precedent." *Will* v. *Hallock*, 546 U. S. 345, 354 (2006).[1]

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[1] Nearby §2672 could further support this interpretation. That section provides that an administrative settlement with the United States "shall constitute a complete release of any claim

Turning next to the FTCA's purpose and effect, under King's reading, the judgment bar also serves the same, familiar functions as claim preclusion: "avoiding duplicative litigation" by barring repetitive suits against employees without "reflecting a policy that a defendant should be scot free of any liability." *Ibid.* Petitioners' interpretation, by contrast, appears inefficient. Precluding claims brought in the same suit incentivizes plaintiffs to bring separate suits, first against federal employees directly and second against the United States under the FTCA. See *Sterling* v. *United States*, 85 F. 3d 1225, 1228–1229 (CA7 1996) (holding that judgment in a prior direct action did not preclude a later FTCA suit against the United States).[2]

Petitioners' interpretation also produces seemingly unfair results by precluding potentially

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against the United States and against the employee of the government" who committed the tort. Unlike the judgment bar, §2672 uses unambiguous language ("release of any claim") to ensure that settlements with the United States both preclude future litigation and resolve pending claims against federal employees. Had Congress intended to give both provisions the same effect, "it presumably would have done so expressly." *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

[2] Some courts have held that precluding claims in the same action prevents plaintiffs from recovering for the same injury from both the United States and the federal employee. The law, however, already bars double recovery for the same injury. See, *e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 348 (1971) ("[T]he law . . . does not permit a plaintiff to recover double payment").

meritorious claims when a plaintiff's FTCA claims fail for unrelated reasons. Here, for example, King's constitutional claims require only a showing that the officers' behavior was objectively unreasonable, while the District Court held that the state torts underlying King's FTCA claims require subjective bad faith. If petitioners are right, King's failure to show bad faith, which is irrelevant to his constitutional claims, means a jury will never decide whether the officers violated King's constitutional rights when they stopped, searched, and hospitalized him.

There are, of course, counterarguments. On the text, petitioners point out that it would be strange to refer to the entire lawsuit as "an action under section 1346(b)" even after the Court has decided all the claims brought under the FTCA. Better, they argue, to read "judgment in an action under section 1346(b)" to mean any order resolving all the FTCA claims in the suit. They urge further that claims in the same suit should be among the covered actions because the bar precludes "any action," rather than "subsequent" actions, which is the typical formulation of claim preclusion. As to the judgment bar's purpose, petitioners contend that the FTCA gives tort claimants a choice that comes with a cost: They can sue the United States and access its deeper pockets, but, if they do, then the outcome of the FTCA claims resolves the entire controversy. This preserves federal resources while allowing tort claimants to decide whether to bring FTCA claims at all.

There are naturally counterarguments to those

counterarguments, and so on, but further elaboration here is unnecessary. As the Court points out, "'we are a court of review, not of first view.'" *Ante,* at [32a], n. 4 (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005)). While lower courts have largely taken petitioners' view of the judgment bar, few have explained how its text or purpose compels that result. In my view, this question deserves much closer analysis and, where appropriate, reconsideration.

Appendix C

United States Court of Appeals
for the Sixth Circuit

No. 17-2101

JAMES KING,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.
Defendants,

DOUGLAS BROWNBACK; TODD ALLEN,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Michigan at Grand Rapids.
No. 1:16-cv-00343—Janet T. Neff, District Judge.

Argued: August 1, 2018

Decided and Filed: February 25, 2019

Before: BOGGS, CLAY, and ROGERS,
Circuit Judges.

Appendix C

COUNSEL

ARGUED: D. Andrew Portinga, MILLER JOHNSON, Grand Rapids, Michigan, for Appellant. Michael Shih, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** D. Andrew Portinga, Patrick M. Jaicomo, MILLER JOHNSON, Grand Rapids, Michigan, for Appellant. Michael Shih, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

CLAY, J., delivered the opinion of the court in which BOGGS, J., joined. ROGERS, J. (pp. [87a–94a], delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. James King ("Plaintiff") appeals the district court's order granting summary judgment[1] for Officers Todd Allen and Douglas

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[1] The district court stated that it was dismissing Plaintiff's claims "under Federal Rule[] of Civil Procedure 12(b)(1) and (b)(6)," but that it was also granting summary judgment for Defendants "to the extent the Court deems it necessary to review [Defendants'] arguments under Rule 56." (R. 91 at PageID #1006.) Because the district court did not explain this ambiguity in its ruling, and because the district court explained that its decision "relies on [the parties'] Joint Statement of Facts . . . unless otherwise indicated," (*id.* at 1002), the Court treats the

Brownback (together "Defendants") on Plaintiff's Fourth Amendment claims arising under 42 U.S.C. § 1983 or, alternatively, under the implied right of action set forth in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The district court also granted summary judgment for two additional defendants, including the United States, who are not parties to this appeal. With respect to Plaintiff's § 1983 or *Bivens* claims, this Court **REVERSES** the judgment of the district court for the reasons set forth below.

BACKGROUND

A. Factual History

On July 18, 2014, Defendants were searching for a criminal suspect named Aaron Davison. Police believed that Davison had committed felony home invasion, and the State of Michigan had issued a warrant for his arrest. Defendants were members of a "joint fugitive task force between the FBI and the City of Grand Rapids." (R. 30 at PageID #108.) Defendant Allen was a detective with the Grand Rapids Police and had been assigned to the FBI task force full-time. Defendant Brownback was a special agent with the FBI. Neither officer was wearing a uniform as they conducted their search, but both of them were wearing lanyards with their badges displayed over their

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district court's ruling as a grant of summary judgment for Defendants.

plainclothes.

Defendants knew that Davison was a 26 year-old white male between 5′10″ and 6′3″ tall with glasses; short, dark hair; and a thin build. Defendants also knew that Davison had a habit of buying a soft drink from a particular gas station every day between 2:00 p.m. and 4:00 p.m. And Defendants had two photographs of Davison. In the first photograph, the lighting was so dark that Davison appeared as the silhouette of a man playing electric guitar. The second photograph, a driver's license photo, showed Davison's face clearly, but the photo was seven years old at the time of the search.

Around 2:30 p.m., Defendants saw Plaintiff walking down the street in an area near the gas station where Davison was known to buy his daily soft drinks. Although Plaintiff was actually a 21-year-old college student who was walking between his two summer jobs, Defendants thought Plaintiff might be their suspect because Plaintiff was a young white male between 5′10″ and 6′3″ and was wearing glasses. From their unmarked vehicle, Defendants studied Plaintiff's face and decided that there was a "good possibility" that he was Davison. (R. 73 at Page ID #429–30.) Defendants parked near Plaintiff and approached him. According to Plaintiff, Defendants never identified themselves as police officers. But Defendants assert that Allen identified himself as a police officer when he first approached Plaintiff.

Defendants started asking Plaintiff questions.

They asked Plaintiff who he was, and Plaintiff truthfully answered that his name was James. Defendants then asked Plaintiff for identification, and Plaintiff said that he had none. Defendants told Plaintiff to put his hands on his head and to face their vehicle. Plaintiff later testified that he complied because Defendants "had small badges around their chest, and [he] assumed [Defendants had] some sort of authority." (*Id.* at PageID #474, 477.) Defendants asked Plaintiff if he was carrying any weapons, and Plaintiff told them that he had a pocketknife. Detective Allen removed the pocketknife from Plaintiff's pocket, commented on the size of Plaintiff's wallet, and then removed that, too, from Plaintiff's pocket. Plaintiff asked, "[a]re you mugging me?" and attempted to run away, but Detective Allen tackled him, grabbed Plaintiff's neck, and pushed him to the ground. (*Id.* at PageID #474.) Plaintiff yelled for help and begged passersby to call the police. Detective Allen then put Plaintiff in a chokehold, at which point, Plaintiff claimed, he lost consciousness. Several seconds later, when Plaintiff came to, he bit into Detective Allen's arm. Detective Allen then started punching Plaintiff in the head and face "as hard as [he] could, as fast as [he] could, and as many times as [he] could." (*Id.* at PageID #433.) Plaintiff attempted to escape and to fight back and eventually released his bite. But he could not get away; the fight continued for over sixty seconds.

As Detective Allen continued to punch Plaintiff in the head and face, several bystanders called the police

and began filming the incident. Numerous police officers arrived on the scene, one of whom ordered the bystanders to delete their videos because the videos could reveal the identities of undercover FBI agents. Some of the bystanders deleted their videos, and footage of the actual altercation was never discovered. The surviving footage from immediately after the incident includes one bystander who can be heard saying, "I was worried. . . . They were out of control pounding him. . . . They were pounding his fa--head for no reason; they were being brutal." (Ex. 6, Timestamp 0:47–1:11.) A bystander who called 911 told the operator "[t]hey're gonna kill this man. . . . We can't see the victim now. They're over top of him. They look like they're suffocating him. . . . I understand they have badges on, but I don't see no undercover police cars, no other—backup, no nothing." (Ex. 18, Timestamp 1:43–3:21.)

Plaintiff was transported from the scene to the emergency room, where he received medical treatment. The emergency room doctors concluded that Plaintiff's injuries did not require him to be admitted for further treatment, and they released him with a prescription for painkillers. Upon Plaintiff's discharge, police arrested him and took him to Kent County Jail. Plaintiff spent the weekend in jail before posting bail and visiting another hospital for further examination. Prosecutors pursued charges against Plaintiff, but a jury acquitted him of all charges.

Appendix C

B. Procedural History

Plaintiff brought this suit alleging that Defendants violated his clearly established Fourth Amendment rights by conducting an unreasonable seizure and by using excessive force. Plaintiff also asserted a claim against the United States. The district court found that it lacked subject-matter jurisdiction to hear Plaintiff's claim against the United States, and it granted summary judgment for Defendants on the basis that Defendants are entitled to qualified immunity. Plaintiff then filed this timely appeal of his claims against Defendants.

DISCUSSION

A. The Federal Tort Claims Act Judgment Bar Does Not Preclude Plaintiff's Claims Against Defendants

The Court requested supplemental briefing on whether the judgment bar of the Federal Tort Claims Act ("FTCA"), *see* 28 U.S.C. § 2676, prohibits Plaintiff from maintaining his § 1983 or *Bivens* claims against Defendants. After considering the parties' arguments and examining the governing statutes and case law, the Court concludes that the FTCA does not preclude Plaintiff's claims.

Appendix C

1. Analysis

a. Standard of Review

This Court reviews the application of the FTCA judgment bar *de novo*. *See United States v. Kuehne*, 547 F.3d 667, 678 (6th Cir. 2008) ("Because this issue is a matter of statutory interpretation, we conduct *de novo* review." (quoting *United States v. VanHoose*, 437 F.3d 497, 501 (6th Cir. 2006))).

b. Relevant Legal Principles

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (citing *Loeffler v. Frank,* 486 U.S. 549 (1988)). Sovereign immunity is jurisdictional in nature. *Id.*

"In 1946, Congress passed the FTCA, which waived the sovereign immunity of the United States for certain torts committed by federal employees." *Id.* at 475–76. The FTCA's waiver provides "subject matter jurisdiction for plaintiffs to pursue state law tort claims against the United States." *Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012) (citing 28 U.S.C. § 1346(b)(1)). "Section 1346(b) [of the FTCA] grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed]' itself liable." *Meyer*, 510 U.S. at 477 (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)). "A claim comes within this jurisdictional grant" only if it

is:

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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.

Id. (quoting 28 U.S.C. § 1346(b)). If a claim fails to satisfy these six elements, it is not "cognizable" under § 1346(b) and does not fall within the FTCA's "jurisdictional grant." *Id.*

The FTCA's judgment bar provision precludes a plaintiff from bringing additional claims concerning the "same subject matter" as an FTCA claim after judgment is entered on the FTCA claim. 28 U.S.C. § 2676.

"A dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar. Put bluntly, in the absence of jurisdiction, the court lacks the power to enter judgment." *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 579 (6th Cir. 2014); *see also Meyer*, 510 U.S. at 478 (holding that if a claim "is not cognizable under § 1346(b), the FTCA does not constitute [a plaintiff's] 'exclusive' remedy" because the FTCA's judgment bar does not apply).

c. Application to the Matter at Hand

As explained below, the district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction. Because the district court did not reach the merits of Plaintiff's FTCA claim, the FTCA's judgment bar does not preclude Plaintiff from pursuing his claims against Defendants.

"The FTCA waives sovereign immunity where state law would impose liability against a private individual." *Milligan*, 670 F.3d at 692 (citing *Myers v. United States*, 17 F.3d 890, 894 (6th Cir. 1994)). Under Michigan law, a government employee is entitled to qualified immunity for intentional torts if he or she establishes that:

> (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature.

Odom v. Wayne Cty., 760 N.W.2d 217, 218 (Mich. 2008) (adopting test articulated in *Ross v. Consumers Power Co.*, 363 N.W.2d 641 (Mich. 1984)). The district court found that Plaintiff failed to satisfy the *Odom/Ross* test. According to the district court, the undisputed facts indicated that Defendants' conduct occurred during the course of their employment and within the scope of their authority, was not

undertaken with the requisite malice required under Michigan law, and was discretionary. (Dist. Ct. Op. at PageID #1029–30.) Because Plaintiff failed to state a claim against the United States under Michigan law, the district court held that the United States was "entitled to immunity under the FTCA." (*Id.* at PageID #1030.)

The FTCA does not bar Plaintiff from maintaining his claims against Defendants because the district court lacked subject-matter jurisdiction over Plaintiff's FTCA claim. Plaintiff failed to satisfy the sixth element of the *Meyer* test—he failed to allege a claim "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." *Meyer*, 510 U.S. at 477. Because Plaintiff failed to state a FTCA claim, his claim did not fall within the FTCA's "jurisdictional grant." *Id.* And because the district court lacked subject-matter jurisdiction over Plaintiff's FTCA claim, the district court's dismissal of his FTCA claim "does not trigger the § 2676 judgment bar." *Himmelreich*, 766 F.3d at 579.

Few circuit courts of appeals have addressed whether the FTCA's judgment bar applies when a district court dismisses a plaintiff's FTCA claims for lack of subject-matter jurisdiction. But the D.C. Circuit reached the same conclusion that this Court reaches here—the FTCA's judgment bar does not apply to dismissals for lack of subject-matter jurisdiction. *See Atherton v. Jewell*, 689 F. App'x 643, 644 (D.C. Cir.

2017) (holding that because the district court "correctly determined that it lacked subject-matter jurisdiction" under the FTCA, the FTCA's judgment bar "is not a basis for the denial of appellant's motion to amend the complaint" to include a *Bivens* claim) (citing *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847–49 (2016)). The Ninth Circuit reached a similar conclusion in *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008), *abrogated by Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), where it held that the FTCA's judgment bar did not preclude a plaintiff from pursuing *Bivens* claims after the district court dismissed his FTCA claims for lack of subject-matter jurisdiction. *Arsenault*, 543 F.3d at 1041. However, the Ninth Circuit stated that the plaintiff's *Bivens* claims "are barred to the extent that they rest upon the same misrepresentations alleged" in the FTCA action dismissed for lack of subject-matter jurisdiction. *Id.* at 1042. This holding is clearly wrong. If a federal court lacks subject-matter jurisdiction, it lacks the power to hear a case. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Therefore, its dismissal for lack of subject-matter jurisdiction does not have any preclusive effect. *Himmelreich*, 766 F.3d at 580.

The government contends that the district court denied Plaintiff's FTCA claim on the merits because it found that Defendants failed to act with malice as required to defeat qualified immunity under Michigan law. The Court rejects this argument. The district court could not, as a matter of law, decide the merits of Plaintiff's FTCA claim—it lacked subject-

matter jurisdiction over that claim. *Himmelreich*, 766 F.3d at 580. It is true that the district court analyzed Michigan law to determine whether Plaintiff stated a FTCA claim. But stating a claim under state law is a *jurisdictional prerequisite* without which the FTCA's waiver of sovereign immunity does not apply. *Meyer*, 510 U.S. at 477. Therefore, the district court's conclusion that Plaintiff failed to state a claim under Michigan law was not a disposition on the merits. In fact, it was the opposite—it *precluded* the district court from exercising subject-matter jurisdiction over the FTCA claim and *prevented* the district court from reaching a decision on the merits. *Haywood v. Drown*, 556 U.S. 729, 755 (2009) ("Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *McCardle*, 74 U.S. (7 Wall.) at 514)).

The Supreme Court's opinion in *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), does not change the result. In *Simmons*, the Supreme Court affirmed the Sixth Circuit's ruling and held that the judgment bar does not apply where an FTCA claim was dismissed because it fell within an enumerated "[e]xception." *Id.* at 1845. While *Simmons* was decided on narrower

grounds than *Himmelreich*, it does not conflict with the unequivocal rule in this Circuit that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar." *Himmelreich*, 766 F.3d at 579.

Defendants argue that footnote 5 in *Simmons* supports their position. This argument fails to persuade the Court. Footnote 5 explains that "the [FTCA's] judgment bar provision functions in much the same way" as the "common-law doctrine of claim preclusion." *Simmons*, 136 S. Ct. at 1850 (internal citations and quotations omitted). It is well-established that "a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect." *Himmelreich*, 766 F.3d at 580 (citing *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985)). Thus, Defendants fail to appreciate that footnote 5 actually undermines their argument: because the district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction, its dismissal does not carry any preclusive effect. *See id.* Therefore, under the logic of footnote 5, the FTCA judgment bar does not prevent Plaintiff from pursuing his claims against Defendants.

The cases that Defendants rely on are inapposite. In *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), the district court rejected the plaintiff's FTCA claim on the merits after a bench trial. *Id.* at 324. This Court held that the FTCA's judgment bar precluded further adjudication of the plaintiff's *Bivens* claims against the individual defendants. *Id.* at 324–25. In *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986),

the district court granted judgment for the plaintiff on the merits of his FTCA claim. *Id.* at 237. This Court held that the decision on the merits prevented the plaintiff from maintaining a *Bivens* action against the individual defendants. *Id.* at 238. Defendants' analogy to *Harris* and *Serra* fails. Here, unlike in those cases, the district court did not reach the merits of the FTCA claim.

2. Conclusion

Because the district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction, the FTCA's judgment bar provision does not preclude Plaintiff from pursuing his remaining claims against Defendants.

B. Qualified Immunity Does Not Shield Defendants

1. Standard of Review

This Court "review[s] a grant or denial of summary judgment *de novo*, using the same Rule 56(c) standard as the district court." *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, this Court views the

factual evidence and draws all reasonable inferences in favor of the non-moving party. *Nat'l Enters. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). In order to defeat a motion for summary judgment, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 341–42 (6th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

2. Analysis

Plaintiff argues that the district court erred when it granted summary judgment for Defendants because the evidence leaves material facts in dispute as to whether Defendants are entitled to qualified immunity. The doctrine of qualified immunity shields government officials "from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Webb v. United States*, 789 F.3d 647, 659 (6th Cir. 2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The qualified immunity analysis involves a two-step inquiry: (1) whether, viewing the record in the light most

favorable to the plaintiff, a constitutional right has been violated; and (2) whether the right at issue was "clearly established" at the time the constitutional violation occurred. *Id.*

The Court will first analyze qualified immunity in the context of Plaintiff's unreasonable search and seizure claims. The Court will then turn to Plaintiff's excessive force claims. As explained below, the district court erred by finding that qualified immunity shielded Defendants in regard to both sets of claims.

a. Unreasonable Search and Seizure Claims

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. "A warrantless search or seizure is '*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *United States v. Roark*, 36 F.3d 14, 17 (6th Cir. 1994) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The Supreme Court has identified three types of reasonable, and thus permissible, warrantless encounters between the police and citizens: (1) consensual encounters, which may be initiated by a police officer based on a mere hunch or without any articulable reason whatsoever; (2) investigative stops (or *Terry* stops), which are temporary, involuntary detentions that must be predicated upon "reasonable suspicion;" and (3) arrests, which must be

based upon "probable cause." *United States v. Pearce*, 531 F.3d 374, 380 (6th Cir. 2008) (citing *United States v. Alston*, 375 F.3d 408, 411 (6th Cir. 2004)). Under this framework, an individual is free "to ignore the police and go about [his or her] business," *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000), unless a police officer has at least reasonable suspicion that the individual has committed, or is about to commit, a crime. *See Family Serv. Ass'n ex rel. Coil v. Wells Twp.*, 783 F.3d 600, 604 (6th Cir. 2015).

In this case, Plaintiff argues that Defendants acted unreasonably when they (1) performed an investigative stop, (2) performed a protective search, and (3) stopped Plaintiff's attempt to run away. The Court analyzes each argument in turn.

i. Reasonableness of the Investigative Stop

As a threshold matter, Defendants could have arrested Plaintiff without running afoul of the Fourth Amendment if they had reasonably mistaken Plaintiff for Davison. "Arrest warrants in the hands of a police officer, unless facially invalid, are presumed valid." *Fettes v. Hendershot*, 375 F. App'x 528, 532 (6th Cir. 2010). "[P]olice and correction employees may rely on facially valid arrest warrants even in the face of vehement claims of innocence by reason of mistaken identity or otherwise." *Masters v. Crouch*, 872 F.2d 1248, 1253 (6th Cir. 1989) (citing *Baker v. McCollan*, 443 U.S. 137, 145 (1979)). "[W]hen the police have probable cause to arrest one party, and when

they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802 (1971) (internal citations and quotation marks omitted); *see also Fettes*, 375 F. App'x at 532; *Ingram v. City of Columbus*, 185 F.3d 579, 595 (6th Cir. 1999).

But Defendants do not argue that they reasonably mistook Plaintiff for Davison. Instead, they argue that they reasonably *suspected* that Plaintiff *might be* Davison, thereby justifying an investigative stop.[2] "[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *United States v. Hensley*, 469 U.S. 221, 229 (1985). Reasonable suspicion is:

> more than a mere hunch, but is satisfied by a likelihood of criminal activity less than probable cause, and falls considerably short of satisfying a preponderance of the evidence standard. If an officer possesses a particularized and objective basis for suspecting the particular

[2] The parties dispute whether the encounter between Plaintiff and Defendants began as an investigative *Terry* stop or instead as a consensual encounter, but this dispute is ultimately inconsequential because, as explained *infra*, there is a genuine dispute of material fact as to whether the officers had reasonable suspicion, even by the point that the encounter escalated to what was alleged to constitute a *Terry* stop.

> person . . . based on specific and articulable facts, he may conduct a *Terry* stop.

Dorsey v. Barber, 517 F.3d 389, 395 (6th Cir. 2008) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)) (citations and internal quotation marks omitted).

Defendants assert that they had reasonable suspicion to believe that Plaintiff was Davison. However, the undisputed facts do not show that the officers' suspicion was reasonable under the totality of the circumstances. The foundation of Defendants' suspicion was a physical description of Davison, which described him as a 26-year old white male with a height between 5′10″ and 6′3″, short dark hair, glasses, and a thin build. But given the broad swath of the population that matches this physical description and the requirement that reasonable suspicion be based on a "particularized and objective basis for suspecting [a] *particular* person," *Dorsey*, 517 F.3d at 395 (emphasis added), this physical description of Davison alone would not have given Defendants a reasonable suspicion that *anyone*, let alone Plaintiff, was Davison.

Building on their physical description of Davison, the officers had information about one of Davison's habits. Defendants knew that "[a]lmost every day between 2:00 pm and 4:00 pm, he bought a soft drink from the Shell gas station at the intersection of Leonard Street and Alpine Avenue." (Def. Br. 3–4.) This information arguably could have provided Defendants with a reasonable basis to detain and request

identification from any individual who matched Davison's physical description and bought a soft drink consistent with Davison's habit. *See Family Serv. Ass'n*, 783 F.3d at 604 (explaining that officers may request identification if relevant to purpose of *Terry* stop); *United States v. Orsolini*, 300 F.3d 724, 730 (6th Cir. 2002) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983))). But that is not what happened. Defendants cite no evidence to show that Plaintiff bought a soft drink or even entered the relevant gas station, which was located at the intersection of Leonard and Alpine Streets. Rather, Defendants say that they merely found Plaintiff "*near* the intersection of Leonard and Alpine" at 2:30 p.m. while Plaintiff was "walking down Leonard Street." (Def. Br. at 4.) In fact, Plaintiff was several blocks away from the relevant intersection. Thus, Defendants could not have mistaken Plaintiff for Davison based, in part, on Davison's habit. Although Defendants found Plaintiff in the general neighborhood where they thought Davison might be found, Defendants also do not cite any cases suggesting that officers may detain everyone in an entire neighborhood who matches the vague physical description of a criminal suspect. Fourth Amendment case law has clearly established the contrary. *See Dorsey*, 517 F.3d at 395.

Further building on their description of Davison, the officers had two photographs:

Appendix C

The first of these photographs depicts the silhouette of a man playing an electric guitar. The man is wearing sunglasses, his head is tilted downward, and there is insufficient light to discern identifying characteristics. This photograph adds nothing to the physical description of Davison and therefore did not provide additional support for the *Terry* stop.

The second photograph—a 2007 driver's license photo—depicts Davison's face clearly. Obviously, Plaintiff, whose photograph appears below, is not a match to the driver's license photo:

Appendix C

Defendants admit that they "did not know how Mr. Davison looked in 2014," (R. 74-1 at PageID #610), but they suspected that he "look[ed] more like the [silhouette] photo" than the driver's license photo. (R. 73 at PageID #428). Defendants' theory seems to be that they could have detained anybody who remotely resembled Davison's old driver's license photograph, given that Davison could have changed his appearance in the intervening seven years. But whether Plaintiff resembles the photograph is a question of fact. *See Ingram*, 185 F.3d at 596 ("[A] genuine issue of fact existed as to whether the officers' mistake in identifying [the plaintiff] as [a particular fugitive] was a reasonable one."); *Thomas v. Noder-Love*, 621 F. App'x 825, 830 (6th Cir. 2015) ("[D]eciding whether the man in the Footage Photo and the man in the Booking Photo looked similar in appearance . . . raises issues of fact that are only properly resolvable at trial."). A jury could reasonably conclude that

Plaintiff bears no resemblance whatsoever to Davison's driver's license photograph, in which case the photograph could not have supported reasonable suspicion for a *Terry* stop.

Finally, Defendants assert that their reasonable suspicion was cemented when Plaintiff "declined to supply has last name and denied possessing any identification." (Def. Br. 21.) But there is no evidence in the record to show that Defendants asked Plaintiff for his last name, so he could not have "declined" to provide it.[3] Moreover, it would not have been suspicious, as a matter of law, for Plaintiff to refuse to cooperate with Defendants' investigation. *Family Serv. Ass'n*, 783 F.3d at 604 ("Refusing to answer an officer's questions during an officer's attempt to conduct a consensual encounter does not create reasonable suspicion for a *Terry* stop."). Thus, unless Defendants already had reasonable suspicion that Plaintiff was Davison when they approached him, Plaintiff's simple refusal to cooperate was not suspicious and could not provide grounds for a *Terry* stop. *See id.*

Thus, under the totality of the circumstances, the

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[3] Plaintiff also argues that Defendants' suspicion, if any, should have been dispelled when Plaintiff stated that his name was "James" because the suspect's name was not James. But if Defendants reasonably suspected that Plaintiff matched the photo of Davison, Defendants were not required to believe Plaintiff's assertions that his name was James. *See Masters*, 872 F.2d at 1253. As further explained in this opinion, Plaintiff's response to being asked for his name was largely inconsequential—unless, of course, his answer had been "Aaron."

following factors supported Defendants' suspicion that Plaintiff was Davison: Plaintiff matched a rather incomplete physical description of Davison that did not include any defining characteristics; Defendants saw Plaintiff walking during the afternoon in a neighborhood near where Davison was known to buy soft drinks in the afternoon, but Plaintiff had not purchased a soft drink; and Defendants may have reasonably suspected that Plaintiff resembled a seven-year-old driver's license photograph of Davison—or a photograph that did not show Davison's face. The first two factors together could not have provided a "particularized and objective basis for suspecting [a] particular person," because they could describe any number of people in the neighborhood where Plaintiff was walking. *See Dorsey*, 517 F.3d at 395. Thus, under clearly established law, Defendants needed more; they needed to find someone who resembled the photographs of Davison. Because there is a genuine dispute about whether a reasonable officer could conclude that Plaintiff resembled the photographs, the district court erred in granting Defendants' motion for summary judgment on the basis of qualified immunity.

In granting Defendants qualified immunity, the district court correctly explained that "'certainty' is not 'the touchstone of reasonableness under the Fourth Amendment'" (R. 91 at PageID #1016 (quoting *Hill*, 401 U.S. at 803–04)) and that "the reasonableness inquiry includes some 'latitude for honest mistakes' . . . in the difficult task of finding and arresting

fugitives." (*Id.* (quoting *Maryland v. Garrison*, 480 U.S. 79, 87 (1987))). Indeed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). But this standard does not become more forgiving as the quality of evidence (or of police work) decreases. Rather, as the description of a suspect becomes less reliable—due to the passage of time or otherwise—an officer's reliance on that description becomes objectively *less* reasonable and *less* likely to support a warrantless detention, arrest, or search. When officers mistake a person for a criminal suspect, the officers' "subjective good-faith belief" is irrelevant; the mistake must be "understandable" and based on "sufficient probability." *Hill*, 401 U.S. at 804; *see Illinois v. Gates*, 462 U.S. 213, 232 (1983) (explaining that the Fourth Amendment inquiry requires "the assessment of probabilities in particular factual contexts").

In support of the district court's logic, Defendants explain that their mistake was reasonable because "[d]espite their best efforts, the officers 'did not know how . . . Davison looked in 2014' because they could not find a recent image of his face." (Def. Br. 23.) But Defendants' logic is faulty; the old age of a suspect's photograph cannot *increase* its reliability or, in turn, the chances of finding a match. The less an officer knows about a suspect's appearance, the less reasonable it is for the officer to suspect that any particular person matches that appearance. *See Dorsey*, 517 F.3d at 395. The greater difficulty in accurately

identifying anyone as Davison decreases, not increases, the reasonableness of any particular suspicion. Under the totality of the circumstances, the only way for Defendants to have had reasonable suspicion that Plaintiff was Davison was if Defendants' belief that Plaintiff resembled Davison's old driver's license photograph was "understandable" in light of the other identifying information available to Defendants at the time. *See Hill*, 401 U.S. at 804. This is a question for the jury.

ii. Reasonableness of the Protective Search

Plaintiff also argues that Detective Allen violated his Fourth Amendment right to be free from unreasonable searches when he frisked Plaintiff for weapons and removed Plaintiff's wallet from his pocket.[4]

For a protective search conducted during a *Terry* stop to be reasonable, "the police officer must reasonably suspect that the person stopped is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 326–27 (2009). The officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." *Sibron v. New York*, 392 U.S. 40, 64 (1968). Based on such

[4] If Defendants lacked reasonable suspicion to conduct a *Terry* stop, clearly established law provides that this frisk was unreasonable in its entirety. *Sibron v. New York*, 392 U.S. 40, 64 (1968) ("The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries.").

suspicion, "the officer may conduct a limited search for concealed weapons." *United States v. Strahan*, 984 F.2d 155, 158 (6th Cir. 1993). As applicable to this case, "*Terry* allows only an examination for concealed objects and forbids searching for anything other than weapons." *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 92–94 (1980)). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

Plaintiff does not dispute that Defendants could have reasonably believed he was armed and dangerous, assuming of course that Defendants reasonably believed that he was Aaron Davison.[5] Rather, Plaintiff argues that Detective Allen exceeded the scope of a lawful protective search when he removed Plaintiff's wallet from the back pocket of Plaintiff's pants.

The Supreme Court has recognized that officers' training enables them to identify objects with particularity during protective frisks. In *Dickerson*, for instance, the Supreme Court articulated the so-called "plain touch" doctrine: "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an

[5] Before the frisk, Plaintiff told Defendants that he was armed with a pocket knife. Because Plaintiff does not press the issue, the Court does not analyze whether Plaintiff's admission to possessing a pocket knife, combined with reasonable suspicion that Plaintiff was Davison, would give rise to reasonable suspicion that Plaintiff was armed and dangerous.

object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 375–76. This Court has elaborated on the plain touch doctrine and the relevance of an officer's training to investigatory decisions made during a frisk:

> In assessing whether an object's incriminatory nature is immediately apparent, the court must look to three factors, none of which is necessary but each of which is instructive. These factors are: (1) a nexus between the seized object and the [suspected criminal activity]; (2) whether the intrinsic nature or appearance of the seized object gives probable cause to believe that it is associated with criminal activity; and (3) whether the executing officers can at the time of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature.

United States v. Pacheco, 841 F.3d 384, 395 (6th Cir. 2016) (quoting *United States v. Garcia*, 496 F.3d 495, 510 (6th Cir. 2007)) (citations and internal quotation marks omitted).

Applying these principles, removing Plaintiff's wallet was not "necessary to determine if the suspect [was] armed" and was therefore unreasonable based

on clearly established law. *See Dickerson*, 508 U.S. at 373. Detective Allen admits that the object in Plaintiff's pocket looked like a wallet, felt like a wallet, and was located where one would expect to find a wallet. And nothing related to the circumstances of the investigative stop or to the crime that Davison was suspected of committing created a reasonable suspicion that the wallet might be something other than what it immediately appeared to be. Detective Allen points to the existence of razor blades and artfully concealed weapons—weapons "that are designed to look like wallets but in fact are not"—but he does not suggest that there was reason to believe that Plaintiff (or Davison) might have been carrying a razor blade or an artfully concealed weapon. (Def. Br. 27.) In the context of reasonable suspicion, which requires a "particularized and objective basis" for suspicion "based on specific and articulable facts," *Dorsey*, 517 F.3d at 395, the fact that razor blades exist does not give rise to a reasonable inference that there is a razor blade in any particular person's wallet. The same analysis applies to artfully concealed weapons. Indeed, if an officer's suspicion that a suspect is armed and dangerous were sufficient to *also* reasonably suspect that every object in a suspect's pocket either contains a razor blade or is an artfully concealed weapon, then there would be no practical distinction between a protective search and a search incident to arrest. *Cf. United States v. Robinson*, 414 U.S. 218, 236 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the

respondent or that he did not himself suspect that respondent was armed.").

Defendants argue that removing Plaintiff's wallet was reasonable and cite several cases in support of their assertion, but these cases are easily distinguishable. In *Strahan*, 984 F.2d at 158, we concluded that an officer was justified in reaching into Strahan's pockets when the officer reasonably believed that Strahan was armed because the officer: (1) was familiar with Strahan; (2) had a reliable tip that Strahan was armed; and (3) felt a bulge in Strahan's pocket during the frisk, which could have been a weapon. In *United States v. Brown*, 310 F. App'x 776, 781 (6th Cir. 2009), we concluded that an officer did not violate the Fourth Amendment by taking Brown's wallet from his pocket when the officer was alone, it was late at night, and Brown was acting nervous and made a furtive gesture towards his back pocket as he tried to leave the scene. In *United States v. Muhammad*, 604 F.3d 1022, 1026–27 (8th Cir. 2010), the Eighth Circuit concluded that removing Muhammad's wallet was permissible when the officer felt a four-inch by three-inch hard object in Muhammad's pocket, the officer could not tell what the object was, and Muhammad had been detained for his suspected participation in an armed robbery that had taken place less two hours earlier. Here, by contrast, Defendants were working together in broad daylight and did not suspect Plaintiff's wallet was a weapon.

Accordingly, the district court erred when it concluded that "[n]othing in Plaintiff's allegations

supports the proposition that Allen's 'search' was any broader than necessary to ensure that Plaintiff did not have access to a weapon." (*See* R. 91 at PageID #1018.) Detective Allen's interest in searching the contents of Plaintiff's pocket to avoid "unnecessary risks in the performance of [his] duties" was minimal given that Detective Allen could not have reasonably suspected that the wallet was anything other than a wallet. *See Terry*, 392 U.S. at 23. Under clearly established law, removing Plaintiff's wallet during a protective search was unreasonable even if the protective search was reasonable at its inception. *See Dickerson*, 508 U.S. at 373.

iii. Stopping Plaintiff's Attempt to Flee

Assuming that Defendants had detained Plaintiff upon reasonable suspicion and that they had properly identified themselves as police officers, it was not unreasonable for Defendants to attempt to stop Plaintiff's flight. As the Supreme Court has explained:

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the [Fourth Amendment].

Wardlow, 528 U.S. at 125. Plaintiff is therefore incorrect to the extent that he suggests that the Fourth Amendment compelled Defendants to permit him to

flee from his detention, again, assuming that the detention was lawful. But if a jury determines that Plaintiff reasonably believed he was being mugged rather than being detained by police officers, then extending the detention after Plaintiff attempted to flee was just as unreasonable as detaining Plaintiff in the first instance.

b. Excessive Force Claim

Plaintiff next asserts that Defendants used excessive force in their attempt to prevent his flight. An excessive force claim may be analyzed under the Fourth, Eighth, or Fourteenth Amendment: "the applicable amendment depends on the plaintiff's status at the time of the incident: a free citizen in the process of being arrested or seized; a convicted prisoner; or someone in 'gray area[s]' around the two." *Coley v. Lucas Cty.*, 799 F.3d 530, 537 (6th Cir. 2015) (quoting *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013)). Where a free citizen claims that a government actor used excessive force during the process of an arrest, seizure, or investigatory stop, the applicable analysis is governed by the Fourth Amendment. *Id.*

"[T]he right to be free from the excessive use of force is a clearly established Fourth Amendment right." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004) (quoting *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir. 2001)). The Supreme Court has explained that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."

Graham v. Connor, 490 U.S. 386, 396 (1989). Rather, "the question is whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396. Therefore, to determine whether the use of force in a particular situation was reasonable, this Court must look to the totality of the circumstances. *See id.*; *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996) (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)). In doing so, the court must assume "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The analysis of whether an officer's use of force was reasonable is guided by the following three factors: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006).

Excessive force cases typically require this Court to "analyze the events in segments." *Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir. 2002) (citing *Dickerson*, 101 F.3d at 1161–62). In *Phelps*, for instance, this Court analyzed three separate segments: first, the

officer arrested Phelps and placed him in handcuffs; second, the officer took Phelps to the police station for booking; and third, the officer tackled Phelps to the ground, sat on top of him, and beat him in response to a gesture by Phelps that the officer claimed he perceived to be threatening. *See id.* at 301–02.

Plaintiff alleges that Defendants used excessive force in two distinct segments of their encounter. First, Plaintiff alleges that Detective Allen used excessive force by continuing to beat Plaintiff even after he was subdued. Any level of violent force that an officer uses against a subdued detainee is excessive as a matter of clearly established law. *See Champion*, 380 F.3d at 902 (citing cases for the proposition that this Court has "consistently held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right"); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994) (holding and continuing to spray mace in the face of an incapacitated arrestee, if proven, would be unreasonable as a matter of law); *Darnell v. Caver*, No. 97–5297, 1998 WL 416000, at *3 (6th Cir. July 7, 1998) (unpublished) (after suspect thrown to ground, unreasonable for officer to lift suspect's head and let it drop to pavement). But Plaintiff's allegation has no merit—there is no evidence to support it. Plaintiff suggests, without support, that he was subdued the moment that he released his bite. (*See, e.g.*, Pl. Br. 45 ("[A] reasonable jury could conclude that Allen beat [Plaintiff] after [Plaintiff] released his bite.")) But Detective Allen testified during Plaintiff's criminal trial

that he "couldn't gain control of [Plaintiff]" and that he "felt like [he] was losing the fight" until a nearby pedestrian provided assistance. (R. 73 at PageID #435.) Detective Allen stated that the incident ended only after the pedestrian "control[ed] [Plaintiff's] legs, at [which] point we were able to put the handcuffs on him." (*Id.*) The pedestrian also testified that Defendants needed his assistance to subdue Plaintiff. (*Id.* at PageID #448.) Plaintiff presents no evidence to show that he stopped resisting when he stopped biting, and he fails to refute extensive testimony indicating that three people were struggling to subdue him even after he released his bite.[6] Accordingly, Plaintiff has failed to show that Detective Allen used excessive force after Plaintiff was subdued.

Second, Plaintiff alleges that Defendants used excessive force in subduing him. This Court agrees, especially because a jury could find that Defendants failed to identify themselves as police officers.[7] It is impossible to resist an arrest (or detention) without

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[6] Plaintiff states in his reply brief that he disputes whether the pedestrian helped Defendants subdue him. However, Plaintiff does not explain his dispute, nor does he cite any evidence that tends to show that Defendants continued to use force after Plaintiff was subdued.

[7] Detective Allen was primarily responsible for the use of force, but Officer Brownback participated in the *Terry* stop, was present throughout the encounter, did not intervene once the encounter became violent, and at some point joined Detective Allen in subduing Plaintiff. Without resolving the parties' factual disputes, the Court cannot conclude that Officer Brownback is entitled to qualified immunity for any portion of the encounter.

knowing that an arrest (or detention) is being attempted. *Metiva*, 31 F.3d at 385 ("[W]hether plaintiff was actively resisting arrest or attempting to evade arrest is contested as plaintiff alleges he was never told he was under arrest or why he was being further detained after submitting to two pat-down searches."). If a jury were to find that Defendants failed to properly identify themselves, then Plaintiff's flight did not constitute "actively resisting arrest or attempting to evade arrest by flight" as a matter of law. *Id.* Indeed, Plaintiff says that he ran away only after asking whether Defendants were mugging him. If a jury were to credit Plaintiff's testimony, then neither Defendant is entitled to qualified immunity because any reasonable officer would have known, based on clearly established law, that applying force—tackling Plaintiff to the ground, holding him down, choking him, and beating him into submission—was unreasonable under the circumstances.[8]

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[8] Even if Defendants reasonably suspected that Plaintiff was Davison, Davison's suspected crime was not one for which it might have been reasonable for Detective Allen to tackle Plaintiff to the ground without explanation. Davison's suspected crime was home invasion, which the evidence indicates was a non-violent crime, if moderately severe. The degree of home invasion Davison allegedly committed is unclear. The lowest level of home invasion is a felony punishable by imprisonment for up to five years, a fine of up to $2,000, or both. MCL § 750.110a(7). This degree of home invasion does not necessarily require a perpetrator to commit an act of violence or to interact with others. *Id.* at § 750.110a(3). Thus, viewing the evidence in the light most favorable to Plaintiff, Defendants had no reason to think that

See id.; *Atkins v. Twp. of Flint*, 94 F. App'x 342, 349 (6th Cir. 2004) (concluding that "a reasonable officer would ordinarily inform a suspect . . . that he was being arrested" for a low-level crime, especially when "there was no reason not to tell him he was under arrest"); *Griffith v. Coburn*, 473 F.3d 650, 657 (6th Cir. 2007).

But regardless of whether the force was justified at its inception, Detective Allen's use of a chokehold, if proven, would be excessive under clearly established law. The use of a chokehold constitutes deadly force. *See Coley*, 799 F.3d at 540. When a suspect resists arrest by "wrestling [himself] free from officers and running away," officers may reasonably use force, but such conduct "does not justify deadly force, especially when the struggle has concluded and the suspect is in flight." *Bouggess v. Mattingly*, 482 F.3d 886, 891 (6th Cir. 2007). Thus, "[t]he use of a chokehold on an unresisting—and even an initially resistant—detainee" constitutes excessive force. *Coley*, 799 F.3d at 540.[9] Therefore, any officer should have known based on clearly established law that using a chokehold when Plaintiff was attempting to run away was objectively unreasonable. Detective Allen argues that

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Plaintiff was a particularly dangerous criminal and no reason to tackle him to the ground without announcing themselves.

[9] Although *Coley* was published after the events giving rise to this case, this Court recognized in *Coley* that prior cases made it "abundantly clear" that "[c]hokeholds are objectively unreasonable where . . . there is no danger to others." *Coley*, 799 F.3d at 541.

"the Constitution does not prohibit officers from using this technique [a chokehold] to restrain a suspect just seconds after the suspect attempts to punch an officer and to flee." (Def. Br. 32.) Although *Bouggess* addressed an officer's use of his firearm, rather than a chokehold, the principle from *Bouggess* applies to the instant case. *Bouggess* clearly established that using deadly force, when the struggle has concluded and a suspect is fleeing, is excessive and unconstitutional. *See Bouggess*, 482 F.3d at 891. The district court therefore erred by granting Detective Allen qualified immunity as to his use of force.

Therefore, neither Defendant is entitled to qualified immunity on Plaintiff's excessive force claims.

C. The District Court Correctly Held that Plaintiff's Claims Against Detective Allen are *Bivens* Claims Rather than § 1983 Claims

1. Standard of Review

This Court reviews *de novo* the purely legal question of whether a cause of action arises under § 1983 or instead under the implied right of action recognized in *Bivens*, 403 U.S. 388. *See United States v. Graham*, 484 F.3d 413, 416 (6th Cir. 2007); *Rodgers v. Banks*, 344 F.3d 587, 593 (6th Cir. 2003).

2. Analysis

As explained below, the Court concludes that the

district court correctly held that Plaintiff's claims against Detective Allen are *Bivens* claims rather than § 1983 claims.

a. Relevant Legal Principles

To bring a claim under § 1983, the plaintiff must allege: "1) the defendant acted under color of state law; and 2) the defendant's conduct deprived the plaintiff of rights secured under federal law." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citing *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998)). "The ultimate issue in determining whether a party is subject to liability under 42 U.S.C. § 1983 is whether the alleged infringement of federal rights is 'fairly attributable to the state.'" *Crowder v. Conlan*, 740 F.2d 447, 449 (6th Cir. 1984) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). The question of fair attribution involves a two-step inquiry: "[f]irst, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. In addition, "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

A defendant's actions performed pursuant to a "'mixed' federal and state program may . . . be actions 'under color of state law.'" *Rowe v. Tennessee*, 609

F.2d 259, 266 (6th Cir. 1979). The "evaluation of whether particular conduct constitutes action taken under the color of state [or instead federal] law, must focus on the actual nature and character of that action." *Schultz v. Wellman*, 717 F.2d 301, 304 (6th Cir. 1983). In *Schultz*, for instance, this Court explained that the decision by a defendant officer in the Kentucky Air National Guard to terminate a lower-level officer was made under color of state law, not federal law, because "[o]fficers in the National Guard . . . are officers of the state militia until called into active federal duty," and because terminations from the National Guard "are ordered by the state Adjutant General, a state officer, and must be approved by the Governor of the state." *Id.* at 305.

b. Application to the Matter at Hand

Plaintiff's claims against Detective Allen may not be brought under § 1983 because Detective Allen's conduct is fairly attributable only to the United States and not to the State of Michigan.[10] Although Detective Allen was a detective with the Grand Rapids Police and was therefore employed by the state, Detective Allen was working full time with an FBI task force at the time of the incident at issue. Plaintiff has not alleged or demonstrated that the state was

[10] Detective Allen's potential liability is unchanged by whether Plaintiff's claims properly arise under *Bivens* or § 1983. *See Butz v. Economou*, 438 U.S. 478, 500–04 (explaining that liability for an actionable claim under *Bivens* is indistinguishable from an analogous claim under § 1983).

involved in authorizing or administering the task force; instead, it appears that the FBI managed the operation with the benefit of state resources. Detective Allen's "official character" at the time of the incident was therefore "such as to lend the weight of the [United States] to his decisions." *See Lugar*, 457 U.S. at 937. As a deputized federal agent, Detective Allen carried federal authority and acted under color of that authority rather than under any state authority he may have had as a Grand Rapids Police detective. *See Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008) ("[B]ecause Scarazzini and McAllister were federally deputized for their Task Force work, this claim was properly brought . . . as a *Bivens* action."); *Majors v. City of Clarksville*, 113 F. App'x 659, 659–60 (6th Cir. 2004) (explaining that a § 1983 claim brought against police officers serving with a DEA task force was "in reality a *Bivens* claim under the Fourteenth Amendment").

Plaintiff argues that Detective Allen acted under color of state law because the task force was enforcing a state warrant for Davison's arrest at the time the events giving rise to this case took place. But Plaintiff fails to explain why the "nature and character" of a task force should change based on whether the task force chooses to pursue a state fugitive or a federal fugitive. *Schultz*, 717 F.2d at 304. Plaintiff points out that "Davison had committed no federal crime" and therefore "the officers had no authority independent of Michigan state law to *arrest* Davison." (Pl. Br. 61.) However, the nature and character of a cooperative

federal-state program is determined by the source and implementation of authority for the *program*, not for the particular work that the agency chooses, in the exercise of its authority, to perform on a given day. *Cf. id.* at 305 ("That an agency of the state chooses to utilize federal substantive and procedural rules in the exercise of its state law authority does not transform the state law character of its actions."). Thus, as long as the task force's decision to apprehend Davison was made by virtue of an exercise of federal authority, which Plaintiff does not contest, Detective Allen remained a federal agent in the pursuit of a state fugitive. Therefore, the district court correctly concluded that Plaintiff's claims against Detective Allen are *Bivens* claims and not § 1983 claims.

CONCLUSION

For the reasons explained above, the Court **REVERSES** the district court's findings that (1) the FTCA judgment bar precludes Plaintiff's remaining claims and that (2) Defendants are entitled to qualified immunity, **VACATES** the district court's judgment in favor of Defendants, and **REMANDS** for proceedings consistent with this opinion.

Appendix C

DISSENT

ROGERS, Circuit Judge, dissenting. The district court's dismissal of King's FTCA claims against the United States based on the presence of state-law governmental immunity constitutes a "judgment" under 28 U.S.C. § 2676, such that the FTCA's judgment bar precludes King's claims against Allen and Brownback.

The FTCA's judgment bar provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676. King had sued the United States under 28 U.S.C. § 1346(b) based on the allegedly tortious acts of Todd Allen and Douglas Brownback. The district court dismissed King's FTCA claims on state-law grounds. King did not challenge the dismissal of his FTCA claims on appeal, so the decision was final for the purposes of the FTCA's judgment bar. *See Serra v. Pichardo*, 786 F.2d 237, 239, 242 (6th Cir. 1986). Moreover, King does not dispute that the additional claims against Allen and Brownback arise from the same "subject matter" as his FTCA claims. A

judgment for or against the United States on an FTCA claim bars claims based on the same subject matter, "even when 'the claims [a]re tried together in the same suit and [ ] the judgments [ ] entered simultaneously.'" *Harris v. United States*, 422 F.3d 322, 334 (6th Cir. 2005) (quoting *Serra*, 786 F.2d at 241). The district court's order in favor of the United States on King's FTCA claims accordingly triggers the judgment bar and requires the dismissal of King's additional claims against Allen and Brownback.

Although the district court's order established that the district court lacked subject matter jurisdiction over the FTCA claims, this is because merits determinations under the FTCA are jurisdictional in that they implicate the sovereign immunity of the United States. The dismissal still amounted to a "judgment" under 28 U.S.C. § 2676. Indeed, the district court dismissed King's FTCA claims against the United States based on determinations that are legally indistinguishable from determinations that the Supreme Court has identified, albeit in dictum, as triggering the judgment bar. In *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1849 (2016), the Court explained that the judgment bar applies when FTCA claims are dismissed "because the [defendants] were not negligent, because [the plaintiff] was not harmed, or because [the plaintiff] simply failed to prove his claim." Such dismissals are under § 1346(b), which lifts the sovereign immunity of the United States by granting jurisdiction over a cause of action for money damages against the government in certain limited

circumstances.[1] According to the Court, "it would make little sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employees" to proceed in such a case. *Id.* The hypothetical dismissals "would have given [the plaintiff] a fair chance to recover damages" for the alleged constitutional violations, such that applying the judgment bar to preclude litigation over claims arising from the same subject matter would be appropriate. *Id.*

This is precisely what happened in King's lawsuit. The district court dismissed King's FTCA claims against the United States because it determined that Michigan governmental immunity protected Allen and Brownback from liability for their alleged torts. According to the court, "the parties' undisputed facts support the finding that [Allen and Brownback's] actions were not undertaken with the malice required

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[1] 28 U.S.C. § 1346(b) provides:

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

under Michigan law." The district court's dismissal of King's FTCA claims was based on an assessment of their merits under Michigan law. Such a dismissal is warranted by the limits set out in § 1346(b), like those in the *Simmons* dictum. Under § 1346(b), the FTCA creates a cause of action against the United States "for injury or loss of property, or personal injury or death," only 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."

It is true that a merits-based dismissal under the limits of § 1346(b) is jurisdictional; the terms of § 1346(b) explicitly grant jurisdiction to the district courts for such claims against the government. But that cannot be sufficient to preclude application of the FTCA judgment bar because that would effectively nullify the judgment bar with respect to cases where the FTCA judgment was in favor of the government. Every case that determines that the elements of the cause of action are not met is at the same time a determination that the government's immunity is not waived and that there is accordingly no jurisdiction. This is true even of a judgment entered after trial. *See, e.g., Harris*, 422 F.3d at 324–25; *Serra*, 786 F.2d at 241–42. But as the Supreme Court reasoned in *Simmons*, such cases *are* subject to the FTCA judgment bar. *See Simmons*, 136 S. Ct. at 1849.

The actual holding in *Simmons* was that the FTCA's judgment bar does not apply when a judgment is rendered for or against the United States

based on one of the FTCA's "Exceptions" set out in 28 U.S.C. § 2680, such as the discretionary function exception. *Id.* at 1847–48. The Court relied upon the "plain text" of the FTCA for that conclusion. *Id.* The plain text provision dictates that the judgment bar does not apply to cases excepted under 28 U.S.C. § 2680.[2] But the plain text applied in *Simmons* by its terms does not apply to dismissals based on the limits of § 1346(b), such as the dismissal in this case and the dismissals explicitly distinguished in the Court's dictum. *See id.*

Our decision in *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576 (6th Cir. 2014), does not require holding that dismissals under § 1346(b) preclude application of the judgment bar. That decision was the very court of appeals decision affirmed on different grounds in *Simmons*. In *Himmelreich*, we determined that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar," because "in the absence of jurisdiction, the court lacks

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[2] The Supreme Court determined:

> The "Exceptions" section of the FTCA reads: "[T]he provisions of this chapter"—Chapter 171— "shall not apply to . . . [a]ny claim based upon . . . the exercise or performance . . . [of] a discretionary function or duty." § 2680(a). The judgment bar is a provision of Chapter 171; the plain text of the "Exceptions" section therefore dictates that it does "not apply" to cases that, like Himmelreich's first suit, are based on the performance of a discretionary function.

136 S. Ct. at 1847–48.

the power to enter judgment." 766 F.3d at 579. In its review of our *Himmelreich* decision, the Supreme Court in *Simmons* affirmed on narrower grounds, and in dictum reasoned in a way that logically requires application of the judgment bar in this case. *See Simmons*, 136 S. Ct. at 1849. We can hardly be bound by a rationale that the Supreme Court rejected on review of the very case in which we set it forth, in favor of a more limited rationale (the plain text of § 2680) that flatly does not apply in the case before us.

It could be argued that the Supreme Court's language regarding § 1346(b) dismissals is dictum, whereas our previous decision in that very case—more broadly reasoning that neither § 2680 dismissals nor § 1346(b) dismissals implicate the judgment bar—is holding, and thus still binding on subsequent panels in the Sixth Circuit. Such an argument is anomalous, however, and at bottom inconsistent with the theory of stare decisis. "Dicta" encompasses elements of an opinion that are not necessary for the resolution of the case. To discern the difference between holding and dictum, we cannot simply rely on what a given decision purports to hold. Rather, we determine whether the purported holding was actually necessary for the resolution of the case. A subsequent decision issued by a reviewing court in that same case may inform whether the purported holding of the lower court was in fact necessary. When a lower court rules on a particular theory and the reviewing court affirms on narrower grounds, the affirmance can indicate that the broader portion of the lower court's

theory was unnecessary and therefore dictum—even if the lower court did not recognize it as such at the time of the decision.

The litigation in *Simmons* illustrates the point. When we decided *Himmelreich*, we purported to hold that any dismissal of an FTCA claim for lack of subject matter jurisdiction— which would presumably include dismissals under both § 1346(b) and § 2680— would not trigger the judgment bar. *See* 766 F.3d at 579. On appeal, the Supreme Court determined that the case could be resolved on narrower grounds and affirmed on a theory that precluded the judgment bar from applying to § 2680 dismissals (the type of dismissal before it), while *permitting* in dictum the application of the judgment bar to § 1346(b) dismissals. *See Simmons*, 136 S. Ct. at 1849. Once the Supreme Court made the final decision in the *Himmelreich* litigation in *Simmons*, the analysis in the court of appeals decision, to the extent that it encompassed § 1346(b) dismissals, was effectively rendered dictum, if it was not already dictum. It was no longer necessary for the ultimate resolution of the case, since the dismissal of the FTCA claim in *Himmelreich* was based on § 2680 and not § 1346(b).

The Supreme Court, in other words, took away from the Sixth Circuit opinion any relevance that its § 1346(b)-related analysis may have had to the resolution of the case before it, rendering it the equivalent of dictum with respect to subsequent cases. The Supreme Court did so, moreover, before the *Himmelreich* litigation was final.

This leaves us with Sixth Circuit dictum that precludes the application of the judgment bar to § 1346(b) dismissals, and well-considered subsequent Supreme Court dictum that permits the application of the judgment bar to § 1346(b) dismissals. The Supreme Court dictum is far more compelling than our previous inconsistent dictum, and should be followed.

Accordingly, King's claims against Allen and Brownback, as sympathetic as they are, are precluded by the FTCA judgment bar.

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:16-cv-343

JAMES KING,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.

Defendants,

OPINION AND ORDER
August 24, 2017

JANET T. NEFF, District Judge:

Plaintiff James King filed this civil rights and Federal Tort Claims Act (FTCA) action against Defendants, seeking money damages for a July 18, 2014 incident. The matter is before the Court on Defendants' motions to dismiss (ECF Nos. 71 & 77). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the

reasons that follow, the Court grants Defendants' motions.

I. BACKGROUND

Many of the facts surrounding the July 18, 2014 incident giving rise to this case are in dispute. However, for purposes of this motion only, Defendants take Plaintiff's factual allegations as true (ECF No. 72 at PageID.357, 408, 362; ECF No. 78 at PageID.710; ECF No. 81 at PageID.838-839). To that end, the parties filed a "Joint Statement of Facts" (JSF) (ECF No. 79), which, as the Federal Defendants indicate (ECF No. 90 at PageID.946, n.1), is a nearly verbatim recitation of the factual allegations in Plaintiff's Amended Complaint (ECF No. 30). The Court relies on their Joint Statement of Facts for resolution of these motions unless otherwise indicated.

Plaintiff is a 23-year-old who came to Grand Rapids, Michigan from Alpena, Michigan to study computer science at Grand Valley State University (JSF ¶ 1). During the summer of 2014, Plaintiff worked two jobs, one installing DSL cable for Moss Telecommunications and the other working for the Geek Group, a local science education non-profit (*id.* ¶ 2). On Friday, July 18, 2014, Plaintiff had worked at Moss Telecommunications in the morning and had lunch at home (*id.* ¶ 4). After lunch, he left to walk to his next job at the Geek Group (*id.*). As Plaintiff was walking down Leonard Street, he came upon two men leaning against a black SUV near Tamarack Avenue (*id.* ¶¶ 3, 5). One of the men was Todd Allen, a Grand Rapids

police detective (*id.* ¶ 6). The other was Douglas Brownback, an agent with the Federal Bureau of Investigation (FBI) (*id.* ¶ 7). Neither Allen nor Brownback were in uniform; rather, they were wearing plain clothes and baseball hats (*id.* ¶ 8). Allen was wearing jeans and sunglasses (*id.*). Allen and Brownback were both wearing lanyards with badges (*id.* ¶ 17).

Unbeknownst to Plaintiff, Allen and Brownback were members of a fugitive task force operating in West Michigan (JSF ¶ 9). They were looking for a fugitive named Aaron Davison (*id.* ¶ 10). Davison was wanted for home invasion and had been seen in the area the previous day (*id.* ¶ 11). Allen and Brownback knew that Davison was a 26-year-old white male with glasses and that he was between 5'10" and 6'3" tall (*id.* ¶ 12). Allen and Brownback had a seven-year-old driver's license photo of Davison and a more recent Facebook photo, where Davison's face was not visible (*id.* ¶ 13).

Allen and Brownback did not find Davison on July 18, 2014, but they did find Plaintiff (JSF ¶ 14). Allen and Brownback determined that Plaintiff, a 21-year-old white male with glasses between 5'10" and 6'3" tall, matched Davison's description (JSF ¶¶ 15-16; Amended Compl. ¶ 24). Allen asked Plaintiff who he was, and Plaintiff simply replied, "James" (JSF ¶¶ 18-19). Allen asked Plaintiff for identification, and Plaintiff said that he did not have any (*id.* ¶¶ 20-21). One of the men patted Plaintiff's pants (*id.* ¶ 22). Allen and Brownback then told Plaintiff to get against the unmarked SUV and put his hands behind his head

(*id.* ¶ 23). Plaintiff initially complied (*id.* ¶ 24).

Allen then removed Plaintiff's wallet (JSF ¶ 25). At that point, Plaintiff asked, "Are you mugging me?" (*id.* ¶ 26). And Plaintiff attempted to run (*id.* ¶ 27). However, Plaintiff was tackled to the ground (*id.* ¶ 28). Plaintiff yelled for help, begging for passersby to call the police (*id.* ¶ 29). Plaintiff bit Allen in the arm that was around Plaintiff's neck (*id.* ¶ 30). Allen then started punching Plaintiff in the head and face "as hard as I could, as fast as I could, and as many times as I could" (*id.* ¶ 31). Plaintiff continued screaming for help and for someone to call the police (*id.* ¶ 32). Several bystanders called the police, and uniformed officers eventually arrived (*id.* ¶¶ 33-34). One of the bystanders took video on her phone (JSF ¶ 35). The video does not show the struggle, but it does contain bystander statements (*id.*). Among the uniformed officers who arrived on the scene was Grand Rapids Police Officer Connie Morris (*id.* ¶ 36). Morris ordered several bystanders to delete any video of the event (*id.* ¶ 37). No video of the actual struggle between Allen, Brownback and Plaintiff was ever discovered (*id.* ¶ 38).

Plaintiff was transported from the scene to the emergency room, where he was given a CT scan (JSF ¶ 39). Eventually, the police realized Plaintiff was not Davison, the sought-after fugitive (*id.* ¶ 40). Police took Plaintiff from the hospital to the Kent County Jail and booked him on charges relating to the incident: assault with intent to do great bodily harm, aggravated assault of a police officer, and resisting

arrest (*id.* ¶ 41; Amended Compl. ¶ 62). Plaintiff spent the weekend in jail and was only allowed to leave his cell for meals (JSF ¶ 42). Plaintiff was released on bond the following Monday, after his parents posted bail (*id.* ¶ 43). Upon his release, Plaintiff visited another hospital for further examination (*id.* ¶ 44). By that time, much of the swelling had gone down, but the whites of his eyes had turned almost entirely black and red (*id.* ¶ 45). The prosecutor proceeded with the charges against Plaintiff (*id.* ¶ 46). Following a jury trial, Plaintiff was acquitted of all charges (*id.* ¶ 47).

On April 4, 2016, Plaintiff commenced the instant action against Defendants Allen, Brownback, Morris and the United States. Plaintiff filed an Amended Complaint on August 18, 2016, alleging the following four claims:

I. Violation of Rights Secured by the Fourth Amendment (42 U.S.C. § 1983— Defendants Brownback & Allen)

II. Violation of Rights Secured by the Fourth Amendment (*Bivens*— Defendants Brownback & Allen)

III. Violation of Rights Secured by the Fourth Amendment (42 U.S.C. § 1983— Defendant Morris)

IV. Federal Tort Claims Act (Defendant United States of America)

(ECF No. 30).

Following a Pre-Motion Conference on Defendants' proposed dispositive motions, the Court issued a briefing schedule (ECF No. 50). On January 17, 2017, Defendant Morris filed a Motion to Dismiss (ECF No. 77), to which Plaintiff filed a Response (ECF No. 80) and Defendant Morris filed a Reply (ECF No. 81). On January 17, 2017, Defendants Allen, Brownback and the United States (collectively, "the Federal Defendants") also filed a "Motion to Dismiss, or, in the Alternative, for Summary Judgment" (ECF No. 71), to which Plaintiff filed a Response (ECF No. 74). The Federal Defendants filed a Reply on February 6, 2017 (ECF No. 90).

II. ANALYSIS

A. Motion Standards

Defendants move to dismiss this case under Federal Rules of Civil Procedure 12(b)(1) and (b)(6), although the Federal Defendants (ECF No. 72 at PageID.368) and Defendant Morris (ECF No. 78 at PageID.715) alternatively request summary judgment under Rule 56, to the extent the Court deems it necessary to review their arguments under Rule 56.

Federal Rule of Civil Procedure 12(b)(1) permits dismissal for a lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). "When the defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing

jurisdiction." *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) (quoting *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000)). *See also Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. *Id.* A factual attack challenges the factual existence of subject matter jurisdiction. *Id.* In the case of a factual attack, a court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings, and has the power to weigh the evidence and determine the effect of that evidence on the court's authority to hear the case. *Id.* at 759-60. *See also Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015) (describing the court's wide discretion to consider material outside the complaint in assessing the validity of its jurisdiction); *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) (same); *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 721-22 (6th Cir. 1999) (same);

Ohio Nat'l Life Ins. Co. v. U.S., 922 F.2d 320, 325 (6th Cir. 1990) (same).

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). In deciding a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations in the complaint as true. *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). To survive a motion to dismiss, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). "[T]he 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See also Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007) ("When a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment.").

Under Federal Rule of Civil Procedure 56, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The court must consider the evidence and all reasonable inferences in favor of the

nonmoving party. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013); *U.S. S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013). The moving party has the initial burden of showing the absence of a genuine issue of material fact. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010). The burden then "shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) (citing *Anderson*, 477 U.S. at 249). "A dispute is genuine if there is evidence 'upon which a reasonable jury could return a verdict in favor of the non-moving party.' A factual dispute is material only if it could affect the outcome of the suit under the governing law." *Smith v. Erie Cty. Sheriff's Dep't*, 603 F. App'x 414, 418 (6th Cir. 2015) (quoting *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006)). "The ultimate question is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Back v. Nestlé USA, Inc.*, 694 F.3d 571, 575 (6th Cir. 2012) (quoting *Anderson*, 477 U.S. at 251-52).

Appendix D

B. Discussion

1. Count I: § 1983 (Brownback & Allen)

The Federal Defendants argue that Plaintiff cannot bring his § 1983 claim in Count I against Allen and Brownback because they were acting under the color of federal law, in their capacities as federal agents (ECF No. 72 at PageID.369). Specifically, Defendant Brownback is a Special Agent employed by the FBI and assigned to its Grand Rapids Resident Agency Violent Crimes/Fugitive Safe Streets Task Force (*id.*). And Officer Allen is a federally deputized Special Deputy U.S. Marshal, also working full time with the Task Force (*id.*). The Federal Defendants emphasize that in looking for Davison, Brownback and Allen acted in an authorized FBI investigation pursuant to the federal Fugitive Felon Act, 18 U.S.C. § 1073 (*id.* at PageID.360-361).

In response, Plaintiff argues that the mere fact that Allen and Brownback may have been federal agents does not preclude § 1983 liability; instead, they are still liable under § 1983 if they acted under color of state law (ECF No. 74 at PageID.573). Plaintiff argues that Allen and Brownback were acting under color of state law because the officers were executing "a Michigan warrant for a Michigan fugitive who was wanted for a Michigan crime in Michigan" (*id.* at PageID.574). Plaintiff emphasizes that state law, MICH. COMP. LAWS § 764.15d, authorized Allen and Brownback to serve the state warrant and that the Chief of the Grand Rapids Police Department (GRPD)

made the request to look for Davison (*id.*). Conversely, Plaintiff argues that although Officer Allen was apparently federally-deputized, he was employed by the GRPD and wearing his GRPD neck badge at the time of the incident (*id.*). Last, Plaintiff argues that Agent Brownback was acting in concert with Officer Allen, and a federal agent who acts in concert with a state actor is liable under § 1983 (*id.* at PageID.575).

In reply, the Federal Defendants assert that Plaintiff has not identified a single case where a court held that § 1983 applied to a federal Task Force officer working on an open federal investigation (ECF No. 90 at PageID.964). The Federal Defendants further assert that Plaintiff has made no effort to distinguish the cases the Federal Defendants cited, cases that hold that § 1983 does not apply under these circumstances (*id.*).

The Federal Defendants' argument has merit.

42 U.S.C. § 1983 provides a remedy for a deprivation, "under color of any statute, ordinance, regulation, custom, or usage, of any State," of any right guaranteed by the Constitution and laws of the United States. "A prerequisite to the vesting of federal jurisdiction for an alleged wrong under § 1983 is the deprivation of a right guaranteed by the Constitution and laws of the United States. Such deprivation must be 'under color of law.' There must be state action." *Watson v. Kenlick Coal Co.*, 498 F.2d 1183, 1185 (6th Cir. 1974) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S.

144, 150, 152, n.7 (1970); *United States v. Price*, 383 U.S. 787, 794, n.7 (1966)). The federal government and its officials are not subject to suit under 42 U.S.C. § 1983. *Conner v. Greef*, 99 F. App'x 577, 580 (6th Cir. 2004) (citing *Ana Leon T. v. Fed. Reserve Bank*, 823 F.2d 928, 931 (6th Cir. 1987)).

The traditional definition of "acting under color of state law" requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). *See also Monroe v. Pape*, 365 U.S. 167, 187 (1961) (adopting *Classic* standard for purposes of § 1983) (overruled in part on other grounds, *Monell v. New York City Dep't of Soc. Svcs.*, 436 U.S. 658, 695-701 (1978)); *Polk Cty. v. Dodson*, 454 U.S. 312, 317-318 (1981). That is, the conduct allegedly causing the deprivation of a federal right must be "fairly attributable" to the State. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* And "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

Here, Plaintiff does not dispute that (1) Agent

Brownback is an FBI Agent; (2) Officer Allen is a Task Force Officer; (3) the FBI opened an investigation into Davison; and (4) in the course of that investigation, Agent Brownback and Officer Allen encountered King. As the Federal Defendants point out, the Sixth Circuit has repeatedly held that § 1983 does not apply to federal Task Force officers working on an open federal investigation. The fact that a state arrest warrant or state crime was involved in the exercise of duties under a cooperative federalism scheme does not change the analysis. Nor does Plaintiff provide any support for finding that either the geographical location of the federal Task Force officers or the citizenship of the fugitive sought would change the analysis. The mere exercise of duties under a cooperative federalism scheme does not qualify a person as acting "under color of state law." *Strickland on Behalf of Strickland v. Shalala*, 123 F.3d 863, 867 (6th Cir. 1997) (reversing the district court's decision and observing that "[n]o other court has extended the 'under color of state law' element of § 1983 to the implementation of a cooperative federalism program by federal officials").

For example, in *Petty v. United States*, 80 F. App'x 986 (6th Cir. 2003), a case arising from the execution of a search warrant, the Sixth Circuit held that the federally deputized local law enforcement officers were federal actors. *Id.* at 989. The Sixth Circuit pointed out that a city police officer assigned to the FBI's multi-jurisdictional task force was considered a federal employee for purposes of the Federal Tort

Claims Act (FTCA) "[b]y virtue of his assignment to an FBI-operated task force," while other city police officers involved in the same incident who were not attached to the task force were not subject to the FTCA "because they [were] not federal employees." *Id.* *See also Majors v. City of Clarksville*, 113 F. App'x 659, 659 (6th Cir. 2004) (§ 1983 claim against police officers acting as deputized task force agents of Drug Enforcement Administration [DEA] to participate in an investigation with the DEA was "in reality a *Bivens* claim"); *Ellis v. Ficano*, No. 94-1039, 1995 WL 764127, at *6 (6th Cir. Dec. 27, 1995) (table opinion) (§ 1983 did not apply to Wayne County law enforcement officers who were deputized as DEA Task Force agents executing a search warrant in conjunction with the Wayne County sheriff's department, but "the plaintiffs were left with an appropriate avenue of recovery against them under *Bivens*"); *Love v. Mosley*, No. 1:14-CV-281, 2015 WL 5749517, at *6-8 (holding § 1983 inapplicable to claim against the defendant-Michigan Department of Corrections investigator who was deputized as a U.S. Marshal and working with the U.S. Marshal's Grand Rapids Fugitive Task Force to arrest the plaintiff), adopted in 2015 WL 5749508 (W.D. Mich. 2015); *Pike v. United States*, 868 F. Supp. 2d 667, 678 (M.D. Tenn. 2012) (§ 1983 claims brought by resident of a residence searched by state and local law enforcement officers who served as members of a fugitive task force "are plainly *Bivens* claims, not § 1983 claims").

Similarly, "[t]he intergovernmental nature of a

joint state-federal program does not by itself make out a conspiracy." *Strickland*, 123 F.3d at 867 (quoting *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987)). Therefore, even if Officer Allen were acting under color of state law, there is no merit in Plaintiff's argument that Agent Brownback was conspiring with Officer Allen such that § 1983 would apply to both Defendants. There must be evidence that the federal and state officials engaged in a conspiracy or "symbiotic" venture to violate a person's rights under the Constitution or federal law, not that they merely participated in a joint state-federal program. *See Strickland, supra. Cf. Snyder v. United States*, 990 F. Supp. 2d 818, 836 (S.D. Ohio) (holding that the defendant-FBI employee is "a federal actor" and "cannot be sued under Section 1983"), aff'd, 590 F. App'x 505 (6th Cir. 2014).

Because Agent Brownback and Officer Allen acted under color of federal law, not state law, they are not subject to liability under § 1983. Accordingly, Count I is properly dismissed.

2. Count II: *Bivens* (Brownback & Allen)

Alternatively, Plaintiff alleges in Count II of his Amended Complaint that all of the actions taken by Brownback and Allen "were done while acting in their capacity as federal agents and caused the deprivation of James' clearly-established constitutional rights under the Fourth Amendment of the United States Constitution, including (a) Freedom from unreasonable seizure; (b) Freedom from unreasonable

searches; (c) Freedom from the use of excessive force; and (d) Freedom from malicious prosecution" (ECF No. 30, Amend. Compl. at ¶ 80).

The Federal Defendants argue that qualified immunity protects Allen and Brownback from Plaintiff's *Bivens* claims in Count II (ECF No. 72 at PageID.371-405). Specifically, the Federal Defendants argue that accepting Plaintiff's version of the facts as true, his claim fails all three parts of the Sixth Circuit's qualified immunity test: (1) the Officers' conduct was reasonable and did not violate Plaintiff's constitutional rights; (2) even if one assumes that Plaintiff's rights were violated, they were not clearly established at the time, i.e., every reasonable officer would not have known that the Officers' conduct was unconstitutional; and (3) the Officers did not act in an objectively unreasonable manner given the tense and rapidly developing circumstances (*id.* at PageID.357-358).

Plaintiff rejects the Federal Defendants' argument that Allen and Brownback are entitled to qualified immunity (ECF No. 74 at PageID.576). According to Plaintiff, Allen and Brownback violated his constitutional rights in illegally stopping, searching and arresting him; using excessive force; and maliciously prosecuting him (*id.* at PageID.576-589). Plaintiff asserts that these constitutional rights were clearly established at the time Allen and Brownback violated them (*id.* at PageID.589).

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme

Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). The doctrine of qualified immunity is an affirmative defense to *Bivens* claims. *Robertson v. Lucas*, 753 F.3d 606, 614-15 (6th Cir. 2014). "Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Id.* at 615 (citation omitted). The Sixth Circuit has instructed that "insubstantial claims against government employees should be resolved as early in the litigation as possible, preferably prior to broad discovery." *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015).

In *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), the Supreme Court set forth the following two-step qualified immunity analysis: a court must determine whether "the facts alleged show the officer's conduct violated a constitutional right," and the court must determine whether that right was "clearly established." *Id.* Some panels of the Sixth Circuit add a third inquiry: "whether the official's actions were objectively unreasonable in light of that clearly established right." *Abel v. Harp*, 278 F. App'x 642, 649 (6th Cir. 2008) (quoting *Risbridger v. Connelly*, 275 F.3d 565, 569 (6th Cir. 2002)). *See Sample v. Bailey*, 409 F.3d 689, 696 n.3 (6th Cir. 2005) (explaining the reasoning for the Sixth Circuit's three-step approach for evaluating qualified immunity claims). *But see Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009)

(opining that the third step is "redundant" in excessive force cases).

The court must determine whether the plaintiff's facts, as necessarily admitted by the defendants, show a violation of clearly established law. *Abel*, 278 F. App'x at 649 (citing *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999) (en banc)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201. *See also Abel*, 278 F. App'x at 649 ("If the analysis under the first step suggests that no constitutional violation transpired, then the analysis is complete, and we should grant summary judgment to the defendant.").

a. Freedom from Unreasonable Search & Seizure

The first *Bivens* claims Plaintiff alleges are a violation of his right to be free from an unreasonable search and a violation of his right to be free from an unreasonable seizure. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968), the Supreme Court held that "when a law enforcement officer has a reasonable, articulable suspicion that a person may be involved in criminal activity, he may, consistent with the Fourth Amendment, conduct a brief investigatory stop of the person." *Loza v. Mitchell*, 766 F.3d 466, 476 (6th Cir. 2014). Moreover, "[d]uring the stop,

the officer may make 'reasonable inquiries' of the person and conduct a pat-down search to check for weapons." *Id.* "Reasonable inquiries" include, for example, questions about a person's identity. *Id.; see also United States v. Hensley*, 469 U.S. 221, 229 (1985) (observing that if police have a reasonable suspicion that a person they encounter was involved in connection with a completed felony, then they may conduct a *Terry* stop to "ask questions[] or check identification"); *Hayes v. Florida*, 470 U.S. 811, 816 (1985) ("[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information."). "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). Last, an officer may seize other evidence discovered during a pat-down search for weapons as long as the search "stays within the bounds marked by *Terry*." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

The facts alleged in this case do not show that the officers' conduct violated Plaintiff's constitutional right to be free from an unreasonable search or seizure. Plaintiff argues that any suspicion that the officers had that Plaintiff had committed a crime was "neither reasonable nor grounded in specific and articulable facts" where Plaintiff and Davison "looked nothing alike" (ECF No. 74 at PageID.578-580).

However, the Court agrees with the Federal Defendants that stopping Plaintiff to confirm whether he was the fugitive they sought did not violate Plaintiff's constitutional rights (ECF No. 72 at PageID.373).

"Reasonable suspicion for an investigative stop must be considered under the totality of the circumstances, considering 'all of the information available to law enforcement officials at the time.'" *Humphrey v. Mabry*, 482 F.3d 840, 846 (6th Cir. 2007) (quoting *Feathers v. Aey*, 319 F.3d 843, 849 (6th Cir. 2003)). At the time of the investigative stop in this case, Agent Brownback and Officer Allen had two photographs of the fugitive, and they knew he was a white male, 26 years old, between 5'10" and 6'3" tall, wearing glasses, and seen in the Leonard Street area on the previous day (JSF ¶¶ 11-13). The officers identified Plaintiff, a white male in his 20s, within the same height range, wearing glasses, and walking in the same vicinity the following day (*id.* ¶¶ 14-16). Their identification, while mistaken, had a particularized and objective basis. It was more than a mere hunch. And the officers' subsequent interaction with Plaintiff provided support for their reasonable suspicion. *See, e.g., Kowolonek v. Moore*, 463 F. App'x 531, 535 (6th Cir. 2012) (holding, where the plaintiff only "generally fit" the suspect's description and the officer was unable to immediately corroborate his identity, the plaintiff's angry demeanor and active resistance also provided support for the officer's reasonable suspicion).

While the officers' identification on July 18, 2014 was mistaken, "certainty" is not "the touchstone of

reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 803-04 (1971). Rather, the reasonableness inquiry includes some "latitude for honest mistakes" that officers may make in the difficult task of finding and arresting fugitives. *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). Indeed, "[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Sample,* 409 F.3d at 696 n.3 (quoting *Saucier*, 533 U.S. at 205).

An incorrect suspicion does not necessarily mean an unreasonable suspicion. *See, e.g., United States v. Mundy*, 591 F. App'x 320, 323 (6th Cir. 2014) ("That [the officer's] suspicion of a break-in turned out to be incorrect does not negate the reasonableness of his decision to stop and investigate."); *Dorsey v. Barber*, 517 F.3d 389, 397 (6th Cir. 2008) (while "the amount of detail in the suspects' descriptions in the ['be on the lookout'] left much to be desired" and was "not definitive, the available details supported the formation of reasonable suspicion that plaintiffs were the same two young black males" sought by the sheriff's department); *Wrubel v. Bouchard*, 65 F. App'x 933, 938 (6th Cir. 2003) ("although the fact that [the victim's] description did not identify all of Wrubel's distinctive facial features would create some doubt in any reasonable person's mind as to whether Wrubel was in fact the rapist, this fact does not make it unreasonable to conclude that Wrubel was the rapist"); *Houston v. Clark Cty. Sheriff Deputy John Does 1-5*, 174 F.3d

809, 813 (6th Cir. 1999) ("Viewing the totality of the circumstances, we are convinced that all four officers reasonably believed that a crime occurred at Chuck's and possessed a reasonable suspicion (to be sure, a mistaken one) that the occupants of Houston's car were involved in that crime.").

Neither does the seizure of the wallet, a fact alleged by Plaintiff (JSF ¶ 25), require a finding that a constitutional violation transpired. Assuming that Officer Allen removed Plaintiff's wallet, he could properly do so as part of the protective pat-down permitted by *Terry*. *See Loza,* 766 F.3d at 476. The Supreme Court recognized in *Terry* that "the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams v. Williams*, 407 U.S. 143, 146 (1972). Nothing in Plaintiff's allegations supports the proposition that Allen's "search" was any broader than necessary to ensure that Plaintiff did not have access to a weapon. *See, e.g., United States v. Brown*, 310 F. App'x 776, 781 (6th Cir. 2009) (finding no Fourth Amendment violation where officer removed wallet from the suspect's pocket out of concern for her own safety).

In sum, Plaintiff's allegations, taken as true, do not set forth a constitutional violation of Plaintiff's right to be free from an unreasonable search and seizure. Accordingly, the Court holds that Officer Allen and Agent Brownback are entitled to qualified immunity from these *Bivens* claims in Count II.

b. Freedom from Use of Excessive Force

The Court turns next to Plaintiff's *Bivens* claim that Brownback and Allen violated his right to be free from excessive force. "[C]laims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Important to resolution of the issue in the case at bar is the instruction that the court must evaluate the excessive-force claim at issue by assuming "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Abel*, 278 F. App'x at 649-52 (quoting *Graham*, 490 U.S. at 396); *Fox v. DeSoto*, 489 F.3d 227, 236 (6th Cir. 2007) (same).

In applying the reasonableness calculus, the court considers the following three factors: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Abel*, 278 F. App'x at 650; *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006); *Dunigan v. Noble*, 390 F.3d 486, 492 (6th Cir. 2004). Despite these three discrete factors, the jurisprudence on excessive-force claims has consistently maintained that "the test of reasonableness under the Fourth Amendment

is not capable of precise definition or mechanical application . . . its proper application requires careful attention to the facts and circumstances of each particular case." *Abel, supra* (quoting *Graham*, 490 U.S. at 396).

Here, the "severity of the crime at issue"—home invasion—is a factor that weighs in favor of a finding of reasonableness on the part of Defendants Allen and Brownback. Home invasion is a felony crime under Michigan law, punishable by imprisonment up to 20 years. MICH. COMP. LAWS § 750.110a.

The second factor in the reasonableness calculus weighs against a finding of reasonableness on the part of Defendants Allen and Brownback, but only to the extent that Plaintiff did not pose an *immediate* threat to the safety of the officers or others. Defendants Allen and Brownback initiated the investigative stop, making a calculated—and mistaken—judgment about whether to stop Plaintiff and, indeed, the manner in which they stopped him.

However, the third factor—whether Plaintiff actively resisted or attempted to evade arrest—strongly weighs in favor of a finding of reasonableness on the part of Defendants Allen and Brownback. Unlike the plaintiff in *Abel, supra,* who did not actively resist arrest but instead adopted a passive position and "[b]alled up in a fetal position to protect [his] face, chest, and stomach," 278 F. App'x at 651-52, Plaintiff does not allege that he was a passive participant. Rather, Plaintiff admits that he attempted to run and

that he bit Officer Allen in the arm that was around Plaintiff's neck (JSF ¶¶ 27-30).

Plaintiff thought Allen and Brownback were mugging him and believed he was acting in self-defense, but the reasonableness of Allen and Brownback's particular use of force is not judged from the perspective of the victim. Rather, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. *Graham*, 490 U.S at 396. The reasonableness calculus "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002). From Allen and Brownback's perspective, it was reasonable of them to interpret Plaintiff's attempt to run and biting as an escalation of violence and to move "quickly and aggressively to end the confrontation." *See Lyons v. City of Xenia*, 417 F.3d 565, 578 (6th Cir. 2005). In *Bouggess v. Mattingly*, 482 F.3d 886, 891 (6th Cir. 2007), the Sixth Circuit explained that "resisting arrest by wrestling oneself free from officers and running away would justify use of some force to restrain the suspect." Likewise, in *Lyons*, 417 F.3d at 577-78, the Sixth Circuit concluded that no constitutional violation was established where the officer tackled a suspect who resisted arrest. And in *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002), where the plaintiff admitted that he "twisted and turned some" when the officers tried to handcuff him, the Sixth Circuit found the officers' use of force reasonable.

In sum, the Court determines that the factors to be considered in the reasonableness analysis require a finding that no constitutional violation transpired. Accordingly, the Court holds that Officer Allen and Agent Brownback are also entitled to qualified immunity from Plaintiff's *Bivens* excessive-force claim in Count II.

c. Freedom from Malicious Prosecution

The parties agree that, assuming a *Bivens* claim of malicious prosecution exists, such a claim would require Plaintiff to prove "(1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was a lack of probable cause for the prosecution; (3) as a consequence of the prosecution, the plaintiff suffered a deprivation of liberty, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor" (ECF No. 72 at PageID.397; ECF No. 74 at PageID.587). *Buchanan v. Metz*, 647 F. App'x 659, 665 (6th Cir. 2016). *See also Johnson*, 790 F.3d at 654 (delineating elements).

Here, Plaintiff does not include in Count II any specific factual allegations supporting his *Bivens* malicious prosecution claim. In an earlier paragraph in his Amended Complaint, he alleges the following:

> 68. Owing to the false and misleading statements of Allen and Brownback and the lack of video evidence to the contrary due to the actions of Morris, the prosecutor proceeded

> with charges against James and tried him for assaulting a police officer and causing injury (Allen), assaulting a police officer (Brownback), and assault with a dangerous weapon (for the handcuffs that Allen or Brownback was able to clasp to one of James's wrists while James was trying to escape).

ECF No. 30 at PageID.117, Amended Compl. ¶ 68. This conclusory allegation against Officer Allen and Agent Brownback does not state a plausible malicious prosecution claim under Rule 12(b)(6). The Court agrees with the Federal Defendants that this paragraph, which does not identify the statements at issue or their speakers, is so non-specific as to make it impossible to discern the basis for Plaintiff's claim (ECF No. 72 at PageID.397-398). The Court cannot discern upon which statements Plaintiff is relying, let alone their materiality to the probable-cause determination. In short, Plaintiff's *Bivens* malicious-prosecution claim in Count II fails to present enough facts to state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 557, 570. The allegations are insufficient to meet the notice pleading requirements of Federal Rule of Civil Procedure 8(a) and warrant further discovery proceedings. Accordingly, the *Bivens* malicious-prosecution claim in Count II will be dismissed.

3. Count III: § 1983 (Morris)

In Count III, Plaintiff alleges that "[a]ll of the actions taken by Morris and referred to in the preceding

allegations were done while acting under color of Michigan law and had the effect of depriving James of his clearly-established constitutional rights under the Fourth Amendment of the United States Constitution, including his freedom from malicious prosecution" (ECF No. 30 at PageID.120, Amend. Compl. ¶ 86). In the preceding allegations, Plaintiff alleges, in pertinent part, the following:

> 57. Morris ordered several bystanders to delete any video of the event, telling them: No, no, no, we got undercover officers there. No pictures. Delete it. Delete it. It's for the safety of the officers. Everybody has cameras . . . All we used to do was tell the story; we didn't have a picture to tell the story with, right? Did you delete it? . . . We don't need no pictures.
>
> 58. Morris confirmed that at least two bystanders deleted video of the event.
>
> 59. Because of Morris's actions, no video of the actual struggle between Allen and Brownback and James was ever discovered; only the aftermath remains.
>
> * * *
>
> 68. Owing to the false and misleading statements of Allen and Brownback and the lack of video evidence to the contrary due to the actions of Morris, the prosecutor proceeded

> with charges against James and tried him for assaulting a police officer and causing injury (Allen), assaulting a police officer (Brownback), and assault with a dangerous weapon (for the handcuffs that Allen or Brownback was able to clasp to one of James's wrists while James was trying to escape).

(ECF No. 30 at PageID.114 & 117, Amended Compl. ¶¶ 57-59 & 68).

Defendant Morris argues that she is entitled to dismissal of Count III against her under Federal Rule of Civil Procedure 12(b)(6) because Plaintiff fails to state a malicious prosecution claim (ECF No. 78 at PageID.712). Specifically, Defendant Morris argues that Plaintiff's complaint fails to allege that she "made, influenced, or participated" in the decision to prosecute (*id.* at PageID.712-715). Defendant Morris argues that at best, Plaintiff's allegation is that her on-scene statements to delete video "influenced" the decision to prosecute by depriving the prosecutor of additional evidence to consider when making the charging decision (ECF No. 78 at PageID.713-714). Morris argues that "[t]hat allegation is nothing more than the passive or neutral activity that fails to pass Sixth Circuit muster" (*id.* at PageID.714). Defendant Morris argues that "the speculated inconsistencies that may have arisen from undiscovered cellphone video cannot reasonably compel the conclusion urged by King, namely, that probable cause to prosecute had ceased to exist, or never existed at all" (*id.* at PageID.715).

Alternatively, Defendant Morris argues that she is entitled to summary judgment on the basis of qualified immunity where Plaintiff fails to show that she personally violated his constitutional rights or to plead or show that she had some reason to doubt the victim eyewitness identification of him as the assailant (*id.* at PageID.715-718).

In response, Plaintiff argues that he sufficiently alleged in his Amended Complaint that Defendant Morris influenced the decision to prosecute him by actively and intentionally destroying video evidence of his altercation with Allen and Brownback (ECF No. 80 at PageID.749). Plaintiff also argues that whether Morris influenced the decision to prosecute James is itself a material issue of fact that precludes summary judgment (*id.* at PageID.750). According to Plaintiff, there is nothing "passive or neutral" about Morris' actions on the day in question; rather, she went from person to person at the scene and ordered them to delete video and photographic evidence (*id.* at PageID.751).

Defendant Morris' argument entitles her to dismissal.

To prevail on his § 1983 claim in Count III, Plaintiff must establish that Defendant Morris was acting under color of state law and deprived him of a right secured by the Constitution or the laws of the United States. Defendant Morris does not dispute that she was acting under color of state law, nor does she dispute that malicious prosecution constitutes a

constitutional deprivation in violation of the Fourth Amendment. And the parties generally agree on the elements of a malicious prosecution claim (ECF No. 78 at PageID.712; ECF No. 80 at PageID.749), as set forth *supra*. The parties' dispute centers on whether these unique facts, as set forth in Plaintiff's allegations, state a plausible claim for malicious prosecution, exposing Defendant Morris to liability under 42 U.S.C. § 1983. As there is no dispute that Plaintiff was deprived of his liberty as a result of criminal proceedings that were resolved in his favor, the parties focus on the first and second elements of the claim: whether Defendant Morris "made, influenced, or participated" in the decision to prosecute Plaintiff and whether there was a lack of probable cause for the prosecution.

As to the first element, the parties agree that what it means to "influence" a prosecution is not clearly established law (ECF No. 80 at PageID.749; ECF No. 81 at PageID.840-842). The Sixth Circuit observed that "[t]here is very little case law in this circuit discussing precisely what role an investigating officer must play in initiating a prosecution such that liability for malicious prosecution is warranted . . ." *Sykes v. Anderson*, 625 F.3d 294, 311 (6th Cir. 2010). The Sixth Circuit further noted that "[w]hether an officer influenced . . . the decision to prosecute hinges on the degree of the officer's involvement and the nature of the officer's actions." *Id.* at 311, n.9. "The totality of the circumstances informs this fact determination." *Id.*

Appendix D

Accepting all well-pleaded factual allegations therein as true, the Court determines that Plaintiff sufficiently alleged facts giving rise to a reasonable inference that Defendant Morris' actions "influenced" the prosecutor's decision to prosecute. Specifically, Plaintiff alleges that Defendant Morris' intentional destruction of video and photographic evidence surrounding Plaintiff's struggle with Officer Allen and Agent Brownback "influenced" the institution of legal process against Plaintiff. Although Morris asserts that the allegation is "pure speculation," the Court agrees that it is reasonable to infer that the decision to prosecute would have been altered had Defendant Morris not failed to preserve a video showing that Plaintiff was justified in assaulting Officer Allen and Agent Brownback. *See, e.g., Petrishe v. Tenison*, No. 10 C 7950, 2013 WL 5645689, at *4 (N.D. Ill. Oct. 15, 2013) ("Although Petrishe may have difficulty actually proving the contents of the now-erased video, e.g., the existence of evidence favorable to the accused, the court finds that Petrishe has pleaded sufficient factual detail to put Defendants on notice of the factual basis for the claim pending against them and to plausibly suggest the existence and suppression of exculpatory or impeaching evidence [six seconds of a taser video] that would have altered the decision to go to trial.").

However, even assuming Plaintiff's allegations sufficiently implicate Defendant Morris' actions in the decision to prosecute, Plaintiff's allegations do not sufficiently allege an absence or lack of probable cause

for the criminal proceeding against him. In *Fox*, 489 F.3d at 237, the Sixth Circuit indicated that while the contours of a § 1983-malicious claim may be uncertain, "[w]hat is certain, however, is that such a claim fails when there was probable cause to prosecute." Probable cause to initiate a criminal prosecution exists where "facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe the accused was guilty of the crime charged." *Webb v. United States*, 789 F.3d 647, 660 (6th Cir. 2015) (quoting *MacDermid v. Discover Fin. Servs.*, 342 F. App'x 138, 146 (6th Cir. 2009)).

Here, Plaintiff's Amended Complaint does not address "probable cause," let alone sufficiently allege it was lacking. Conversely, Plaintiff acknowledges that Officer Allen and Agent Brownback were wearing lanyards with badges and admits fleeing from, resisting, fighting with, and eventually biting a law-enforcement officer (Amended Compl. ¶¶ 25, 43 & 48). In short, Plaintiff has not stated facts demonstrating that the facts and circumstances were insufficient to lead an ordinarily prudent person to believe Plaintiff was guilty of the crimes charged. *See* MICH. COMP. LAWS §§ 750.81d(l) (resisting and obstructing a police officer), 750.81d(2) (resisting and obstructing a police officer causing injury), and 750.82 (felonious assault). Accordingly, the Court will grant Defendant Morris' motion and dismiss Count III. *See McKinley v. City of Mansfield*, 404 F.3d 418, 444 (6th Cir. 2005) (affirming the trial court's decision finding that no constitutional

violation occurred and therefore seeing no need to proceed to the issue of qualified immunity).

4. Count IV: FTCA (USA)

In Count IV, under the Federal Tort Claims Act, Plaintiff alleges that the actions of Agent Brownback and Officer Allen amount to the following torts: (1) Assault, (2) Battery, (3) False Arrest, (4) False Imprisonment, (5) Malicious Prosecution and (6) Intentional Infliction of Emotional Distress (ECF No. 30 at PageID.121, Amended Compl. ¶ 96). Plaintiff alleges that their actions were "intentional, malicious, undertaken in bad faith, and/or in gross and reckless disregard of James's constitutional rights" (*id.* ¶ 97).

The Federal Defendants argue that the United States is entitled to dismissal of each of the six tort claims delineated in Count IV against it because Michigan law bars these claims where law enforcement officers act in good faith (ECF No. 72 at PageID.405-409). The Federal Defendants also argue that the tort claims fail because the officers were acting within the law (*id.* at PageID.410-413). Last, the Federal Defendants argue that Plaintiff's FTCA claims based on Officer Allen's conduct must be dismissed because Plaintiff failed to exhaust his administrative remedies for this claim where Plaintiff's administrative claim only sought relief under the FTCA based on Agent Brownback's actions (*id.* at PageID.414-415).

In response, Plaintiff argues that Michigan law does not provide immunity under the FTCA for either Allen's or Brownback's actions (ECF No. 74 at PageID.590-593). Further, Plaintiff argues that even if Michigan governmental immunity applies, it only immunizes actions taken in good faith, and the officers did not act in good faith when they committed multiple torts against Plaintiff (*id.* at PageID.593-594). Plaintiff also argues that questions of fact preclude summary judgment on each of his tort claims (*id.* at PageID.594-595). Last, Plaintiff rejects the Federal Defendants' argument that he did not exhaust his administrative remedies as to Allen (*id.* at PageID.595). According to Plaintiff, the language in the form he submitted makes clear that his claim covered the actions of both Brownback and Allen (*id.* at PageID.596-597).

The Federal Defendants' argument has merit.

The United States may be liable under the FTCA for certain torts committed by federal employees, both individually and collectively. *See* 28 U.S.C. § 2671 *et seq*. Although generally exempted from liability under the FTCA for intentional torts, the United States remains liable for claims arising from certain intentional torts committed by investigative or law enforcement officers, including assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. 28 U.S.C. § 2680(h). The FTCA requires courts to apply the substantive law of the place where the event occurred. 28 U.S.C. § 1346(b)(1).

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In *Odom v. Wayne County*, 760 N.W.2d 217, 228 (Mich. 2008), the Michigan Supreme Court stated that the proper method for determining whether governmental immunity applies to intentional torts, such as assault and battery, is to apply the test set forth in *Ross v. Consumers Power Co.*, 363 N.W.2d 641, 667-68 (Mich. 1984). Under the *Ross* test, a governmental employee is immune from liability from intentional torts if he can establish that (1) the challenged actions were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority; (2) the acts were undertaken in good faith, or were not undertaken with malice; and (3) the acts were discretionary, as opposed to ministerial. *Odom*, 760 N.W.2d at 228.

In *Valdez v. United States*, 58 F. Supp. 3d 795 (W.D. Mich. 2014) (Jonker, J.), this Court held that the United States retains the benefit of the same state law immunities available to the employees. The Court determined that this reading of the statute "measures the liability of the United States by the liability that would apply to its individual employee if that employee were sued in state court on the state tort law." *Id.* at 828. "To read [the FTCA] otherwise would lead to the incongruous result of the United States opening itself to liability that would never be imposed on the individual employee as an individual defendant under state law." *Id.* at 829. *See also Washington v. Drug Enforcement Admin.*, 183 F.3d 868, 874 (8th Cir. 1999) (applying Missouri law on police

use of force during searches); *Jackson v. United States*, 77 F. Supp. 2d 709, 715 (D. Md. 1999) (applying actual malice requirement of Maryland law); *McElroy v. United States*, 861 F. Supp. 585, 594-96 (W.D. Tex. 1994) ("When determining whether the conduct of law enforcement officers constituted assault, false imprisonment, or false arrest under the FTCA, the United States may invoke any defenses available to individual law enforcement officers under [state] law"); *Nash v. United States*, 897 F. Supp. 180, 182-83 (E.D. Pa. 1994) (applying Pennsylvania law for use of force by task force officers). The Court agrees that the United States is entitled to the same Michigan governmental immunity from intentional torts that Agent Brownback and Officer Allen would have had under state law in this case.

Applying the *Ross* test here, Plaintiff does not dispute that the Task Force officers' conduct was in the course of their employment and under their authority as Task Force officers. Nor does Plaintiff dispute that the acts at issue—Plaintiff's stop, arrest and prosecution—were discretionary, not ministerial, acts. The only prong of the *Ross* test that Plaintiff challenges is whether the officers acted in "good faith." Plaintiff asserts that the officers acted in bad faith because they unlawfully "stopped," "arrested" and "beat" him (ECF No. 74 at PageID.594).

The Michigan Supreme Court defines a lack of good faith as "malicious intent, capricious action or corrupt conduct" or "willful and corrupt misconduct." *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 784 (6th

Cir. 2015) (quoting *Odom, supra*). "Unlike qualified immunity under federal law, which uses an objective standard, '[t]he good-faith element of the *Ross* test is subjective in nature.'" *Bletz v. Gribble*, 641 F.3d 743, 757 (6th Cir. 2011) (citation omitted). *See also Brown v. Lewis*, 779 F.3d 401, 420 (6th Cir. 2015) ("Michigan state law imposes a subjective test for governmental immunity for intentional torts, based on the officials' state of mind, in contrast to the objective test for federal qualified immunity."). Hence, "determining good faith is not the same as analyzing whether a defendant's conduct was objectively reasonable," although "evidence useful to determining objective reasonableness can also serve to evaluate good faith." *Scozzari v. Miedzianowski*, 454 F. App'x 455, 467 (6th Cir. 2012).

Here, the parties' undisputed facts support the finding that the Task Force officers' actions were not undertaken with the malice required under Michigan law. Rather, even Plaintiff's stated reason for the officers' stop was the officers' determination that Plaintiff was the fugitive, and the officers' motive for restraining Plaintiff was to secure him and ensure their safety after Plaintiff admittedly attempted to flee and bit Officer Allen. These facts do not indicate that the officers "demonstrated a reckless indifference to the common dictates of humanity." *Odom*, 760 N.W.2d at 225. While the officers' identification was mistaken, and Plaintiff's perception of the incident was vastly different, the officer who can show that he had a good-faith belief "is entitled to the protections of governmental immunity regardless of whether he was

correct in that belief." *Rucinski v. Cty. of Oakland*, 655 F. App'x 338, 343-44 (6th Cir. 2016) (quoting *Latits v. Phillips*, 826 N.W.2d 190, 195 (Mich. Ct. App. 2012)). Hence, assuming arguendo that Plaintiff preserved his FTCA claims as to both Officer Allen and Agent Brownback, the United States is entitled to dismissal of the claims because (1) the challenged actions were undertaken during the course of employment and the employees were acting within the scope of their authority; (2) the acts were undertaken in good faith, or were not undertaken with malice; and (3) the acts were discretionary, as opposed to ministerial. *See Odom*, 760 N.W.2d at 228.

Even if the United States is not entitled to immunity under the FTCA in this case, Count IV is also properly dismissed for failure to state a claim, for the reasons previously stated and for the reasons stated more fully by the Federal Defendants (ECF No. 72 at PageID.410-413; ECF No. 90 at PageID.971-973). Specifically, Plaintiff's claims for assault and battery are properly dismissed where the Task Force officers used reasonable force in subduing Plaintiff. Plaintiff's false-imprisonment, false-arrest and malicious prosecution claims are properly dismissed where probable cause existed. And Plaintiff's intentional-infliction-of-emotional-distress claim is properly dismissed where the Task Force officers acted within their authority.

In sum, Michigan law bars Plaintiff's FTCA claims, either on governmental immunity grounds or for failure to state a claim. Accordingly, Count IV is dismissed.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants Allen, Brownback and the United States' Motion to Dismiss, or in the Alternative for Summary Judgment (ECF No. 71) is GRANTED.

IT IS FURTHER ORDERED that Defendant Morris' Motion to Dismiss (ECF No. 77) is GRANTED.

Because this Opinion and Order resolves all pending claims in this matter, a corresponding Judgment will also enter. *See* FED. R. CIV. P. 58

Dated: August 24, 2017

/s/ Janet T. Neff
JANET T. NEFF
United States
District Judge

Appendix E

United States Court of Appeals
for the Sixth Circuit

No. 17-2101

JAMES KING,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.
Defendants,

DOUGLAS BROWNBACK; TODD ALLEN,
Defendants-Appellees.

ORDER

December 19, 2022

BEFORE: BOGGS, CLAY, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk