IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

XIAOXING XI, *et al.*, Plaintiffs, v. FBI SPECIAL AGENT ANDREW HAUGEN, *et al.*, Defendants.	Civil Action No. 17-2132

FBI SPECIAL AGENT ANDREW HAUGEN'S RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff Xiaoxing Xi recently filed a Notice of Supplemental Authority purporting to provide "further support," *see* Doc. 48 at 1 (filed Aug. 27, 2018), to his opposition to FBI Special Agent Andrew Haugen's motion to dismiss the claims against him. In that motion Special Agent Haugen demonstrated that under recent Supreme Court and Third Circuit precedent, Xi urges this Court to imply a damages remedy in a new context that presents multiple special factors counselling hesitation. *See* Doc. 35 at 6-18. Xi's notice refers to two recent Ninth Circuit cases, *Rodriguez v. Swartz*, No. 15-16410, 2018 WL 3733428 (9th Cir. Aug. 7, 2018), and *Lanuza v. Love*, No. 15-35408, 2018 WL 3848507 (9th Cir. Aug. 14, 2018), that, Xi argues, support his opposition. Doc. 48 at 1.*

Neither case supports Xi's opposition. On the contrary, to the extent they are relevant, those cases support Special Agent Haugen's motion. At the outset, both cases held that the plaintiffs' claims extended *Bivens* into a new context given the differences between those cases

* Xi mistakenly attached to his notice the district court opinion in *Lanuza v. Love*, which, Special Agent Haugen submits, correctly determined that special factors barred the claims there. *See* Doc. 48 at 33-39. Special Agent Haugen attaches the Ninth Circuit opinion in *Lanuza* to this response for the Court's convenience.

and the three cases in which the Supreme Court implied a remedy. *See Rodriguez*, 2018 WL 3733428, at *10; *Lanuza*, 2018 WL 3848507, at *6. That supports Special Agent Haugen's showing that Xi attempts to extend *Bivens* into a new context given the differences between his claims and those in the prior three Supreme Court cases. *See* Doc. 35 at 11. Those cases are not otherwise relevant to this litigation.

First, *Rodriguez* and *Lanuza* involved facts very different than here. *Rodriguez* involved a shooting across the border into Mexico, *Rodriguez*, 2018 WL 3733428, at *1, and *Lanuza* involved an undisputed forgery of immigration documents during removal proceedings. *Lanuza*, 2018 WL 3848507, at *2. And the facts drove the Ninth Circuit's analysis in both cases. In *Rodriguez*, a Border Patrol officer, "[w]ithout warning or provocation," fired between fourteen and thirty bullets at a sixteen-year-old boy "peacefully walking down" a street across the border in Mexico, hitting him "mostly in the back" with "about" ten bullets and killing him. *Rodriguez*, 2018 WL 3733428, at *1. The court carefully tailored its analysis to the unique, egregious facts of that case, thus cabining its decision to the limited, unusual circumstances presented. *See id.* at *15 (noting that implying a damages remedy under the circumstances of that case "would not meaningfully deter Border Patrol agents from performing their duties").

Similarly, in *Lanuza*, a government attorney "forged and submitted evidence" to an immigration court "to deprive an individual of his right to relief under congressionally enacted laws." *Lanuza*, 2018 WL 3848507, at *7. Xi makes no such allegations, and his claims of "reckless falsifications," Sec. Am. Compl. (SAC) ¶ 59, do not refer to outright forgery, which undisputedly occurred in *Lanuza*. As in *Rodriguez*, the Ninth Circuit in *Lanuza* limited its holding to the egregious facts of that case. *See* 2018 WL 3848507, at *7, 10, 12 (repeatedly describing the claim and remedy sought as "narrow" in light of the facts alleged). The Ninth

Circuit did "not foresee a 'deluge' of potential claimants seeking to avail themselves of this particular *Bivens* action" because "[r]ecognizing a *Bivens* action here will produce widespread litigation only if ICE attorneys routinely submit false evidence, which no party argues is the case." *Id*. at *11. The court also noted the facts were "undisputed," so a remedy would not "involve the disclosure of any sensitive information at all." *Id.* at *8. The Court cannot be so confident here because Xi claims his communications were improperly obtained through FISA surveillance. *See* SAC ¶¶ 59-60.

Second, as the Ninth Circuit noted in both cases, the United States had prosecuted the officials, one for murder and the other for deprivation of rights. *See Rodriguez*, 2018 WL 3733428, at *6; *Lanuza*, 2018 WL 3848507, at *2. Indeed, contrary to Xi's assertion, Doc. 48 at 2, the Ninth Circuit held in *Rodriguez* that national security was not a special factor in *that case* because the United States was prosecuting the official for his actions. *See Rodriguez*, 2018 WL 3733428, at *15 ("It cannot harm national security to hold Swartz civilly liable any more than it would to hold him criminally liable, and the government is currently trying to do the latter."). The court did not hold that, as a general matter, national security was not a special factor. *See id.*; *cf. Lanuza*, 2018 WL 3848507, at *8 ("Lanuza has no ties to terrorism and, as a run-of-the-mill immigration proceeding, his case is unrelated to any other national security decision or interest."). Here, Special Agent Haugen was not prosecuted; his actions were assuredly not a crime. Unlike the defendants in *Rodriguez* and *Lanuza*, Special Agent Haugen was not a rogue actor. Xi could not have been indicted, nor subject to the FISA searches he alleges, without coordinated, high-level government approval. *See, e.g.*, Fed. R. Crim. P. 7(g)(1) (indictment must be signed by the attorney for the government); 50 U.S.C. § 1804(a) (stating that each

application for electronic surveillance shall require the approval of the Attorney General and must include a certification from one of the executive branch officials described in the statute). Moreover, as Xi alleges, the United States indicted him as a spy for China, which *is* related to national security. *See* SAC ¶ 1.

In any event, the Ninth Circuit decisions Xi cites are not binding on this Court. The Third Circuit, however, has already addressed many of the issues Xi discusses in his notice. In *Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017), the Third Circuit ruled that special factors counselled hesitation and refused to imply a remedy, even though the remedy sought was against a line-level officer, not a high-level policymaker. *See id.* at 193 (refusing to imply remedy against TSA agent who performed secondary screening). The Third Circuit also discussed at length the national security implications of that suit, and relied on Supreme Court guidance that claims that implicate national security raise special factors. *See id.* at 206-07. *Vanderklok*'s analysis, along with the other Supreme Court and circuit precedent that Special Agent Haugen highlighted in his motion, demonstrate that Xi's claims raise special factors counselling hesitation and should be dismissed.

Dated: August 30, 2018

Respectfully submitted,

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