

1 TONY WEST  
Assistant Attorney General  
2 Civil Division

3 C. SALVATORE D’ALESSIO, JR.  
Acting Director, Torts Branch  
4 Civil Division

5 ANDREA W. McCARTHY  
Senior Trial Counsel  
6 Civil Division

7 JAMES G. BARTOLOTTA  
KELLY HEIDRICH  
8 Trial Attorneys  
Civil Division  
9 United States Department of Justice  
P.O. Box 7146  
10 Washington, DC 20044  
[james.bartolotto@usdoj.gov](mailto:james.bartolotto@usdoj.gov)  
11 Tel: 202-616-4174  
Fax: 202-616-4314

12 *Attorneys for the Defendant United States*

13  
14 **IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

15  
16 JESSE DUPRIS and JEREMY REED,

17 Plaintiffs,

18 v.

19 SELANHONGVA McDONALD, *et al.*,

20 Defendants.

No. CV-08-08132-PCT-PGR

No. CV-08-08133-PCT-PGR  
(Consolidated)

21  
22 **DEFENDANT UNITED STATES’ MOTION FOR SUMMARY JUDGMENT**  
23 **AS TO PLAINTIFFS’ FTCA CLAIMS**  
24 **WITH INCORPORATED MEMORANDUM IN SUPPORT**  
25  
26  
27  
28

1 Defendant United States of America respectfully moves the Court pursuant to Fed.  
2 R. Civ. P. 56 and LRCiv 56.1 for summary judgment as a matter of law on Plaintiffs'  
3 Federal Tort Claims Act (FTCA) claims. Plaintiffs' FTCA claims should be dismissed  
4 because (1) the FTCA's discretionary function exception bars them, (2) Arizona Revised  
5 Statute (A.R.S.) § 13-3620 bars them, (3) they fail to meet the necessary elements, and  
6 (4) probable cause existed at the time. This Motion is supported by the following  
7 Memorandum and the Federal Defendants' Statement of Material Facts, filed con-  
8 currently.

### 9 INTRODUCTION

10 Plaintiffs sue two tribal police officers of the White Mountain Apache Tribe  
11 (WMAT) and four Bureau of Indian Affairs (BIA) agents in their individual capacities for  
12 civil rights violations under Bivens v. Six Unknown Named Agents of Federal Bureau of  
13 Narcotics, 403 U.S. 388 (1971), and the United States under the FTCA, 28 U.S.C.  
14 §§ 1346(b)(1) and 2671, *et seq.* Plaintiffs contend their Fourth and Fifth Amendment  
15 rights were violated when they were wrongfully arrested and then maliciously prosecuted  
16 in connection with a series of sexual assaults which occurred on the White Mountain  
17 Apache Indian Reservation ("Reservation") and that the actions of the Individual  
18 Defendants constituted those violations.<sup>1</sup> Fourth Am. Compl. (FAC) ¶¶ 25, 144, 157.  
19 Plaintiffs contend the United States is responsible for those actions under the FTCA  
20 because they "constituted a false arrest, malicious prosecution, abuse of process, and  
21 aiding and abetting the tortious conduct of others." *Id.* ¶¶ 175, 188.

### 22 STANDARD OF REVIEW

23 Summary judgment is appropriate when the pleadings and supporting documents,  
24 viewed in the light most favorable to the nonmoving party, show that there is no genuine  
25 issue as to any material fact and that the moving party is entitled to judgment as a matter  
26

---

27 <sup>1</sup> The Bivens claims against Hawkins, Hernandez, Lopez and Proctor are  
28 addressed in the BIA Individual Defendants' Motion for Summary Judgment, filed  
concurrently.

1 of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v. Nevada Fed.  
2 Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994); Fed. R. Civ. P. 56(a) (“[T]he court  
3 shall grant summary judgment if the movant shows that there is no genuine dispute as to  
4 any material fact and the movant is entitled to judgment as a matter of law...”). Substantive  
5 law determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
6 248 (1986); Jessinger, 24 F.3d at 1130. Under Rule 56(c), “the mere existence of some  
7 alleged factual dispute between the parties will not defeat an otherwise properly  
8 supported motion for summary judgment.” Anderson, 477 U.S. at 247-48. Rather, “[o]nly  
9 disputes over facts that might affect the outcome of the suit under governing law will  
10 properly preclude the entry of summary judgment.” Id. at 248.

11 The movant bears the initial burden of showing that there is an absence of  
12 evidence to support the nonmoving party’s case. Celotex, 477 U.S. at 323. If the movant  
13 meets this burden, Rule 56(e) requires the nonmoving party to designate specific facts  
14 showing that there is a genuine issue for trial as to elements essential to the nonmoving  
15 party’s case. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-  
16 87 (1986); Brinson v. Lind Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). The  
17 nonmoving party cannot rest on the mere allegations in the pleadings to meet this burden.  
18 Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. “Where the record taken as a whole could  
19 not lead a rational trier of fact to find for the nonmoving party,” no genuine issue for trial  
20 exists. Matsushita, 475 U.S. at 587 (1986).

21 As demonstrated herein, there are no genuine issues of material fact regarding the  
22 elements missing from Plaintiffs’ FTCA claims, or the facts necessary to determine  
23 discretionary function and probable cause. Accordingly, based on the record and merits of  
24 this case, this Motion should be granted as a matter of law.

## 25 ARGUMENT

### 26 **I. THE DISCRETIONARY FUNCTION EXCEPTION BARS PLAINTIFFS’ FTCA CLAIMS.**

27 The United States “is immune from suit save as it consents to be sued...and the  
28 terms of its consent to be sued in any court define that court’s jurisdiction to entertain that

1 suit.” Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (citation omitted). Thus, suit  
2 against the United States can only be entertained when Congress has specifically waived  
3 the United States’ immunity. Id. Such a waiver of sovereign immunity cannot be implied;  
4 it must be unequivocally expressed. Franconia Assocs. v. United States, 536 U.S. 129,  
5 141 (2002). The FTCA provides a specific waiver of sovereign immunity for “the  
6 negligent or wrongful act or omission of any employee of the Government while acting  
7 within the scope of his office or employment.” 28 U.S.C. § 1346(b). But, while Congress  
8 intended to waive governmental immunity for ordinary common law torts, it expressly  
9 retained immunity for claims

10 based upon the exercise or performance or the failure to exercise or perform  
11 a discretionary function or duty on the part of a federal agency or an  
12 employee of the Government, whether or not the discretion involved be  
13 abused.

14 28 U.S.C. § 2680(a). See also United States v. Varig Airlines, 467 U.S. 797, 808 (1984).  
15 Statutes waiving sovereign immunity must be “construed strictly in favor” of the United  
16 States. McMahon v. United States, 342 U.S. 25, 27 (1951). Plaintiffs’ FTCA claims fall  
17 squarely into § 2680(a) and therefore are barred even if the discretion to investigate and  
18 arrest them was abused by the BIA agents.

19 The discretionary function exception “marks the boundary between Congress’  
20 willingness to impose tort liability upon the United States and its desire to protect certain  
21 governmental activities from exposure to suit.” Varig Airlines, 467 U.S. at 808; Conrad v.  
22 United States, 447 F.3d 760, 764 (9th Cir. 2006); Booker v. Arizona, Slip Copy, 2010  
23 WL 1814520, at \*4 (D. Ariz. May 5, 2010). It applies to conduct that “involves the  
24 permissible exercise of policy judgment” and, if applicable, leaves a court without subject  
25 matter jurisdiction over a plaintiff’s claims. Berkovitz v. United States, 486 U.S. 531, 537  
26 (1988); General Dynamics Corp. v. United States, 139 F.3d 1280, 1283 (9th Cir. 1998) (if  
27 discretionary function exception applies “sovereign immunity is not waived, and no  
28 subject matter jurisdiction exists”). The party who sues the United States bears the burden  
of proving that the government has “unequivocally waived its sovereign immunity.”

1 Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983) (citation omitted). Accordingly,  
2 Plaintiffs bear the burden of showing that the discretionary function exception to the  
3 FTCA's broad waiver of immunity does not apply here. Gasho v. United States, 39 F.3d  
4 1420, 1433 (9th Cir. 1994) ("to maintain an FTCA claim for an intentional tort, a plaintiff  
5 must first clear the 'discretionary function' hurdle") (citing Pooler v. United States, 787  
6 F.2d 868, 872-73 (3d Cir.), cert. denied, 479 U.S. 849 (1986)).

7 The Supreme Court has articulated a two-part test to determine whether the dis-  
8 cretionary function exception applies to a particular government action. Berkovitz, 486  
9 U.S. at 531, 536. The first part of the test requires a determination of whether the chal-  
10 lenged conduct involved an element of choice or judgment or whether it instead violated a  
11 mandatory regulation or policy. It is the nature of the conduct that is at issue, not whether  
12 the conduct may have been negligent.

13 The exception covers only acts that are discretionary in nature, acts that  
14 "involv[e] an element of judgment or choice,"...and "it is the nature of the  
15 conduct, rather than the status of the actor" that governs whether the  
16 exception applies.... The requirement of judgment or choice is not satisfied  
if a "federal statute, regulation, or policy specifically prescribes a course of  
action for an employee to follow," because "the employee has no rightful  
option but to adhere to the directive."

17 United States v. Gaubert, 499 U.S. 315, 322 (1991) (citations omitted). See Conrad, 447  
18 F.3d at 764.

19 The second element of the test requires a determination of whether the government  
20 conduct at issue is based on policy considerations, that is whether the judgment or choice  
21 is the kind that the discretionary function exception was designed to shield. Berkovitz,  
22 486 U.S. at 536; Conrad, 447 F.3d at 765. This second element is "grounded in the notion  
23 that the discretionary function exception is designed to 'prevent judicial "second-  
24 guessing" of legislative and administrative decisions grounded in social, economic, and  
25 political policy.'" Kelly v. United States, 241 F.3d 755, 760 (9th Cir. 2001) (citing  
26 Gaubert, 499 U.S. at 323). The focus of the inquiry is not on the agent's subjective intent  
27 in exercising the discretion and the decision need not actually be grounded in policy  
28 considerations so long as it is by its nature, susceptible to policy analysis. Gaubert, 499

1 U.S. at 325. “When established governmental policy, as expressed or implied by statute,  
2 regulation or agency guidelines, allows a Government agent to exercise discretion, it must  
3 be presumed that the agent’s acts are grounded in policy when exercising that discretion.”  
4 Id. at 324. The Supreme Court expressly rejected the notion of a “dichotomy between dis-  
5 cretionary functions and operational activities” and reaffirmed that § 2680(a) protects the  
6 conduct of federal employees at all levels of government. Id. at 326. Thus, § 2680(a)  
7 protects a federal employee’s conduct whenever the employee must “act according to  
8 one’s judgment of the best course[.]” Dalehite v. United States, 346 U.S. 15, 34 (1953);  
9 Berkovitz, 486 U.S. at 536; Gaubert, 499 U.S. at 325. Moreover, as this Court stated, “[i]t  
10 cannot be denied that the discretionary function exception applies with special force in  
11 the law enforcement context.” Kerns v. United States, 2007 WL 552227, at \*21 (D. Ariz.  
12 Feb. 21, 2007), rev’d on other grounds, 2009 WL 226207 (9th Cir. Jan. 28, 2009).

13 Plaintiffs challenge the judgments made by the BIA agents regarding the dis-  
14 cretionary decisions to investigate and arrest them. However, the decisions of McCoy and  
15 Youngman, as well as the other members of the Task Force regarding their own  
16 investigative decisions, are quintessential examples of discretionary function since law  
17 enforcement personnel must necessarily use judgment as to the best course to follow in  
18 compelling compliance with criminal statutes and uncovering and deterring unlawful  
19 conduct. Sabow v. United States, 93 F.3d 1445, 1452 (9th Cir. 1996) (decisions  
20 concerning who and how to investigate are classic examples of discretionary conduct)  
21 (citations omitted). See also Pooler, 787 F.2d at 871 (held various alleged deficiencies in  
22 investigative methods which led to plaintiff’s arrest represented discretionary choices  
23 shielded from FTCA liability). Judicial review of those decisions “is foreclosed by the  
24 discretionary function exception.” Casillas v. United States, Slip Copy, 2009 WL 735193,  
25 at \*12 (D. Ariz. Feb. 11, 2009). The record overwhelmingly demonstrates that the  
26 decisions to arrest Plaintiffs were discretionary based on the judgment and law  
27 enforcement experience of McCoy and Youngman obtained from the investigation  
28 materials provided by the Task Force via Whiting. SOF ¶¶ 5, 9, 15, 65-71.

1 Finally, Plaintiffs have failed to prove that the Task Force was negligent or abused  
2 its authority. FAC ¶¶ 175-176, 183; SOF ¶¶ 1-2, 5, 25, 28, 67-71, 90-91, 95-99. 101-102,  
3 105. Equally unpersuasive—and similarly unproven—are the assertions the arrests were  
4 made to cover up a negligent investigation, to protect a fellow police officer, to “bring a  
5 quick resolution” to the investigation “to obtain a monetary award,” and to “mollify  
6 critics.” FAC ¶¶ 162-165, 175-176, 183, 185-186; SOF ¶¶ 55-56, 90-91. Arguably, even  
7 if they could prove those allegations, it is uncontested that judicial review of decisions to  
8 include “*negligent investigation by law enforcement is foreclosed by the discretionary*  
9 *function exception.*” Casillas, 2009 WL 735193, at \*12 (emphasis added). Even decisions  
10 that “represent alarming instances of poor judgment and a general disregard for sound  
11 investigative procedures” are barred from judicial review by § 2680(a). Alfrey v. United  
12 States, 276 F.3d 557, 565 (9th Cir. 2002) (citing Sabow, 93 F.3d at 1454). Section  
13 2680(a) applies even when there is negligence and “whether or not the discretion  
14 involved be abused.” 28 U.S.C. § 2680(a); Mitchell v. United States, 787 F.2d 466, 468  
15 (9th Cir. 1986) (“Negligence, however, is irrelevant to the discretionary function issue.”).  
16 “Congress exercised care to protect the government from claims, however negligently  
17 caused, that affected the governmental functions.” Dalehite, 346 U.S. at 32. Moreover,  
18 § 2680(a), which applies both to the exercise of discretion and the failure to exercise  
19 discretion, is applicable even when a federal employee fails to consider or balance  
20 important policy concerns in reaching a decision. Reed ex. rel Allen v. United States  
21 Dep’t of the Interior, 231 F.3d 501, 505 (9th Cir. 2000) (citations omitted).

22 In the end, Plaintiffs cannot overcome the legal doctrine that “the discretionary  
23 function exception protects agency decisions concerning the scope *and manner* in which  
24 it conducts an investigation.” Alfrey, 276 F.3d at 565 (quoting Vickers v. United States,  
25 228 F.3d 944, 951 (9th Cir. 2000)) (original emphasis); see also Rourke v. United States,  
26 744 F. Supp. 100, 102 (E.D. Pa. 1988) (allegations of “a ‘haphazard’ investigation  
27 calculated to achieve a quick arrest” held barred by the discretionary function exception),  
28 aff’d, 909 F.2d 1477 (3d Cir. 1990). Accordingly, applying Berkovitz’s two-part test, it is

1 apparent the discretionary function exception bars all of Plaintiffs' FTCA claims and they  
2 must be dismissed.

3 **II. A.R.S. § 13-3620 BARS PLAINTIFFS' FTCA CLAIMS.**

4 Under 28 U.S.C. § 1336(b), FTCA actions are governed by "the law of the place  
5 where the act or omission causing the injury occurred." Mundt v. United States, 611 F.2d  
6 1257, 1259 (9th Cir. 1980). The FTCA authorizes tort actions against the United States in  
7 circumstances where a private person would be liable for a tort in accordance with the  
8 law of the state where it occurred. 28 U.S.C. § 1346(b)(1); Conrad, 447 F.3d at 767. In  
9 addition, the United States is liable "in the same manner and to the same extent as a  
10 private individual in like circumstances." 28 U.S.C. § 2674. "Even if the conduct entails  
11 uniquely governmental functions, the court is to examine the liability of private persons in  
12 analogous situations," under the state law standards. Tekle v. United States, 511 F.3d 839,  
13 852 (9th Cir. 2007) (citing United States v. Olson, 546 U.S. 43, 45-46 (2005)). Thus, the  
14 law of Arizona is used to determine the United States' tort liability which includes  
15 applying the same immunities Arizona affords a private person. Moreover, if a private  
16 person analogy exists in this context, the United States' tort liability must be determined  
17 in light of the particular privileges an individual possesses.

18 In Arizona any person including a police officer investigating allegations of sexual  
19 assault of a minor, is immune from civil liability arising from the investigation unless  
20 they act with malice. A.R.S. § 13-3620(A), (J); Crawford v. City of Phoenix, 2007 WL  
21 1140396, at \*2 (D. Ariz. Apr. 16, 2007). Malicious intent must be proved to defeat this  
22 qualified immunity. L.A.R. v. Ludwig, 821 P.2d 291, 295 (Ariz. Ct. App. 1991). "A.R.S.  
23 § 1-215(15) provides that 'malice' and 'maliciously' import a wish to vex, annoy or injure  
24 another person, or an intent to do a wrongful act, established by either proof or a  
25 presumption of law." Id.

26 It is undisputed that the investigation here concerned sexual assaults, on victims  
27 who were mainly minors, and the conduct took place in Arizona. FAC ¶¶ 24-27; SOF  
28 ¶¶ 1-7, 93-94. It is also undisputed that evidence of malice neither exists in the record, nor

1 can be proven by the alleged intentional or negligent conduct of the Task Force. FAC  
2 ¶¶ 175-176, 183. See Ramsey v. Yavapai Family Advocacy Ctr., 235 P.3d 285, 292 (Ariz.  
3 Ct. App. 2010) (court disagreed with interpretation that defendants “acted with malice  
4 because they intended to do the actions alleged and that their actions ultimately proved to  
5 be ‘wrong and harmful’”); see also Smith v. Barrow Neurological Inst., Slip Copy, 2011  
6 WL 1672024 (D. Ariz. May 4, 2011). Accordingly, the elements of § 13-3620 have been  
7 met. Because under the facts a private person in Arizona would be entitled to § 13-3620’s  
8 immunity, Ludwig, 821 P.2d at 295, so too is the United States. Tekle, 511 F.3d at 852.  
9 Therefore, § 13-3620 acts as a complete bar to Plaintiffs’ FTCA claims.

### 10 **III. PROBABLE CAUSE BARS PLAINTIFFS’ FTCA CLAIMS.**

11 The four “components” of Plaintiffs’ FTCA claim (FAC ¶ 175) are nothing more  
12 than a piling-on of unproven causes of action, all of which are barred by the presence of  
13 probable cause at the time of the arrests. In fact, granting summary judgment in favor of  
14 the United States on the claims for “aiding and abetting tortious conduct,” “abuse of  
15 process,” and “malicious prosecution” does not even require a probable cause analysis as  
16 those claims fail to meet the basic elements necessary to maintain them.

17 First, “aiding and abetting tortious conduct” is neither a cognizable tort under the  
18 FTCA, see, e.g., Safeway Portland Emp. Fed. Credit Union v. FDIC, 506 F.2d 1213,  
19 1215-16 (9th Cir. 1974) (aiding and abetting “in the nature of deceit” is barred by 28  
20 U.S.C. § 2680(h)), nor is it covered by the proviso to § 2680(h)’s intentional tort ex-  
21 ception to the FTCA even if it is a cognizable tort. Because § 2680(h) does not waive  
22 sovereign immunity for “aiding and abetting,” that part of the FTCA claim must be  
23 dismissed. Even if the Court deems it a cognizable tort under the FTCA, Plaintiffs have  
24 still failed to demonstrate *any* tortious conduct on the part of the Task Force.

25 Second, here “abuse of process” is merely another way of pleading Plaintiffs’  
26 malicious prosecution claims. Although there are differences between the elements  
27 necessary to prove them, see, e.g., Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246,  
28 1252 n.10 (9th Cir. 1987) (citation omitted), the alleged facts Plaintiffs rely upon as

1 support are identical and equally unavailing. The evidence does not support the elements  
2 for abuse of process because Plaintiffs have failed to prove that the Task Force brought  
3 about and continued the prosecutions for “an ulterior purpose” and by “a wilful act in the  
4 use of judicial process not in the regular conduct of the proceeding.” Id., 827 F.2d at 1252  
5 (citation omitted). Even a complaint filed for an improper motive, as claimed here (FAC  
6 ¶¶ 183, 185-186), is not sufficient because “abuse of process requires some act *beyond*  
7 *the initiation of the lawsuit.*” Best Western Int’l Inc. v. Furber, 2008 WL 2045701, at \*2  
8 (D. Ariz. May 12, 2008) (citation omitted) (original emphasis). In fact, “mere persistence”  
9 of an action “even if based on an improper motive, does not sustain the tort.” Id. (citation  
10 omitted).

11 Third, Plaintiffs have failed prove malicious prosecution. In Arizona the elements  
12 of malicious prosecution are: “(1) a criminal prosecution, (2) that terminates in favor of  
13 plaintiff, (3) *with defendants as prosecutors*, (4) *actuated by malice*, (5) *without probable*  
14 *cause*, and (6) causing damages.” Slade v. Phoenix, 541 P.2d 550, 552 (1975) (emphasis  
15 added). The record shows that, even though Massey and Anderson arrested Plaintiffs on  
16 the original tribal charges drafted by Massey, SOF ¶¶ 73-76, the tribal prosecutor King  
17 modified Reed’s charges and attempted to modify Dupris’ charges and the Task Force did  
18 not pressure her into prosecuting Plaintiffs. Id. ¶¶ 88-89, 95-98; Walsh v. Eberlein, 560  
19 P.2d 1249, 1252-53 (“the instigator of a proceeding loses control over the case once the  
20 prosecution has been initiated”). After the arrests King, in her prosecutorial discretion,  
21 initiated the prosecutions and carried them out without contact with the BIA. SOF ¶¶ 65-  
22 67, 94-98, 88-89, 102. Later, on her own accord when she believed the evidence would  
23 not support a conviction at trial beyond a reasonable doubt, King dismissed the charges.  
24 Id. ¶¶ 105-109. Moreover, the record is devoid of malice or even the inference of malice.  
25 As a result, the only FTCA claim that is not defeated prior to a probable cause analysis is  
26 the one for false arrest.

27 Under Arizona law probable cause is an absolute defense to false arrest. Gasho, 39  
28 F.3d at 1427. It is also a complete defense to malicious prosecution “without regard to the

1 existence of malice.” Cullison v. City of Peoria, 584 P.2d 1156, 1160 (1978). A  
2 subsequent dismissal of the charges does not make an arrest made with probable cause  
3 unlawful. Freeman v. City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995); Todd v.  
4 Melcher, 462 P.2d 850, 853 (Ariz. Ct. App. 1970). Furthermore, it is immaterial that the  
5 person may turn out to be innocent. Boudette v. Singer, 8 F.3d 25, n.8 (9th Cir. 1993)  
6 (citation omitted). Probable cause to make an arrest exists when the arresting officer has  
7 reasonably trustworthy information of facts and circumstances sufficient to lead a reason-  
8 able man to believe an offense is being or has been committed and that the person to be  
9 arrested committed it. State v. Nelson, 633 P.2d 391 (1981); State v. Vaughn, 471 P.2d  
10 744 (Ariz. Ct. App. 1970). Probable cause is much less than the proof needed to convict  
11 and more than an unsupported suspicion. It is a practical, nontechnical concept acting as a  
12 compromise between society’s need for effective law enforcement and an individual  
13 citizen’s interest in liberty. Hansen v. Garcia, Fletcher, Lund & McVean, 713 P.2d 1263  
14 (Ariz. Ct. App. 1985) (collecting decisions).

15       The uncontested material facts demonstrate probable cause existed at the time of  
16 the arrest. Plaintiffs’ only maneuver has been to attempt to undermine the *reasonableness*  
17 of that probable cause based on nothing more than *a perception of others assuming what*  
18 *the BIA agents should have believed at the time of the arrest* long after the charges were  
19 dismissed and directly contrary to the record evidence and testimony of those very same  
20 BIA agents. They cannot, however, challenge the applicable law that probable cause is  
21 determined “at the moment of arrest” based on the facts and circumstances *known to the*  
22 *arresting officers at that time*. Blankenhorn v. City of Orange, 485 F.3d 463, 471 (9th Cir.  
23 2007) (citation omitted) (emphasis added). Contrary to Plaintiffs’ claims, probable cause  
24 for an arrest is neither based on evidence discovered after the fact, nor on *what the*  
25 *suspect believes* the arresting officer *ideally should have known*. Slade, 541 P.2d at 553  
26 (“Additional investigation might have avoided the mistake in this case, but this position  
27 confuses the ideal with the minimum.”). Rather, an arrest is lawful if there is probable  
28 cause based on a reasonable conclusion “*drawn from the facts known to the arresting*

1 *officer at the time of the arrest.”* Devenpeck v. Alford, 543 U.S. 146, 152 (2004)  
2 (emphasis added). Plaintiffs’ attempt to hold the agents to a higher standard of proof  
3 necessary for an arrest must fail because probable cause “as the very name implies...  
4 deal[s] with probabilities” that “are the factual and practical considerations of everyday  
5 life on which reasonable and prudent men, not legal technicians, act.” Brinegar v. United  
6 States, 338 U.S. 160, 175 (1949); United States v. Diaz, 491 F.3d 1074, 1078 (9th Cir.  
7 2007).

8 As the Task Force Incident Commanders McCoy and Youngman made the  
9 probable cause determination to arrest Plaintiffs based on the evidence provided to them  
10 by Case Agent Whiting. SOF ¶¶ 68-69, 92. The probable cause determination to arrest  
11 was not made in a vacuum or based on one single piece of evidence. Id. ¶¶ 69-71. It was  
12 rather based on the totality of the evidence obtained during the investigation in  
13 conjunction with the extensive law enforcement experience and expertise of McCoy and  
14 Youngman. Id. ¶¶ 5, 69-71.

15 At the moment McCoy and Youngman made the probable cause determination to  
16 arrest Dupris they *knew*: (a) he was positively identified by victims L.T. and L.B., and  
17 witness M.M.; (b) he matched the height and weight descriptions provided by at least  
18 seven victims and eyewitnesses; (c) he matched the descriptions that the suspect had  
19 “crooked teeth,” “acne” and very short hair, “almost bald;” (d) he lived in the “Ben Gay”  
20 housing area near the trail where some of the assaults occurred; (e) he was seen by former  
21 police officer Young in August 2006, at night, running down from one of the trails to his  
22 vehicle, wearing dark clothing with a shirt that said “security” on it, not his White  
23 Mountain Apache Housing Authority (WMAHA) security shirt, and that he changed back  
24 into his WMAHA shirt; (f) he lied about his current address and was not acting like  
25 someone who was just charged with multiple sexual assaults; (g) he was deemed  
26 “deceptive” by the FBI polygrapher; (h) he was recently a security guard for the  
27 WMAHA during the dates of some of the assaults and was now a security guard for the  
28 casino; (i) he had knowledge of the trail where the sexual assaults occurred due to

1 patrolling that area and his residence's proximity to that trail; (j) he had unique  
2 knowledge and training as a security guard and access to law enforcement equipment  
3 used during the sexual assaults, such as handcuffs; (k) he is Irish and Sioux, not Apache,  
4 and lived off of the Reservation for some years, and C.D. stated her attacker did not have  
5 the voice or the accent of an Apache man, was "built or muscular," had a "light  
6 complexion" and was not Apache; (l) his supervisor thought he had gotten into trouble  
7 when he worked for housing security for "having a young woman in his work vehicle;"  
8 (m) the U.S. District Court had authorized a search of his vehicle and residence based on  
9 the information provided; and (n) King had given them permission to have Dupris  
10 arrested on tribal charges. SOF ¶ 70. These facts demonstrate that a reasonable officer  
11 could believe probable cause existed.

12 At the moment McCoy and Youngman made the probable cause determination to  
13 arrest Reed, they *knew*: (a) he was positively identified by victim B.L.; (b) he matched the  
14 height and weight descriptions provided by at least seven victims and eyewitnesses; (c) he  
15 matched the descriptions that the suspect had "hairy" or "bushy" eyebrows, and that he  
16 was "chubby;" (d) he lived in the "Ben Gay" housing area near the trail where some of  
17 the assaults occurred; (e) he was being evasive and refused to speak with the Task Force  
18 or come in for an interview; (f) Dupris identified him as someone that looks "a lot" like  
19 Dupris when asked who could be a suspect, and when asked why he thought Reed might  
20 be a suspect, Dupris said Reed is "about the same height," "like the same build as me,"  
21 and Reed "probably got bushy eyebrows;" (g) Dupris identified Reed as a possible  
22 suspect to the FBI polygrapher because he is a former co-worker at WMAHA who "looks  
23 a lot like" Dupris and "perhaps the victims might have mistaken" Reed with Dupris;  
24 (h) he was a security guard for the WMAHA during some of the assaults and was former-  
25 ly a security guard for the casino; (i) he had knowledge of the trail where the sexual  
26 assaults occurred due to patrolling that area and his residence's proximity to that trail;  
27 (j) he had unique knowledge and training as a security guard and access to law enforce-  
28 ment equipment used during the sexual assaults, such as handcuffs; (k) he is Apache and

1 has lived on the Reservation his entire life, and victim B.L. who identified him said her  
2 attacker had a “rez boy” voice indicating he was an Apache man from the Reservation;  
3 (l) his supervisor said he was the only security guard who has a flashlight with a blue light  
4 which matched the type of flashlight used by a suspect; (m) he admitted he was accused  
5 “of picking up girls in different areas, and having two way radios;”(n) even though C.C.,  
6 S.R., and B.L., were not definitive in their identification of him as their attacker, all three of them  
7 kept focusing on him; and (o) King had given them permission to have Reed arrested on tribal  
8 charges. SOF ¶ 71. These facts demonstrate that a reasonable officer could believe  
9 probable cause existed.

10 In the Ninth Circuit, the test for probable cause is whether “at the moment of  
11 arrest” the facts and circumstances known to the arresting officers and “of which they had  
12 reasonably trustworthy information were sufficient to warrant a prudent man” in believing  
13 that Plaintiffs had committed an offense. Blankenhorn, 485 F.3d at 471 (citation omitted).  
14 See also Devenpeck, 543 U.S. at 152. When there is no factual dispute—as in this case  
15 —probable cause is a question of law for the Court. Winfrey v. City of Gilbert, Slip Copy,  
16 2006 WL 997185, at \*2 (D. Ariz. Apr. 17, 2006) (citations omitted). See also Gasho, 39  
17 F.3d at 1428.

18 It must not be overlooked that the positive identifications of Plaintiffs was  
19 sufficient for a finding of probable cause. SOF ¶¶ 36, 38, 44, 48, 50, 52. Peng v. Mei  
20 Chin Penghu, 335 F.3d 970, 976-78 (9th Cir. 2003); Cullison, 584 P.2d at 1159  
21 (eyewitness identification provided police with sufficient probable cause upon which to  
22 make arrest); Slade, 541 P.2d at 553 (reasonable police officer could believe the accused  
23 committed an assault based on information solely from the victim without conducting an  
24 independent investigation). See also Neil v. Biggers, 409 U.S. 188, 199-201 (1972)  
25 (reliability of identification determined on “totality of circumstances” including whether  
26 witness viewed criminal at time of crime); Torchinsky v. Siwinski, 942 F.2d 257, 262  
27 (4th Cir. 1991) (reasonable police officer could base his belief in probable cause on  
28 victim’s reliable identification). Plaintiffs freely admit they were identified in the photo

1 line-ups, SOF ¶¶ 36, 38, 44, 48, 50, 52, they merely claim those identifications were  
2 flawed. Arguably, even if the eyewitness identifications were *later* discovered to be  
3 flawed, such a fact is irrelevant to what McCoy and Youngman *knew at the time the*  
4 *probable cause decision* to arrest Plaintiffs was made. Slade, 541 P.2d at 553. Of course,  
5 the probable cause determinations to arrest Plaintiffs were *not* made solely on the  
6 eyewitness identifications but rather on the *totality of the evidence* collected by Whiting  
7 and relied on by McCoy and Youngman at the time. SOF ¶¶ 2-5, 16-52, 54-55, 57-63, 67-  
8 71. That is the basis of probable cause in this case.

9 Plaintiffs' reliance on Grant v. City of Long Beach, 315 F.3d 1081 (9th Cir. 2002)  
10 throughout this litigation is not persuasive because the probable cause there was based on  
11 completely different factors: two impermissibly suggestive identifications, contradictory  
12 descriptions, and a faulty canine identification. Id. at 1081. The record here, however, is  
13 devoid of evidence that the identifications were impermissibly suggestive. Also, unlike  
14 Grant, the facts show the majority of eyewitness descriptions were consistent and  
15 matched Plaintiffs' height and weight and other important distinguishing physical  
16 features. SOF ¶¶ 3-4, 16-21, 33-34, 36, 38-40, 43-52, 59-60, 62, 57-63. More important,  
17 the record contains the additional factors enumerated above which resulted in a finding of  
18 probable cause. Id. ¶¶ 22-30, 32, 54-58, 61, 63, 67-71, 101, 105. These additional  
19 factors—neither found, nor addressed in Grant, demonstrate more than an unsupported  
20 suspicion. Hansen, 148 Ariz. at 205, 713 P.2d at 1263; see also Peng, 335 F.3d at 976-78.

21 Regardless of the speculative hindsight available years after the arrest, Plaintiffs  
22 cannot escape the fact that they were arrested based on probable cause, however mistaken  
23 Plaintiffs attempt to paint that assessment now. Key v. State, 2010 WL 5060706, \*5  
24 (Ariz. Ct. App. Dec. 2, 2010) (“probable cause is judged by information known to the  
25 defendants at the initiation of proceedings, not a their conclusion”). The above evidence  
26 was the basis for a reasonable probable cause determination at the time of the arrest and  
27 as a result, is a complete bar to all of Plaintiffs' claims. Devenpeck, 543 U.S. at 152.  
28 Accordingly, summary judgment should be granted for the United States as to the FTCA

1 claims.

2 **CONCLUSION**

3 As demonstrated, there are no genuine issues of material fact regarding the facts  
4 necessary to determine probable cause. For these and the other foregoing reasons,  
5 Defendant United States respectfully requests the Court grant summary judgment in its  
6 favor and dismiss Plaintiffs' FTCA claims pursuant to Fed. R. Civ. P. 56.

7 Dated: August 26, 2011

Respectfully submitted,

8  
9 */s/James G. Bartolotto*  
10 JAMES G. BARTOLOTTO  
11 KELLY HEIDRICH  
12 Trial Attorneys  
13 Torts Branch, Civil Division  
14 United States Department of Justice  
15 *Attorneys for the Defendant United States*  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2011, a true and correct copy of the foregoing **DEFENDANT UNITED STATES’ MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS’ FTCA CLAIMS WITH INCORPORATED MEMORANDUM IN SUPPORT** was filed with this Court electronically and served by mail on any party to this action unable to accept electronic filing. Notice of this filing will be sent by electronic mail (e-mail) to Plaintiffs’ counsel and all parties by operation of the Court’s electronic filing system (ECF) or by mail to any party unable to accept electronic filing. Parties may access this filing through the Court’s CM/ECF System. This Motion is filed electronically pursuant to LRCiv 5.5, and comports with LRCiv 7.1, LRCiv 7.2 and LRCiv 56.1.

*/s/James G. Bartolotto*  
**JAMES G. BARTOLOTTO**  
Trial Attorney