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 OF APPELLEE

September 1, 2021

Lena F. Masri
Justin Sadowsky
Gadeir I. Abbas*
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave. SE
Washington, DC 20003
(202) 742-6420
Counsel for Anas Elhady
**Licensed in Virginia only. Practice limited to federal matters.*

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INTRODUCTION

This Court has asked the parties to brief how *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), applies in this case. The answer is simple: it does not.

Hernandez is a case about *Bivens* while this interlocutory appeal regards qualified immunity alone.

Bradley challenged the applicability of *Bivens* in his motion to dismiss, but did not repeat that challenge at summary judgment. Nor did he include the denial of his motion to dismiss in his notice of appeal. Nor did Bradley raise any *Bivens* arguments in any briefing here. Before filing in this Court, Bradley's train left the station without *Bivens* in tow. They are now waived.

And even if he had somehow managed to preserve his *Bivens* arguments, this Court would still lack jurisdiction to consider the *Bivens* issue. Bradley's appeal would remain interlocutory and regard qualified immunity alone with no pendant jurisdiction.

Even if *Bivens* was before this Court, *Hernandez* would still be inapplicable here. *Hernandez* was a case involving a cross-border shooting of a foreign national. This case involves the conditions of confinement of

a United States citizen, Anas Elhady, who was kept in a freezing cold cell without his jacket, footwear, or a blanket for four hours until he passed out and required hospitalization. The only similarity between the two cases is that the defendant is a border patrol agent. But the Supreme Court did not rely on Agent Mesa's status as a border patrol employee in its new-context determination.,

ARGUMENT

I. The Court's jurisdiction in this case is limited to the question of qualified immunity.

Bradley brings this appeal under *Mitchell v. Forsyth,* 472 U.S. 511, 526-30 (1985), which allows an interlocutory appeal from a denial of qualified immunity under 28 U.S.C. § 1291. *See* Appellant's Br. at 2. Jurisdiction in these instances is "narrow." *Meals v. City of Memphis, Tenn*., 493 F.3d 720, 726 (6th Cir. 2007). "In hearing a qualified immunity appeal, an appellate court must be careful to limit its consideration to only those issues over which it has jurisdiction." *Id.* Outside of the qualified-immunity issue itself, only those issues that are both "'inextricably intertwined' with the question of qualified immunity" and "necessary for meaningful review of [the] claim of qualified immunity" may be reviewed. *Id.*

In the Sixth Circuit, a *Bivens* defense does not give rise to an interlocutory appeal on its own. Rather, "where the defendant has failed to raise a timely defense of qualified immunity," this Court held that "a district court order allowing a Bivens damages action to proceed does not come within the confines of the collateral order doctrine." *Himmelreich v. Fed. Bureau of Prisons*, 5 F.4th 653, 659 (6th Cir. 2021). *Himmelreich* left open the question—which has split other Circuits—whether a defendant who raises both a *Bivens* defense and a qualified immunity defense at the summary judgment stage could raise a *Bivens* defense in an interlocutory appeal under the collateral order doctrine. *Compare Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1083 (8th Cir. 2005) (collateral review available) *with Wong v. U.S.*, 373 F.3d 952, 961 (9th Cir. 2004) (no collateral review available).

A. The *Bivens* issue was not raised or preserved for appeal.

The Court need not reach the issue left open in *Himmelrich*. Here, Bradley only raised his *Bivens* defense at the motion to dismiss stage, which was denied by the Court on March 1, 2019. RE 46, PageID ## 670. The time to appeal that expired, at the latest, 60 days later. Fed. R. App. P. 4. He did not raise the issue again in his summary-judgment motion,

and his notice of appeal does not reference the Court's March 2019 Order. RE 128 PageID # 4705. Absent exceptional circumstances, arguments not preserved below are forfeited on appeal. *U.S. v. Means*, 133 F.3d 444, 447 (6th Cir. 1998); *see also PACCAR Inc. v. TeleScan Technologies, L.L.C.,* 319 F.3d 243 (6th Cir. 2003), ("[a]rguments that were not raised below may not be asserted on appeal").

Then on appeal, Bradley again did not raise *Bivens*, further forfeiting the issue. *See Kuhn v. Washtenaw County,* 709 F.3d 612, 624 (6th Cir.2013) ("This court has consistently held that arguments not raised in a party's opening brief, as well as arguments adverted to in only a perfunctory manner, are waived."). And a *Bivens* defense is not jurisdictional, so this Court would need reach it sua sponte. *Smith v. United States*, 561 F.3d 1090, 1100 n.10 (10th Cir. 2009); *see also Koprowski v. Baker*, 822 F.3d 248, 251 (6th Cir. 2016) (explaining that subject matter jurisdiction arises under the Constitution and treating the *Bivens* issue as non-jurisdictional).

B. No *Bivens*-related pendant jurisdiction exists.

Even if Bradley had properly preserved the *Bivens* issue for appeal, this Court would not have pendant jurisdiction to reach it. Under *Meals*,

pendant jurisdiction only arises if "necessary for meaningful review of [the] claim of qualified immunity." 493 F.3d at 726. Here, qualified immunity was fully briefed and decided at the trial stage, and then fully briefed again on appeal, so deciding *Bivens* would not be necessary to adjudicating qualified immunity.

That *Bivens* issues are not necessary for meaningful review of qualified immunity defenses makes sense because qualified immunity is analyzed the exact same way in a *Bivens* action as it would in a Section 1983 action. *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984); *see also Snyder v. U.S.*, 590 F. App'x 505, 513 (6th Cir. 2014) (unpublished). So the Third Circuit's assertion in *Bistrian v. Levi*, 696 F.3d 352, 366 (3d Cir. 2012), that the *Bivens* analysis and qualified immunity analysis are "inextricably intertwined" because a federal agent had to be put on notice as to whether he would be subject to *Bivens* is wrong, or at least ignores the *Meals* necessity test.[1] Instead, the *Bivens* analysis is "entirely dis-

[1] Elhady can find no cases in the Sixth Circuit or elsewhere that found qualified immunity applied to a federal officer because, although the federal officer violated a clearly established constitutional right, the existence of a *Bivens* remedy for the violation is not clearly established.

tinct" and therefore not necessary to resolve the qualified immunity question. *See Wong*, 373 F.3d at 961 ("resolution is not a logical predicate to the resolution of[] the qualified immunity issue"). *Meals* shows what kind of interconnection the pendant question required, as the Court found the question of whether a constitutional violation was clearly established necessarily implied the question of whether there was a constitutional violation at all. 493 F.3d at 727. The lack of linkage between *Bivens* and qualified immunity stands in stark contrast.

Nor is the judicial efficiency reason that *Nebraska Beef* found gave rise to pendant jurisdiction over *Bivens* cases, 398 F.3d at 1083, sufficient for pendant jurisdiction under *Meals*. So, given the Sixth Circuit's pendant jurisdiction test, if the Court determined it even had to reach the issue, it should apply *Wong* and not *Nebraska Beef* or *Bistrian*.

II. *Hernandez* is not relevant to any *Bivens* issue in this case.

Because *Hernandez* only deals with the question of a new *Bivens* context, and not qualified immunity, it is irrelevant to this appeal. *See* § I, above.

But even if *Bivens* was squarely before the Court, *Hernandez* would still not impact this case. *Hernandez* addressed a border agent's shooting

of a Mexican citizen across the U.S.-Mexico border. 140 S. Ct. at 739-40. The Court reasoned that because such a situation was a new context that raised significant foreign policy and national security issues, no *Bivens* cause of action existed. *See id.* at 749. Notably, the Supreme Court's analysis made no mention of Mesa's status as a border agent—even though the Fifth Circuit relied heavily on it in determining that "special factors counseling hesitation" existed. 885 F.3d 811, 819 (5th Cir. 2018); *but see* id. at n.14 (suggesting even then that the Fifth Circuit did not "repudiate *Bivens* claims where constitutional violations by the Border Patrol are wholly domestic").

The only possible similarity between *Hernandez* and this case is that both defendants were border agents. This case is about the abhorrent conditions in which Bradley detained Elhady, a U.S. citizen. And whatever can be said about the reasons why Bradley detained Elhady—a U.S. citizen not suspected of any crime with an absolute right to enter the country—for four hours, the critical facts here regard the conditions of that confinement. And the fact that Bradley knowingly imposed freezing cold conditions on Elhady, who Bradley and his colleagues deprived

of a jacket and shoes, and then declined to provide him an available blanket in response to Elhady's increasingly desperate pleas has nothing to do with national security or foreign affairs. *See also Boule v. Egbert,* 998 F.3d 370, 388 (9th Cir. 2021) ("Boule is a United States citizen, complaining of harm suffered on his own property in the United States") (rejecting application of *Hernandez*)

Indeed, Elhady filed an amicus brief in *Hernandez* on behalf of neither party.[2] In that amicus brief, Elhady argued that (a) contrary to the Fifth Circuit's suggestion, the mere fact that a border patrol agent is the defendant does not make a new context and is not a factor weighing against a *Bivens* remedy, Br. at 5-7, and (b) any decision that a cross-border shooting context weighed against a *Bivens* remedy should be issued narrowly, and not apply to a border patrol agent's conduct generally, Br. at 8-11. The amicus brief also explained how, in the *Bivens* analysis, "national security determinations are contextual, not categorical." *Id.* at 11-14. And the Court's decision was entirely consistent with Elhady's assertions and analysis connecting them to the facts in this case.

[2] Available at https://www.supremecourt.gov/docket/docketfiles/html/public/17-1678.html.

So, even if this Court does have jurisdiction over the *Bivens* issue generally, *Hernandez* would supports affirming the lower court's qualified immunity decision.

If there were any national security issues at all in this case, it would be in the reasons why Elhady was detained, and not his conditions of confinement. In his reply brief (at 15), Bradley faults Elhady for not overcoming an objection into why Bradley detained Elhady on relevance grounds. This missed the point, because Elhady raises a Fifth Amendment conditions of confinement claim and not a Fourth Amendment unlawful seizure claim. The issue about the lack of penological justification for the detention is related to the fact that the clearly-established case law potentially creates an affirmative defense of sorts to otherwise unconstitutional conditions. *See Hope v. Pelzer*, 536 U.S. 730, 738, 746 (2002) (finding "unnecessary exposure to the heat of the sun" clearly-established violation because it is done without penological "justification"); *see also Porter v. Clarke*, 923 F.3d 348, 362 (4th Cir. 2019), as amended (May 6, 2019) ("the exact role of penological justification in analyzing an Eighth Amendment conditions of confinement case is unsettled"); *Willis v. Barksdale*, 625 F. Supp. 411, 414–17 (W.D. Tenn. 1985) (no Eighth

Amendment violation when government did all it could to ameliorate unusual and extreme heatwave). So the burden would not be on Elhady but on Bradley. Nor did Bradley raise a state secrets defense of any kind.

As explained above and in Elhady's amicus brief, to the extent Bradley argues that Elhady's detention implicates national security—an assertion not supported by any evidence in the record of any kind—*Hernandez* is so different in facts and violation as to not speak in any way to any national security issue in detaining Elhady, even the fact of detaining him at all. But the national security concern element to the *Bivens* analysis—which comes from *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017), not *Hernandez*, in any event—would ***at most*** merely require the Court to assume Bradley had a valid penological reason for detaining Elhady. It would not excuse the decision to detain Bradley in freezing cold conditions without adequate (and available) protection from that cold.

CONCLUSION

For the reasons explained in Elhady's Brief, the Court should affirm the District Court's denial of summary judgment. The Court should not rely on *Hernandez* in reaching that determination.

Respectfully submitted,

Date: October 1, 2021

/s/ Lena Masri
Lena F. Masri
Justin Sadowsky
Gadeir I. Abbas*
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave. SE
Washington, DC 20003
(202) 742-6420
Counsel for Anas Elhady
**Licensed in Virginia only. Practice limited to federal matters*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface, Century Schoolbook, using Microsoft Office's Word 2019, in 14-point font.

Date: September 1, 2021

/s/ Lena Masri
Lena F. Masri

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused to be electronically filed Appellee's Supplemental Brief with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 1st day of September, 2021.

/s/ Lena Masri
Lena F. Masri

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Record Entry	**Description**	**Page ID # Range**
RE 46	Complaint	1-9
RE 128	Notice of Appeal	670-689