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VIA CM/ECF

June 15, 2022

Ms. Patricia S. Dodszuweit
Clerk, United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

RE: *Xi v. Haugen*, No. 21-2798 (3d Cir.)

Dear Ms. Dodszuweit:

Pursuant to FRAP 28(j), we write to notify the Court of the Supreme Court's decision in *Egbert v. Boule*, No. 21-147, 2022 WL 2056291 (June 8, 2022).

In *Egbert*, the Supreme Court held that it would not extend *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), to plaintiff's First and Fourth Amendment claims alleging that a U.S. Border Patrol agent used excessive force and retaliated against the plaintiff for filing a grievance and administrative claim. The Court emphasized that *Bivens* may not be extended when "there is *any* rational reason (even one) to think that Congress is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" Op. 11 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017)).

Applying this stringent test, the Supreme Court concluded that "superficial similarities" between the plaintiff's Fourth Amendment claim and the claim in *Bivens* "are not enough to support the judicial creation of a cause of action." Op. 10. It held that *Bivens* should not be extended in the national-security context of a claim against a Border Patrol agent, emphasizing that the question is not "whether

Bivens relief is appropriate in light of the balance of circumstances in the ‘particular case’” but more broadly whether “‘judicial intrusion’ into a given field might be ‘harmful’ or ‘inappropriate.’” *Id.* at 11 (quoting *United States v. Stanley*, 483 U. S. 669, 681, 683 (1987)). It further held that alternative remedies, including an administrative process directing Border Patrol to investigate alleged violations of its standards and accept grievances from persons wishing to lodge a complaint, independently foreclosed creating a damages remedy, *id.* at 12-13, stating that “[s]o long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy.” *Id.* at 13.

The decision further supports the government’s arguments, *see* Appellees’ Br. at 15–32, that special factors, including the availability of alternative remedial processes, preclude extending *Bivens* to plaintiffs’ claims against an FBI counterintelligence agent here.

Sincerely,

/s/ Leif Overvold

Leif Overvold

Counsel for Defendants-Appellees

cc (via CM/ECF): Counsel of Record