1

2 UNITED STATES COURT OF APPEALS

3 FOR THE SECOND CIRCUIT

4 August Term 2012

5 (Argued: April 8, 2013 Decided: June 21, 2013)

6 Docket No. 12-4268-cv

7 ---x

8 MONSERRATE VIDRO,

9 Plaintiff-Appellant,

10 -- v. --

11 UNITED STATES OF AMERICA,

12 Defendant-Appellee.

13 ---x

14 B e f o r e : WALKER, CHIN, Circuit Judges, RESTANI,[1] Judge.

15 Monserrate Vidro appeals from the October 18, 2012 judgment of
16 the District Court for the District of Connecticut (Underhill,
17 Judge) granting the government's motion to dismiss his FTCA suit at
18 the pleading stage. Vidro alleged that two federal law enforcement
19 officers maliciously and falsely testified before a federal grand
20 jury about his involvement in a drug conspiracy, causing the
21 tortious intentional infliction of emotional distress. However,
22 because Connecticut would recognize an absolute privilege for grand
23 jury witness testimony and the officers would not be liable in tort

[1] The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

1 for their statements, the United States is not vicariously liable

2 under the FTCA. AFFIRMED.

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4 JOHN R. WILLIAMS, John R. Williams
5 and Associates LLC, 51 Elm St., New
6 Haven, CT, for Plaintiff-Appellant.
7
8 SANDRA S. GLOVER (Alan M. Soloway,
9 on the brief), Assistant United
10 States Attorneys, of counsel to
11 David B. Fein, United States
12 Attorney, District of Connecticut,
13 New Haven, CT, for Defendant-
14 Appellee.
15

16 JOHN M. WALKER, JR., Circuit Judge:

17 In the October 18, 2012 judgment of the District Court for the
18 District of Connecticut (Underhill, Judge), Monserrate Vidro's
19 Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., suit
20 was dismissed at the pleading stage.[2] Vidro had alleged that two
21 federal law enforcement officers maliciously and falsely testified
22 before a federal grand jury about his involvement in a drug
23 conspiracy, causing the tortious intentional infliction of
24 emotional distress.

25 We must address two questions of first impression in this
26 circuit: (1) whether, in FTCA suits, the United States may assert
27 all defenses available to private persons; and (2) whether grand
28 jury witness testimony is absolutely privileged under Connecticut

[2] Under the FTCA, the United States assumes responsibility for government employees' state law torts. See, e.g., Devlin v. United States, 352 F.3d 525, 532 (2d Cir. 2003).

law. Although our analysis is different from that of the district court, we concur with its ultimate conclusion that, if its agents would enjoy immunity from suit under state tort law, the United States may also assert immunity in FTCA actions. Further, because Connecticut would recognize an absolute privilege for grand jury witness testimony, the United States is not vicariously liable under the FTCA for the officers' statements before the federal grand jury. The district court's order of dismissal is affirmed.

BACKGROUND

In his September 6, 2011 federal complaint for the state tort of intentional infliction of emotional distress, Vidro alleges that two law enforcement officers intentionally and falsely testified before a federal grand jury about his involvement in a drug conspiracy. Vidro further alleges that this resulted in his subsequent indictment, four-month detention, and attendant injuries. Specifically, Vidro states that he "suffered imprisonment, loss of liberty, public humiliation and disgrace, severe emotional distress and economic losses." J.A. 10-11.

On December 6, the government moved to dismiss the complaint on the grounds that it should be construed as a claim for false imprisonment and that it failed to make out such a claim. Vidro opposed the motion, arguing that the complaint properly stated a claim for intentional infliction of emotional distress. The government then filed a supplemental memorandum noting that the

1 Supreme Court's recent decision in Rehberg v. Paulk, 132 S. Ct.
2 1497 (2012), might be relevant insofar as it discussed
3 justifications for grand jury witness immunity. At the district
4 court's request, the parties then filed supplemental memoranda
5 addressing the meaning of the FTCA phrase "judicial or legislative
6 immunity." 28 U.S.C. § 2674.

7 On September 26, 2012, the district court granted the
8 government's motion to dismiss the complaint on the basis that the
9 United States was immune from suit. After finding § 2674 ambiguous
10 and examining the limited legislative history, the district court
11 concluded that the provision was meant to preserve all common law
12 protections for officers. It further found that Connecticut common
13 law implicitly recognizes absolute immunity for grand jury witness
14 testimony and that the United States could therefore not be held
15 liable for the officers' statements. This appeal followed.

16 **DISCUSSION**

17 We review a district court's grant of a motion to dismiss on
18 the pleadings de novo, accept all factual claims in the complaint
19 as true, and draw all reasonable inferences in the plaintiff's
20 favor. Anschutz Corp. v. Merrill Lynch & Co., 690 F.3d 98, 107 (2d
21 Cir. 2012).

22 Vidro first argues that § 2674 is not ambiguous. In relevant
23 part, the debated provision states:

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

28 U.S.C. § 2674. The district court determined that the phrase "judicial or legislative immunity" was ambiguous, as it might refer either to judges' and legislators' common law immunity from suit or to any judicially or legislatively created immunities.

If § 2674 is read in the context of the entire statute, however, there is no need to address the potential ambiguity of the debated phrase. Through the FTCA, the United States has waived its sovereign immunity for certain actions of its employees "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. § 1346(b)(1) (providing for district court jurisdiction over the United States in tort actions). The United States is liable for these tort claims "in the same manner and to the same extent as a private individual under like circumstances." Id. § 2674.

As immunities and defenses are defined by the same body of law that creates the cause of action, the defenses available to the United States in FTCA suits are those that would be available to a private person under the relevant state law. See id. ("[T]he United States shall be entitled to assert . . . any other defenses to

which [it] is entitled."); Napolitano v. Flynn, 949 F.2d 617, 621 (2d Cir. 1991) (recognizing that state law defining a cause of action must also be the law defining the corresponding immunities and defenses); see also In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 668 F.3d 281, 288 (5th Cir. 2012). Therefore, although we disagree with the district court about the need to evaluate the possible ambiguity of § 2674, we affirm its ultimate conclusion: In FTCA suits, the United States may assert common law defenses available to private individuals under relevant state law.

Vidro next asserts that Connecticut would not grant grand jury witness testimony absolute immunity. There is no directly relevant state case law, largely because grand juries as commonly understood were abolished in Connecticut by a constitutional amendment that took effect in November 1983. See Connecticut v. Sanabria, 474 A.2d 760, 774-75 (Conn. 1984). Vidro also argues that, at the very least, this issue should be certified to the Connecticut Supreme Court.

We nonetheless conclude that, were Connecticut courts to consider the matter, they would find statements made under oath by federal grand jury witnesses to be privileged. Connecticut courts have long held that "[p]articipants in a judicial process must be able to testify . . . without being hampered by fear of actions seeking damages for statements made . . . in the course of the judicial proceeding." Gallo v. Barile, 935 A.2d 103, 108 (Conn.

1 2007) (quotation marks and alterations omitted). This immunity is
2 based on Connecticut's conclusion that "the public interest in
3 having people speak freely outweighs the risk that individuals will
4 occasionally abuse the privilege by making false and malicious
5 statements." Id. Accordingly, Connecticut courts have long
6 recognized an absolute privilege for witness testimony in judicial
7 or quasi-judicial proceedings, provided that the statements are
8 relevant to the subject of the controversy. See, e.g., id.
9 (applying this protection to claims of intentional infliction of
10 emotional distress); Simms v. Seaman, --- A.3d ---, No. 18839, 2013
11 WL 1943336, at *6-7 (Conn. May 21, 2013) (tracing the historical
12 development of this privilege in Connecticut law).

13 "Judicial proceedings" have been defined to include "any
14 hearing before a tribunal which performs a judicial function, ex
15 parte or otherwise, and whether the hearing is public or not."
16 Craig v. Stafford Constr., Inc., 856 A.2d 372, 376 (Conn. 2004)
17 (quotation marks omitted). Although what constitutes a judicial or
18 quasi-judicial proceeding has not been defined with precision, it
19 has been interpreted broadly. See id. at 376-77 (observing that
20 such proceedings include "lunacy, bankruptcy, or naturalization
21 proceedings, and an election contest [and] extends also to the
22 proceedings of many administrative officers, such as boards and
23 commissions, so far as they have powers of discretion in applying
24 the law to the facts which are regarded as judicial or quasi-

judicial, in character" (quotation marks omitted)). If a proceeding is not clearly judicial in nature, the Connecticut Supreme Court has outlined factors relevant to determining whether it is quasi-judicial:

> These factors include whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties.

Id. at 377 (quotation marks omitted). Whether a statement is taken under oath is also relevant to whether it deserves an absolute privilege. See id.; Chadha v. Charlotte Hungerford Hosp., 865 A.2d 1163, 1171-72 (Conn. 2005) (discussing whether, under specific circumstances, affidavits qualify for the privilege).

Grand jury proceedings are unquestionably judicial or quasi-judicial in nature, see Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 240 (2d Cir. 1996) (describing statements made to a grand jury as statements made in a judicial proceeding), and witness testimony under oath in such proceedings is certainly relevant to the tribunal's fact-finding process. Accordingly, we can conclude with confidence that Connecticut courts would extend the state's longstanding and well-established protections of statements made in such proceedings to grand jury witness testimony. As "sufficient precedents exist for us to make a determination," there is no need

1 to certify this question to the Connecticut Supreme Court. Amerex
2 Grp., Inc. v. Lexington Ins. Co., 678 F.3d 193, 200 (2d Cir. 2012)
3 (quotation marks and alteration omitted).

4 Our conclusion is bolstered by the fact that the public policy
5 justifications underlying Connecticut's absolute immunity defense
6 for statements made in judicial and quasi-judicial proceedings
7 apply to federal grand jury testimony. See Gallo, 935 A.2d at 111
8 ("Ultimately, . . . the issue [in evaluating whether certain
9 statements deserve absolute immunity] is whether the public
10 interest is advanced."). As discussed in Rehberg, 132 S. Ct. 1497,
11 there are strong policy justifications for absolute immunity for
12 witness testimony in grand jury proceedings. First, "a witness'
13 fear of retaliatory litigation may deprive the tribunal of critical
14 evidence." Id. at 1505. Second, "the possibility of civil liability
15 [is] not needed to deter false testimony . . . because other
16 sanctions . . . provid[e] a sufficient deterrent." Id.
17 Additionally, the public's interest in preserving grand jury
18 secrecy counsels against anything less than absolute immunity for
19 witness testimony, as the jurors' identities might be disclosed in
20 the course of discovery in subsequent suits. Id. at 1509.

21 Based on Gallo, 935 A.2d 103, in which the Connecticut Supreme
22 Court found that witness statements to an investigating police
23 officer received only qualified immunity, Vidro argues that
24 Connecticut courts are restricting the privilege. We disagree.

1 Under Connecticut law, statements with an attenuated
2 connection to judicial proceedings receive only qualified immunity
3 if they do not affect the fact-finding process of a tribunal. See
4 Petyan v. Ellis, 510 A.2d 1337, 1341-42 (Conn. 1986) (noting that
5 police officers sued for false arrests or "complaining witnesses"
6 who initiate prosecutions are entitled only to qualified immunity).
7 Accordingly, the Gallo court's holding was grounded in its
8 determination that the public policy justifications for granting
9 absolute immunity to statements made in judicial proceedings did
10 not apply with equal force to statements made in the course of a
11 police investigation. 935 A.2d at 111 ("There is no benefit to
12 society or the administration of justice in protecting those who
13 make intentionally false and malicious defamatory statements to the
14 police."); see also id. at 112-13 (distinguishing Craig, 856 A.2d
15 372). As described above, however, there are significantly stronger
16 policy reasons for protecting grand jury testimony. See Rehberg,
17 132 S. Ct. at 1507-09 (reasoning that the customary grant of only
18 qualified immunity to "complaining witnesses" is irrelevant in the
19 federal grand jury context).

20 Furthermore, as evidenced by the Connecticut Supreme Court's
21 recent decision in Simms, 2013 WL 1943336 (holding that attorneys
22 enjoy absolute immunity from suits for fraud or intentional
23 infliction of emotional distress based on their conduct during

1 judicial proceedings), Connecticut courts show no intention of
2 restricting the privilege's traditionally broad scope.

3 **CONCLUSION**

4 For the foregoing reasons, the district court's dismissal of
5 Vidro's complaint is AFFIRMED.