No. 20-1339

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANAS ELHADY,
Plaintiff-Appellee,

v.

UNIDENTIFIED CBP AGENTS;
MATTHEW PEW; JOSEPH PIRANEO; DANIEL BECKHAM;
TONYA LAPSLEY; NYREE IVERSON; WALTER KEHR;
SCOTT ROCKY; JASON FERGUSON
Defendants,

and

BLAKE BRADLEY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan

SUPPLEMENTAL BRIEF FOR APPELLANT BLAKE BRADLEY

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INTRODUCTION AND SUMMARY

In its September 21, 2021 order, the Court requested supplemental briefing to address how *Hernández v. Mesa*, 140 S. Ct. 735 (2020), applies in this case. Order (Sept. 21, 2021). Appellant Blake Bradley respectfully submits this supplemental brief in response to that order.

The Supreme Court in *Hernández* explained that constitutional separation-of-powers concerns require courts "to exercise caution before extending" the judicially crafted damages remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a new context. *Hernández*, 140 S. Ct. at 739. Out of "respect for the separation of powers," the Court declined to create a damages remedy in that case, which concerned claims against a Border Patrol agent stemming from a cross-border-shooting incident. *Id.* at 749.

This Court may reach a similar conclusion here. Although Officer Bradley did not appeal the issue, the availability of a *Bivens* remedy is an "antecedent" question, *Hernández v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (quotations omitted), and if the Court takes up the issue—as it may *sua sponte*, *see Bistrian v. Levi*, 912 F.3d 79, 89 (3d Cir. 2018)—the Court must consider at the outset whether the constitutional concerns discussed in *Hernández* and other cases warrant creating such a remedy here.

The district court correctly recognized that this case presents a new context, but it nevertheless allowed plaintiff to proceed under a new judicially created damages remedy, without the guidance of the Supreme Court's most recent *Hernández* decision.

The decisions the court relied on to reach that conclusion have since been overturned or are, at best, of questionable validity—which could prompt this Court to address the issue at the outset, and to determine that separation-of-powers concerns counsel against creating a new cause of action for damages against a federal official in his individual capacity.

ARGUMENT

APPLYING *HERNÁNDEZ V. MESA*, THIS COURT MAY DECLINE TO CREATE A NEW CAUSE OF ACTION IN THIS CASE.

A. In *Hernández v. Mesa*, 140 S. Ct. 735 (2020), the Supreme Court repeated its now-familiar refrain that the cause of action recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was the product of an "'*ancien regime*,'" during which the Court "routinely inferred" causes of action that were not otherwise textually explicit. *Hernández*, 140 S. Ct. at 741 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017)). But the Court later "came to appreciate" that judicially creating a claim for damages "risks arrogating legislative power," and "may upset the careful balance of interests struck by the lawmakers." *Id.* at 741-42.

Expanding *Bivens* is now "a disfavored judicial activity," as "Congress is best positioned to evaluate whether . . . monetary and other liabilities should be imposed upon" federal officers. *Hernández*, 140 S. Ct. at 742 (quotations omitted). Indeed, following *Bivens*, the Supreme Court has recognized a *Bivens* remedy in only two cases—the most recent of which was decided more than 40 years ago. *See Davis v.*

Passman, 442 U.S. 228 (1979) (former congressional staffer's alleged Fifth Amendment violation based on a gender-based dismissal); *Carlson v. Green*, 446 U.S. 14 (1980) (federal prisoner's alleged Eighth Amendment violation for failure to provide adequate medical care).

Before recognizing a *Bivens* remedy, a court must perform a "two-step inquiry": the court must first consider whether the claim arises in a "new context" and then determine whether any "special factors" counsel hesitation before extending *Bivens* to that new context. *Hernández*, 140 S. Ct. at 743 (quotations omitted). A context is "new" if it differs in any "meaningful way" from the Supreme Court's prior *Bivens* decisions. *Id.* (quotations omitted). And in assessing whether special factors provide a reason not to extend *Bivens*, the Supreme Court has emphasized that separation-of-powers principles are "'central to [this] analysis.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857). A court must assess "the risk of interfering with the authority of the other branches"; whether Congress "might doubt the efficacy or necessity of a damages remedy"; and "whether the Judiciary is well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* (quotations omitted). *Hernández* specifically considered whether a new claim "implicates an element of national security," and whether Congress had "address[ed] related matters," *id.* at 746-49; and the Court specifically noted that because agents' conduct "at the border has a clear and strong connection to national security," creating a new *Bivens* claim for that conduct "risk[s] . . . undermining border security," *id.* at 746-47.

Following *Hernández*, courts of appeals have declined to extend *Bivens* in a number of cases. The Fifth Circuit recently declined to create a new damages remedy simply because "separation of powers counsels against extending *Bivens*," and "Congress did not make individual officers statutorily liable for excessive-force or unlawful-detention claims." *Byrd v. Lamb*, 990 F.3d 879, 882 (5th Cir. 2021) (per curiam) (quotations omitted); *see also, e.g.*, *Callahan v. Federal Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020) (declining to extend *Bivens* in a prison setting because "separation of powers concerns counsel a policy of judicial restraint" (quotations omitted)); *Davis v. Samuels*, 962 F.3d 105, 112 (3d Cir. 2020) (similar); *Mammana v. Barben*, 856 F. App'x 411, 415 (3d Cir. 2021) (unpublished) (explaining that recognizing "a broad new category of claims" against "federal prison officials for unconstitutional conditions of confinement . . . would step well into the lawmaking privilege").

Indeed, courts have explained that judicially created causes of action could interfere with executive policy and functions, contravening the separation of powers. *See, e.g.*, *Annappareddy v. Pascale*, 996 F.3d 120, 137 (4th Cir. 2021) (declining to extend *Bivens* because new claims might "interfere [with] the executive branch's investigative and prosecutorial functions"); *Ahmed v. Weyker*, 984 F.3d 564, 570 (8th Cir. 2020) (similar, where newly recognized claims could "burden[] and interfer[e] with the executive branch's investigative . . . functions" (quotations omitted)); *Boudette v. Buffington*, No. 20-1329, 2021 WL 3626752, at *5 (10th Cir. Aug. 17, 2021)

(unpublished) (similar, for claims that could interfere with the relationships between private citizens, law enforcement, and prosecutors).

B. As the Supreme Court and this Court have recognized, the Court is free to consider the "'antecedent'" question of whether separation-of-powers concerns counsel against extending a *Bivens* remedy in an interlocutory appeal of a district court's denial of qualified immunity. *See Callahan*, 965 F.3d at 526. Although Officer Bradley has not appealed the district court's earlier decision extending *Bivens*, this Court may consider that antecedent question *sua sponte*. If it does so, it should conclude that, in light of *Hernández*, special factors counsel hesitation in creating a new *Bivens* remedy here.

The Supreme Court has repeatedly chosen to address the threshold inquiry of whether to create a *Bivens* remedy, even if the issue was not addressed in the lower courts. Indeed, when *Hernández* was first before the Supreme Court, the plaintiffs sought the Court's review of the Fifth Circuit's grant of qualified immunity to the defendant officers. But in granting review, the Court ordered the parties to brief whether a "claim . . . may be asserted under *Bivens*," even though that question was not raised in the petition for certiorari, *see Hernández v. Mesa*, 137 S. Ct. 291 (2016). The Court then held that the availability of a *Bivens* remedy is "antecedent" to the question of qualified immunity. *Hernández v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (quotations omitted); *see also, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 672-73 (2009) (explaining that on interlocutory appeal of a district court's denial of qualified

immunity, the court of appeals may also consider whether to extend *Bivens*); *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007) ("[T]he recognition of [a] cause of action" is "directly implicated by the defense of qualified immunity" and properly before a court in an interlocutory appeal. (quotations omitted)).

The Third Circuit has accordingly explained that it could *sua sponte* consider the availability of a *Bivens* remedy "even when a defendant does not raise the issue." *Bistrian v. Levi*, 912 F.3d 79, 89 (3d Cir. 2018) (citing *Carlson*, 446 U.S. at 17 n.2 (A court may consider whether to extend *Bivens* even though the issue was "not presented below.")). And the Fifth Circuit has noted that it could address whether to extend *Bivens*, even if a defendant officer "did not even raise the *Bivens* issue in the district court." *Byrd*, 990 F.3d at 882; *see also Oliva v. Nivar*, 973 F.3d 438, 443 n.2 (5th Cir. 2020) ("Because *Bivens* is a judicially crafted remedy, a court asked to extend *Bivens* has a concomitant responsibility to ask whether there are any special factors that counsel hesitation about granting the extension," regardless whether the defendant officer had adequately preserved the argument. (quotations omitted)).

The district court correctly held that this case presents a new context, thus requiring consideration of the special-factors inquiry. MTD Op., RE 46, PageID ## 683-88. But the district court nevertheless created a new damages remedy, and that court notably considered various special factors before the Supreme Court issued its most-recent *Hernández* decision. If the Court takes up the *Bivens* issue, both national security concerns and Congress's frequent, pervasive regulation of immigration

suggest that the Court should be sensitive to the separation of powers and "exercise caution" before extending *Bivens*. *Hernández*, 140 S. Ct. at 739.

1. The Supreme Court has never recognized a Fifth Amendment claim for unlawful civil detention conditions, nor has the Court considered whether to create a *Bivens* remedy based on federal officials' conduct at border facilities. As the district court correctly concluded, those differences are sufficiently meaningful for this case to present a new context. MTD Op., RE 46, PageID # 684 (comparing *Carlson*, 446 U.S. 14, with *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001)); *see also Abbasi*, 137 S. Ct. at 1855, 1859-60 (discussing prior circumstances in which the Court "approved" a new *Bivens* remedy). There can be no doubt that plaintiff's Fifth Amendment conditions-of-confinement claim arises in a new context.

2. Because this case presents a new *Bivens* context, if the Court takes up the *Bivens* question, it must consider whether special factors counsel hesitation before creating a damages remedy.

The district court recognized a new *Bivens* damages remedy without the benefit of the Supreme Court's guidance in *Hernández*. And the district court relied on decisions that are no longer good law, primarily invoking the Ninth Circuit's reasoning in *Rodriguez v. Swartz*, 899 F.3d 719, 746 (9th Cir. 2018), in which that court had extended a *Bivens* remedy to circumstances similar to those in *Hernández* itself—a cross-border shooting. *See* MTD Op., RE 46, PageID # 687. But the Supreme Court vacated and remanded the Ninth Circuit's *Rodriguez* decision in light of *Hernández*, *see*

Swartz v. Rodriguez, 140 S. Ct. 1258 (2020), and the *Rodriguez* suit has since been dismissed with prejudice, *see* Order, *Rodriguez v. Unknown Parties*, No. 4:14-cv-2251 (D. Ariz., July 9, 2020), Doc. 72; *see also Quintero Perez v. United States*, 8 F.4th 1095, 1106-07 (9th Cir. 2021) (declining to extend *Bivens* in a case substantively identical to *Rodriguez*). As relevant here, however, the Ninth Circuit explained in *Rodriguez* that it could consider whether to extend *Bivens*, even if the defendant officer had failed to timely raise that argument. *Rodriguez*, 899 F.3d at 735.

The district court additionally cited *Linlor v. Polson*, 263 F. Supp. 3d 613, 625 (E.D. Va. 2017), in which an airline passenger brought a *Bivens* action against a Transportation Security Administration (TSA) officer, claiming that the officer violated the Fourth Amendment by using excessive force during an airport security screening. *See* MTD Op., RE 46, PageID ## 687-88. But shortly after that decision was issued, the Third Circuit refused to extend *Bivens* in materially indistinguishable circumstances: allegedly unconstitutional actions by a TSA officer during an airport security screening. *Vanderklok v. United States*, 868 F.3d 189, 209 (3d Cir. 2017) ("[T]he role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context."); *see also Pellegrino v. TSA*, 937 F.3d 164, 180 (3d Cir. 2019) (en banc) (reaffirming the holding in *Vanderklok*).

Contrary to the district court, the separation-of-powers concerns cited by the Supreme Court in *Hernández* counsel that *Bivens* should not be extended here, even though Officer Bradley has not appealed that issue. The Supreme Court expressed

particular caution with respect to extending *Bivens* in contexts associated with border enforcement: "the conduct of agents positioned at the border has a clear and strong connection to national security," and "the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." *Hernández*, 140 S. Ct. at 746-47. And the Fifth Circuit recently suggested that *Hernández* "strongly implies that proximity to the border alone is sufficient to qualify as a 'new context' in which *Bivens* is unavailable." *Angulo v. Brown*, 978 F.3d 942, 948 n.3 (5th Cir. 2020). And even before the Supreme Court's decision in *Hernández*, the Fourth Circuit had declined to extend *Bivens* in a case concerning immigration enforcement—not specifically tied to activity at the border—recognizing that such enforcement has "the natural tendency to affect diplomacy, foreign policy, and the security of the nation, which . . . counsel hesitation in extending *Bivens*." *Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019) (quotations omitted), *cert. denied*, 140 S. Ct. 2565 (2020).

Additionally, Congress has enacted a comprehensive and reticulated statutory regime authorizing Customs and Border Protection (CBP) enforcement activities, which the agency has implemented through extensive regulation, and which also counsels against creating a judicially imposed damages remedy that "interfer[es] with the authority of the other branches." *Hernández*, 140 S. Ct. at 743.[1] Congress also

[1] For CBP's customs authorities and implementing regulations, *see, e.g.*, 19 U.S.C. §§ 482, 1455, 1461, 1467, 1496, 1499, 1581, 1582, 1589a; 19 C.F.R. §§ 162.5, 162.6, 162.7. And for CBP's authorities under the Immigration and Nationality Act, *see, e.g.*, 8 U.S.C. § 1357(a); 8 C.F.R. §§ 287.5, 287.8, 287.9, 287.10. Congress has also provided

regularly considers changes to CBP's authorities, *see, e.g.*, Border Zone Reasonableness Restoration Act of 2019, S. 2180, 116th Cong., which may further "indicate that Congress did not want a money damages remedy against" CBP officers for their allegedly wrongful conduct. *Tun-Cos*, 922 F.3d at 527 (listing recent amendments to the immigration statutes).

CONCLUSION

For the foregoing reasons and the reasons discussed in the government's plenary briefs, the judgment of the district court should be reversed.

Respectfully submitted,

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October 2021

that CBP officers are immune from civil damages for performing a border search "in good faith and us[ing] reasonable means." 19 U.S.C. § 482(b).

CERTIFICATE OF COMPLIANCE

This brief complies with the volume limit of the Court's September 21, 2021 order because it contains 10 pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2021, I filed the foregoing supplemental brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Casen B. Ross
CASEN B. ROSS

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant to the supplemental briefing:

Record Entry	**Description**	**Page ID # Range**
RE 46	Opinion and Order Denying Defendants' Motion to Dismiss (Dkt. 41)	670-689