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

PETITION FOR REHEARING EN BANC

Date: January 3, 2022

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 20-1339 Case Name: Elhady v. Unidentified CBP Agents, et al

Name of counsel: Lena Masri

Pursuant to 6th Cir. R. 26.1, Anas Elhady
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on January 3, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Lena Masri

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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RULE 35(b)(1) STATEMENT

The Court should rehear this case en banc because the Panel's decision to take a twice-forfeited *Bivens* issue and decide sua sponte that "when it comes to the border…[*Bivens*] does not apply" conflicts with decisions of this Court and the Supreme Court, including *Johnson v. Ford Motor Co.*, 13 F.4th 493, 504 (6th Cir. 2021), *Hernandez v. Mesa*, 137 S.Ct. 2003, 2006–07 (2017) (per curium) ("*Hernandez I*"), *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 89 (1998), and *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979), as well as decisions of various other Circuits.

The Court should also rehear this case en banc because the proceeding involves a question of exceptional importance: whether the Panel's determination that *Bivens* does not apply to any border or immigration context conflicts with authoritative decisions of the Fifth and Ninth Circuits to the contrary. *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006); *Boule v. Egbert*, 998 F.3d 370, 388 (9th Cir. 2021), *cert. granted in part*, 21-147, 2021 WL 5148065 (U.S. Nov. 5, 2021); *Lanuza v. Love*, 899 F.3d 1019, 1026 (9th Cir. 2018); *Papa v. U.S.*, 281 F.3d 1004, 1011 (9th Cir. 2002).

INTRODUCTION

This Fifth Amendment conditions of confinement case arises from the detention of an innocent American who lawfully crossed the US-Canada border at night. A CBP Officer abused a 23 year-old traveler during an overnight detention.

That officer—Mr. Blake Bradley—appealed the District Court's decision that freezing Anas Elhady in an ice-cold holding cell for four hours—without shoes or a jacket or blanket and despite pleas by Elhady for warmth, until he passed out and was rushed by ambulance to the hospital—violated clearly established law. Critically, Bradley appealed the Fifth Amendment and qualified immunity questions, and did not raise *Bivens* as an issue at summary judgment. But the Panel nevertheless held, sua sponte, that there was no *Bivens* action. Not in this case nor, apparently, in any other border-related case if the panel's decision stands.

In so holding, the Panel did not apply the well-established special factors analysis required when there is a new *Bivens* context, *see Koprowski v. Baker*, 822 F.3d 248, 257 (6th Cir. 2016), and repeatedly made sweeping and unsupported pronouncements of law.

That is not to say that the *Bivens* issue in this case is simple and straightforward in the other direction, either. As the dissent explained (at 12), the *Bivens* question here is "close" and "difficult," requiring nuanced briefing. (Nor did the District Court below treat the *Bivens* issue as simple in its carefully-constructed, unappealed denial of Bradley's Motion to Dismiss.) But this only shows why it was "imprudent" for the Court to reach that issue without the parties' invitation and without any traditional sequential briefing. *Id*. The Panel should rehear this case en banc and undo the significant damage this published decision has done to Sixth Circuit caselaw.

BACKGROUND

Anas Elhady, a United States citizen with an absolute right of entry into the United States, was detained at the United States-Canada border by Customs and Border Patrol agents, led by Officer Blake Bradley, without explanation. Elhady Dep., RE 98-2, PageID ## 1988-1989, 1991, 1994; TECS Record; RE 27-1, PageID # 472, Sosnowski Dep., RE 114-11, PageID # 4298. Bradley held Elhady for over four hours in a freezing cold cell without shoes, a jacket, or any of blankets CBP agents had on hand. MSJ Opinion, RE 122, PageID ## 4664-65, 4677, 4682-83. As a result,

Elhady's body temperature dropped, he lost consciousness, and was rushed to the hospital. *Id.*; *id.* at 4670-74.

Elhady brought a *Bivens* action against Bradley and other CBP agents involved in his detention. Complaint, RE 1, PageID # 1. The defendants filed a motion to dismiss, arguing, among other things, that there was no *Bivens* cause of action for border-related conduct. Motion to Dismiss, RE 41, PageID # 579-83. The District Court denied that motion. MTD Decision, RE 46, PageID # 670.

After discovery, the defendants filed a series of summary judgment motions, arguing (1) that there was no Fifth Amendment conditions of confinement violation, (2) that the defendants were entitled to qualified immunity, and (3) that the defendants were generally insufficiently connected to the conduct Elhady complained of. Motions for Summary Judgment, RE 96-102, Page ID ## 1663-2995. The District Court denied summary judgment as to Bradley, explaining that viewing the facts in the light most favorable to Elhady, a reasonable jury could find that Bradley violated Elhady's clearly established Fifth Amendment rights. MSJ

Opinion, RE 122, Page ID # 4663-64. The District Court granted the motion as to the other defendants, finding their conduct insufficiently connected to the constitutional violation. *Id*.

Bradley took an interlocutory appeal of the summary judgment determination. Notice of Appeal, RE 128, PageID # 4705. On appeal, Bradley argued only the qualified immunity question and the intertwined question of whether he violated the Constitution. Dkt. 41, 48.

Before oral argument, the Panel requested 10-page simultaneous briefing "on how *Hernandez v. Mesa*, 140 S.Ct. 735 (2020) [*Hernandez II*], applies in this case." Dkt. 52. Elhady filed a supplemental brief arguing this Court cannot (due to lack of pendant jurisdiction) and should not (due to Bradley's forfeiture) decide the *Bivens* issue, and that if it did, *Hernandez II* did not change the District Court's *Bivens* analysis. Dkt. 53. Bradley filed a supplemental brief arguing the Court could decide the *Bivens* question, and if it chose to—relying chiefly on pre-*Hernandez II* cases—it should find that no *Bivens* cause of action existed. Dkt. 54. At oral argument, Bradley's counsel, in the words of Judge Rogers' dissent, "repeatedly declined to answer whether we should decide" the *Bivens* issue. Dkt. 60-2 at 11.

Nevertheless, in a 2-1 decision, the Panel held that no *Bivens* remedy existed, and, as a result, declined to reach the qualified immunity question that was actually appealed. *Id.* at 1-10. In making that determination, the Panel stated that the Supreme Court had instructed Courts of Appeal to always reach the *Bivens* issue in qualified immunity cases, so it did not matter either whether the *Bivens* issue was inextricably intertwined with the qualified immunity question (as normally necessary to create pendant jurisdiction) or that Bradley had forfeited the *Bivens* issue. *Id.* at 6. The Panel then held that no *Bivens* cause of action existed, because "when it comes to the border, the *Bivens* issue is not difficult—it does not apply." *Id.* at 10.

The dissent argued that under traditional forfeiture principles, the Court should not reach the *Bivens* issue, and disagreed with the Panel that "whether a cause of action exists" is jurisdictional. *Id.* at 11-13. It also noted that the *Bivens* question was "close" and "difficult," and that it would be "imprudent" for the Court to decide it. *Id.* at 12.

REASONS FOR GRANTING THE PETITION

I. Deciding the forfeited *Bivens* issue sua sponte was contrary to Sixth Circuit forfeiture jurisprudence and based on incorrect interpretations of Supreme Court law.

In deciding that Elhady lacked a *Bivens* remedy, the Panel ignored Circuit precedent on forfeiture and misinterpreted Supreme Court precedents about *Bivens* appeals and jurisdiction.

A. The Panel refused to apply binding Circuit precedent.

There is no dispute that Bradley forfeited the *Bivens* argument twice—once by not raising it when moving for summary judgment (the only interlocutory order on appeal in this case), and again by not raising it on appeal. Under this Circuit's precedent, that should have been the end of the matter. "A court's primary duty is to resolve the dispute in front of it. And in our adversarial system, courts chiefly rely on the parties to give them not just the facts but the law and the issues as well." *Wright v. Spaulding*, 939 F.3d 695, 704 (6th Cir. 2019) (Thapur, J.). As a result, "[i]t is well settled that an argument not raised on direct appeal is forfeited." *United States v. Fleischer*, 971 F.3d 559, 569 (6th Cir. 2020) (quoting *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999)); *see also Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 457 (6th Cir. 2021).

Only in "exceptional" cases will the Court excuse forfeiture. *Johnson v. Ford Motor Co.*, 13 F.4th 493, 504 (6th Cir. 2021). Under Sixth Circuit precedent, there is a four-factor test for exceptionality: "(1) whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts; (2) whether the proper resolution of the new issue is clear and beyond doubt; (3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice; and (4) the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate court." *Id.* (quoting *Friendly Farms v. Reliance Insurance Company*, 79 F.3d 541, 545 (6th Cir. 1996) (cleaned up); *see also* Dissent (Dkt. 60-2 at 11).

Under *Johnson* and *Friendly Farms*, the Panel should not have reached the forfeited *Bivens* question. Factors 2, 3, and 4 all weigh against excusing forfeiture. The proper resolution is not clear or beyond doubt, *see* § II, below. And, as this Court has explained, because the Court "can adequately review the issue of a *Bivens* … claim on appeal from the final judgment," so failure to take up the issue on an interlocutory appeal would not result in a denial or miscarriage of justice. *Himmelreich v. Fed.*

Bureau of Prisons, 5 F.4th 653, 662 (6th Cir. 2021). Indeed, it is almost never appropriate to excuse a party's forfeiture in an interlocutory appeal, as such appeals are already cabined jurisdictionally to limited circumstances. The question of whether a *Bivens* remedy exists in a particular case does not fall within those circumstances. *Id.* at 661 (no independent jurisdiction to review *Bivens* determination); *see also Meals v. Memphis*, 493 F.3d 720, 727 (6th Cir. 2007) ("there is no general appellate jurisdiction to consider issues related to claims that are capable of interlocutory appeal"). The Panel did not even acknowledge, let alone apply, this well-settled test.

B. The Panel misapplied Supreme Court precedent.

Instead of relying on binding Circuit precedent, the Panel looked further afield. The Panel held that *Hernandez v. Mesa*, 137 S.Ct. 2003, 2006–07 (2017) (per curium) ("*Hernandez I*"), requires courts to decide *Bivens* questions, even sua sponte, when raised on an interlocutory qualified immunity appeal. Dkt. 60-2 at 6-7; *but see* Dkt. 60-2 at 12 (dissent). According to the Panel, the Supreme Court "advised lower courts in our position—that is, reviewing an interlocutory appeal of qualified immunity—to first consider the *Bivens* question." *Id.* at 6.

The Panel was mistaken. Strikingly, as the dissent pointed out (at 12), *Hernandez I* itself expressly rejects the Panel's conclusion: "disposing of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy[,] is appropriate in many cases." 137 S.Ct. at 2007. And the distinctions between *Hernandez I* and this case illustrate why resolving the Fifth Amendment conditions of confinement claim first is appropriate here.

Hernandez I was decided on appeal from final judgment, not on interlocutory appeal. 137 S.Ct at 2005. And it said nothing about either interlocutory appeals or forfeiture. Instead, *Hernandez I* involved a situation where (1) the district court dismissed the claims against Mesa on qualified immunity grounds, rendering a final judgment, *id.* at 2005, (2) the Fifth Circuit initially reversed that determination but went en banc to ultimately affirm, both on qualified immunity grounds, *id.* at 2005-06, (3) the Supreme Court granted certiorari on the qualified immunity ground requested and also raised sua sponte the *Bivens* question, *id.* at 2006 & 2008 (Thomas, J., dissenting), and then (4) ultimately decided that the Court of Appeals should decide the *Bivens* issue before the Court addressed either issue, *id.* at 2007-08,

Given that posture, *Hernandez I* does not suggest that the Panel should have decided the forfeited *Bivens* issue. *Hernandez I* contained no forfeiture question at all because the case came up on a final judgment of dismissal; the Supreme Court could affirm on any grounds present in the record "that w[ould] not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). The parties did not have the ability to brief or consider *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017), which had been decided only a week earlier. And although courts routinely decide the qualified immunity issue without deciding the *Bivens* issue, *see Hernandez I*, 137 S.Ct. at 2007, the qualified immunity issue was complicated and fact-bound, making it less amenable to determination on motion to dismiss, *id.* at 2007.

None of those justifications for deciding the *Bivens* question before the qualified immunity issue are present here. A court cannot ***reverse*** for any reason found in the record; instead, a court is generally bound by the questions presented by the appellant. As this Court has put it, "in our adversarial system, courts chiefly rely on the parties to give them not just the facts but the law and the issues as well." *Wright*, 939 F.3d at 704. This case came before the Panel on interlocutory appeal from denial of

summary judgment, so the issue of a narrow factbound dispute preventing affirmance was not present. And *Hernandez II*—which the Panel mainly relies on for general principles that predated that decision anyway—was decided on February 25, 2020, 15 days after the District Court's summary judgment decision on qualified immunity came out, and over a month before Bradley's notice of appeal.

Separately, the Panel held that if there is no *Bivens* cause of action, the Court lacks Article III jurisdiction. Dkt. 60-2 at 6. This is again contrary to established Supreme Court precedent. "[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 89 (1998); *see also Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (explaining the difference between jurisdiction and cause of action specifically in the *Bivens* context); Dkt. 60-2 at 13. If the existence of a *Bivens* cause of action was jurisdictional, *Hernandez I*'s own statement that it is "appropriate" in "many cases" to assume its existence would be wrong. 137 S.Ct. at 2007.

C. The Panel's decision creates several circuit splits.

Predictably, because the Panel's interpretation of *Hernandez I* is untenable, the Panel's decision also conflicts with the decisions of several other circuits.

In the Fourth Circuit, *Hicks v. Ferreyra*, 965 F.3d 302, 309 (4th Cir. 2020), also arose out of an interlocutory appeal from denial of qualified immunity. But *Hicks* expressly rejected the position the Supreme Court's *Bivens* cases required anything other than the Fourth Circuit's "standard forfeiture and waiver principles, under which we will consider an issue not raised before the district court only in 'exceptional circumstances' and reverse only if the proponent of the newly discovered argument can establish 'fundamental error.'" *Id.* at 311. And *Hicks* went on to find the officers' argument there was no *Bivens* cause of action forfeited by failing to raise it before the district court on summary judgment, even though they expressly raised it in the Court of Appeals. *Id.*

Similarly, in another border-related case, the Fifth Circuit assumed without deciding that a *Bivens* remedy existed, declining to conclusively resolve the issue in light of the lack of a "district court opinion and with only a single paragraph of briefing." *Angulo v. Brown*, 978 F.3d 942, 949

n.3 (5th Cir. 2020); *see also Petzold v. Rostollan*, 946 F.3d 242, 248 n.21 (5th Cir. 2019) (assuming without deciding *Bivens* cause of action as an appropriate course of conduct under *Hernandez I*). Other circuits have, like the Fourth Circuit, declined to reach a defendant's forfeited *Bivens* argument, *e.g., Farah v. Weyker*, 926 F.3d 492, 503 (8th Cir. 2019); *see also Ahmed v. Weyker,* 984 F.3d 564, 567 (8th Cir. 2020) (resolving *Bivens* issue in same case when later properly raised); *Pearce v. Doe*, 20-20372, 2021 WL 912313 (5th Cir. Mar. 9, 2021), or like the Fifth Circuit, have reached the qualified immunity determination without addressing the *Bivens* question, *e.g., Dixon v. von Blanckensee*, 994 F.3d 95, 109 (2d Cir. 2021).

D. The Panel's decision will cause serious unintended consequences.

Finally, the Panel's decision would lead to two significant perverse incentives. ***First***, *Bivens* defendants do not get an automatic right of appeal from a holding that a *Bivens* cause of action exists. *Himmelreich*, 5 F.4th at 661. But under the Panel's analysis, if a *Bivens* defendant appeals a denial of qualified immunity, that defendant gets an automatic right of appeal of the *Bivens* question, whether raised below or not. This

will encourage *Bivens* defendants to raise and appeal even frivolous qualified immunity defenses to get interlocutory appeals of *Bivens* questions. ***Second***, because the Panel holds that Courts must decide the *Bivens* issue whether or not it is forfeited (or even if, like here, the defendant expressly declines to press the issue when prompted), it may prompt *Bivens* defendants to avoid raising the issue in its brief in their interlocutory appeals, strategically leaving the plaintiff-appellee with nothing to respond to.

* * *

Because the Panel's decision conflicts with the Sixth Circuit's entire line of forfeiture cases, various decisions of other Circuits, and *Hernandez I* and other Supreme Court cases, and because the Court's decision will have significant adverse effects on how *Bivens* cases will be litigated in future cases, this Court should rehear the case en banc and affirm the District Court's decision based on Judge Rogers' well-reasoned Panel dissent.

II. The Panel's holding that *Bivens* does not apply in any border or immigration context creates a circuit split with the Ninth and Fifth Circuits.

Beyond the Panel's error in reaching the *Bivens* issue at all, its holding on that issue is wrong and creates a multi-circuit split. As far as the Petitioner can tell, the Panel was the first federal court to ever hold that no *Bivens* action exists for any immigration or border-related context. Dkt. 60-2 at 9-10. This conflicts with governing law in a number of circuits.

As the Panel acknowledged, its decision conflicts with the Ninth Circuit's holding in *Boule v. Egbert*, 998 F.3d 370, 388 (9th Cir. 2021), *cert. granted in part*, 21-147, 2021 WL 5148065 (U.S. Nov. 5, 2021). *Id.* But the Panel maintained that because of that certiorari grant, *Boule* "is no longer on the books," *id.*, so the circuit split vanishes. But a grant of certiorari does not vacate a decision unless the Supreme Court expressly chooses to do so, as it does often in a "grant, vacate, and remand" order or a *United States v. Munsingwear, Inc.,* 340 U.S. 36 (1950), order. Otherwise, the Supreme Court only vacates (or reverses, or affirms) an opinion at the end of the process when issuing a final opinion. Indeed, the Supreme Court itself regularly cites to circuit court opinions that it has

reversed "on other grounds." *See, e.g., USPTO v. Booking.com*, 140 S.Ct. 2298, 2302 (2020).

The Panel also created a split with other cases in the Ninth Circuit, which, even under the Panel's mistaken understanding of the results of a grant of certiorari, remain "on the books." In *Lanuza v. Love*, 899 F.3d 1019, 1026 (9th Cir. 2018), the Ninth Circuit explained that "[a]lthough *Abbasi* could have stood for the broad proposition that *Bivens* remedies are not available in the context of immigration proceedings because of the sensitive nature of immigration policy, the *Abbasi* Court did not paint in such broad strokes; rather, it cabined its holding to suits against executive officials issuing policy responses to sensitive issues of national security." *See also Papa v. U.S.*, 281 F.3d 1004, 1011 (9th Cir. 2002).

The Panel's decision further created a split with the Fifth Circuit, which has acknowledged *Bivens'* applicability at the border. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006); *see also De La Paz v. Coy*, 786 F.3d 367, 374 (5th Cir. 2015) (criticizing *Martinez-Aguero* but ultimately distinguishing it on the grounds that it involved an allegation of excessive force).

Conversely, none of the cases the Panel relied on (at 8) for the supposed other-than-the-Ninth-Circuit unanimity have the sweeping holdings the Panel claims. Both circuit court cases on which the Panel relied involved immigration issues and turned on details of the Immigration and Nationalization Act irrelevant to this case. And *Hernandez II* did not go nearly so far as the Panel suggests.

Tun-Cos v. Perrotte, 922 F.3d 514, 523 (4th Cir. 2019) held that "ICE agents' enforcement of the INA" presented a new *Bivens* context. But this case does not involve immigration. And *Tun-Cos* is also inapposite because the Fourth Circuit's analysis of the reasons for hesitancy in extending *Bivens* focused on factors specific to the immigration context, not the border context: the INA's statutory mandate, the Executive Branch's immigration perogative, the INA's alternative remedial scheme, and evidence that Congress did not want ICE agents liable under *Bivens*. *Id.* at 525-27. Here, there is no dispute that Elhady is a United States citizen, that Bradley is a CBP (not ICE) agent, that Elhady has an unqualified right to enter and be present in the United States, that he is

entitled to no immigration-related remedial scheme,[1] and that the INA and immigration policy are irrelevant to this case. Immigration issues and border issues are not the same, and the Panel was wrong to think otherwise.

The Panel made the same mistake in looking to the Fifth Circuit's decision in *Maria S. v. Garza*, 912 F.3d 778 (5th Cir. 2019). There, the Fifth Circuit held that there was no *Bivens* cause of action for immigration-related procedural due process claims because "the comprehensive administrative and remedial procedures of the" INA constituted a congressionally-provided alternative remedy. *Id.* at 785. Again, the Panel conflated immigration and the border.

That leaves *Hernandez II* itself which, unlike *Tun-Cos* and *Maria S.*, dealt directly with the conduct of CBP agents at the border. Nonetheless, the case provides the Panel with no support. There, the Supreme Court held only that *Bivens* did not extend ***past*** the border—and said nothing about whether *Bivens* extends ***to*** the border. 140 S Ct. at 747 ("beyond our borders"); 749 ("outside our borders"). Elhady is aware of no

[1] The presence of a remedy under the FTCA is not a special factor counseling hesitancy. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

case that has interpreted *Hernandez II* to bar all claims against Border Patrol agents. (Indeed, the Panel did not cite a single post-*Hernandez II* case.) Rather, the only post-*Herandez II* case to directly address the question held that *Bivens* continues to extend to the context of border enforcement. *See Boule*, 998 F.3d at 388 ("The fact that Agent Egbert is a border patrol agent, standing alone, does not preclude a *Bivens* action.").

CONCLUSION

The Panel should have adopted Judge Rogers' well-reasoned dissent, and this Court should rehear the case en banc to correct that error, decline to reach the twice-forfeited *Bivens* question, and affirm the district court on qualified immunity. In the alternative, this Court could rehear the case en banc and reach the *Bivens* issue anew with the assistance of full, sequential party briefing.

Respectfully submitted,

January 3, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This brief complies with the type-volume limitation of Fed. R. App. P. 40(b)(1), because this brief contains 3,899 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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: January 3, 2022

/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 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 3rd day of January 2022.

/s/ Lena Masri
Lena F. Masri

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:

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