No. 21-1508

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DUSTIN DYER,

Plaintiff-Appellee,

v.

SHIRRELLIA SMITH, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

The district court held that Transportation Security Administration (TSA) airport screeners may be individually liable for money damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on alleged violations of the First and Fourth Amendments for conduct that occurred during airport security screening. The United States has a substantial interest in the proper resolution of that issue. TSA is a federal agency required by statute to assess threats to transportation and provide security screening at U.S. airports, among other duties. 49 U.S.C. §§ 114, 44901. And TSA is committed to protecting the constitutional rights of everyone in carrying out that mission.

Accepting plaintiff's allegations as true for the purposes of this appeal, the individual defendants may have acted inappropriately in ordering plaintiff to stop recording a pat-down search of his husband and to delete the video; and the government does not condone the alleged conduct of these TSA agents. TSA policies permit videotaping, so long as it is not disruptive and does not impede screening. But the district court's decision improperly imposes potential personal liability on TSA agents performing their critical security and public safety responsibilities. Because of the

national security concerns and other special factors present in the context of TSA security screening, this Court should not extend *Bivens* and should reverse the district court's order.

STATEMENT OF THE CASE

1. Following the terrorist attacks of September 11, 2001, Congress recognized the need for a "fundamental change in the way [the United States] approaches the task of ensuring the safety and security of the civil air transportation system." H.R. Rep. No. 107-296, at 53 (2001) (conference report accompanying the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001)). While commercial airline companies previously employed their own security services, Congress now "expect[ed] that security functions at United States airports should become a Federal government responsibility." *Id.* at 54. Congress thus created TSA to ensure "the safety and security of the civil air transportation system," which "is critical to the security of the United States and its national defense," and "is essential to the basic freedom of America to move in intrastate, interstate and international transportation." *Id.* at 53.

TSA is statutorily charged with "responsib[ility] for security in all modes of transportation" in the United States. 49 U.S.C. § 114(d). As such, TSA agents "are tasked with assisting in a critical aspect of national

security—securing our nation's airports and air traffic." *Vanderklok v. United States*, 868 F.3d 189, 207 (3d Cir. 2017). TSA agents must protect against the "asymmetric threat" posed by terrorists, and the agency "cannot afford to miss a single, genuine threat without potentially catastrophic consequences." *Frustrated Travelers: Rethinking TSA Operations to Improve Passenger Screening and Address Threats to Aviation, Hearing before the S. Comm. on Homeland Security and Government Affairs*, 114th Cong. 1 (2016) (Testimony of John Roth, Inspector General of the Dep't of Homeland Security).[1]

To counter these threats and to fulfill the agency's security mission, TSA agents screen "all passengers and property" that board passenger aircraft in the United States. 49 U.S.C. § 44901(a); *see also* 49 C.F.R. § 1540.107(a) (no one "may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property"). Given the volume of U.S. air travel, this is a considerable task. On a daily basis, TSA agents screen more than two million passengers who carry almost seven million items of luggage, and on an average day TSA will detect 11 firearms at its airport checkpoints.

[1] Available at https://www.oig.dhs.gov/sites/default/files/assets/TM/2016/OIGtm-JR-060716_0.pdf.

Transportation Security Administration, *TSA by the Numbers*, https://www.tsa.gov/news/press/factsheets/tsa-numbers. In addition to firearms, TSA agents must also screen passengers and luggage for a variety of other threats, including nonmetallic explosive devices. *Ruskai v. Pistole*, 775 F.3d 61, 70 (1st Cir. 2014).

Given the massive volume of this screening, which requires screeners' focused attention, TSA has promulgated regulations to prevent "interference that might distract or inhibit a screener from effectively performing his or her duties." 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002) (promulgating 49 C.F.R. § 1540.109). TSA explained that this prohibition is necessary because disruptions can cause a screener to "turn away from his or her normal duties," which in turn "may affect the screening of other individuals" and "discourage the screener from being as thorough as required." *Id.* In promulgating that regulation, TSA did not seek to "prevent good-faith questions from individuals seeking to understand the screening of their persons or their property," but nevertheless recognized that some interferences at the airport checkpoint "potentially can be dangerous" by disrupting the necessary security procedures. *Id.* *See Mocek v. City of Albuquerque*, 813 F.3d 912, 923-24 & n.2 (10th Cir. 2015) (explaining that "disruptions at TSA checkpoints," such as refusing to

provide identification and then filming the reactions of TSA agents, "are especially problematic").

2. The complaint alleges that plaintiff Dustin Dyer traveled through the Richmond International Airport with his husband and children, and went through a TSA checkpoint. JA97. At the checkpoint, a TSA screener conducted a pat-down search of Dyer's husband, while Dyer stood ten feet away and started a video recording of the search on his phone. *Id.* Dyer alleges that TSA agent Natalie Staton asked him to stop recording because it "impeded the ability of the agent performing the pat-down 'to do his job.'" *Id.* When Dyer continued recording, Staton asked her supervisor TSA agent Shirrellia Smith to join her. *Id.* Smith allegedly told Dyer to stop recording and Dyer complied. *Id.* At Staton's request, Smith then allegedly ordered Dyer to delete the recording while Staton watched to confirm its deletion. *Id.* Dyer deleted the video, and the agents allowed Dyer and his family to leave the checkpoint and continue their travel. *Id.*

3. Dyer sued Smith and Staton in their individual capacities under *Bivens*. Dyer alleged that their actions violated his First Amendment right to "record public spaces and, especially, public officials in the performance of their duties in public spaces." JA11-12, ¶¶ 49-54. Dyer also alleged a violation of his Fourth Amendment rights, arguing that by forcing him to

stop recording and to delete his recording, the TSA agents had conducted an unreasonable search and seizure. JA10-11, ¶¶ 41-48.

Smith and Staton, represented by private counsel, moved to dismiss, arguing that Dyer's claims arose in a new *Bivens* context and that special factors—security concerns, congressional oversight, and the potential for alternative remedies—counseled against inferring a new cause of action. Smith and Staton also argued that even if there were a *Bivens* cause of action, they would nevertheless be entitled to qualified immunity on the First Amendment claim.

The district court denied the motion to dismiss. The court held that Dyer's claims arose in a new context not previously recognized by the Supreme Court, both because they involved TSA agents and because they alleged a First Amendment violation. JA101, 105. The court accordingly considered whether there were any special factors that might counsel against expanding *Bivens* into these new contexts. JA100. The court held that national security concerns were not implicated because TSA primarily screens domestic passengers and because "damages in this case would not hamper TSA's efficacy; permitting individuals to record, from a distance, TSA agents performing their duties does not limit TSA agents' ability to screen passengers." JA102. The court also rejected defendants' argument

that Congress's repeated amendments to statutes governing TSA and air travel—without providing a damages remedy against TSA screeners—should counsel against inferring a *Bivens* action. Instead, the court concluded that Congress's failure to provide such a damages action "just as likely indicates implicit permission for such actions," and that defendant's argument "would preclude all expansions of *Bivens*." JA103. The court was similarly unpersuaded by the argument that TSA agents do not receive training on constitutional issues, holding that the agents "should not evade liability for constitutional violations because their employer has not provided adequate training." JA103-04. Finally, the district court recognized that Congress has created an administrative remedy program (the Department of Homeland Security's Traveler Redress Inquiry Program) for travelers with complaints about TSA agents, but held that those administrative remedies were only available to passengers mistakenly perceived to be a threat and thus inapplicable to Dyer. JA104-05.

Relatedly, the district court held that, taking the allegations as true, defendants were not entitled to qualified immunity on the First Amendment claim. JA107-10.

Staton and Smith filed an interlocutory appeal, *see* JA151, and the district court stayed further proceedings pending the appeal's resolution, JA155.

SUMMARY OF ARGUMENT

Congress has chosen not to create a damages action against TSA screening agents for actions they take in screening passengers at the airport checkpoint. This Court, accordingly, must consider whether to extend *Bivens* to that new context. The Court should decline to do so.

This Court has explained that it will not extend *Bivens* to a new context if there are "special factors counselling hesitation in extending *Bivens* liability," and focuses on "whether Congress *might doubt* the need for an implied damages remedy." *Tun-Cos v. Perrotte*, 922 F.3d 514, 525 (4th Cir. 2019) (cleaned up). If there are reasons for doubt or hesitation, then the Court must refrain from inferring a damages cause of action, because the decision to create a new federal cause of action for damages is best left to Congress. *Id.* at 517-18.

There are sound reasons to question whether Congress would want to impose individual liability on TSA screening agents for their actions in maintaining a secure checkpoint. *Vanderklok v. United States*, 868 F.3d 189, 205-09 (3d Cir. 2017). Most notably, Congress has charged TSA agents

with "a critical aspect of national security—securing our nation's airports and air traffic." *Id.* at 207. Imposing individual liability on TSA agents based on their actions in screening passengers "could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers." *Id.* As this Court has recognized, that national security concern "is so significant that we ought not create a damages remedy in this context." *Tun-Cos*, 922 F.3d at 526 (quoting *Vanderklok*, 868 F.3d at 209).

ARGUMENT

THE COURT SHOULD NOT EXTEND *BIVENS* TO CREATE A CAUSE OF ACTION FOR INDIVIDUAL LIABILITY IN THESE CIRCUMSTANCES

A. The Supreme Court And This Court Have Consistently And Correctly Declined To Extend *Bivens* To New Contexts

1. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court for the first time inferred a cause of action for damages against federal officers in their personal capacities for alleged constitutional violations. The Court held that, despite the absence of a statutory cause of action, federal law enforcement officers could be sued for money damages for conducting a warrantless search and arrest in violation of the Fourth Amendment. *Id.* at 389. *Bivens* was issued at a time when, "as a routine matter," the Court

"would imply causes of action not explicit in [a statute's] text" on the assumption that courts could properly "provide such remedies as [were] necessary to make effective" the statute's underlying purpose. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

The Supreme Court has since repudiated this "*ancien regime*" of implied causes of action, and instead "came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020). By inferring a cause of action where Congress has not chosen to create one, "the court risks arrogating legislative power" and "may upset the careful balance of interests struck by the lawmakers." *Id.* at 741-42. Authorizing a cause of action for damages against federal officials in their individual capacities would "create substantial costs[] in the form of defense," and would impose significant "time and administrative costs attendant upon intrusions resulting from the discovery and trial process." *Abbasi*, 137 S. Ct. at 1856. Congress is "better position[ed]" than the judiciary "to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1857 (cleaned up). Thus, whether to create such claims "should be committed to those who write the laws rather than those who interpret them." *Id.* (cleaned up).

As a result of these constitutional concerns, any further expansion of *Bivens* is "disfavored." *Abbasi*, 137 S. Ct. at 1857. Apart from *Bivens* itself, the Supreme Court has recognized an implied damages action under the Constitution only twice: (1) in an equal protection case involving discrimination in congressional staff employment, *Davis v. Passman*, 442 U.S. 228 (1979); and (2) in an Eighth Amendment case involving the failure to treat a prison inmate's asthma that caused his death, *Carlson v. Green*, 446 U.S. 14 (1980).

In the forty-one years since *Carlson*, the Supreme Court has "consistently rebuffed requests to add to the claims allowed under *Bivens*." *Hernandez*, 140 S. Ct. at 743. The Court has "declined to create an implied damages remedy in the following cases:"

- a First Amendment suit against a federal employer, *Bush v. Lucas*, 462 U.S. 367, 390 (1983);
- a race discrimination suit against military officers, *Chappell v. Wallace*, 462 U.S. 296, 297, 304-05 (1983);
- a substantive due process suit against military officers, *United States v. Stanley*, 483 U.S. 669, 671-72, 683-84 (1987);
- a procedural due process suit against Social Security officials, *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988);
- a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer*, 510 U.S. 471, 473-74 (1994);

- an Eighth Amendment suit against a private prison operator, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001);
- a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins*, 551 U.S. 537, 547-48, 562 (2007); and
- an Eighth Amendment suit against prison guards at a private prison, *Minneci v. Pollard*, 565 U.S. 118, 120 (2012).

Abbasi, 137 S. Ct. at 1857.

2. The Supreme Court has set forth a two-step inquiry before a court can infer a cause of action under *Bivens*. First, the court must determine if the cause of action arises in a new context—that is, if it differs "in a meaningful way from previous *Bivens* cases decided by this [Supreme] Court." *Abbasi*, 137 S. Ct. at 1859. A case can present a new context for *Bivens* purposes if "it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases." *Id.* at 1864. Even small differences constitute a new context, because "even a modest extension is still an extension." *Id.*

Second, if the case presents a new context, the court must consider whether "special factors" counsel against inferring such an action absent "affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857. This "inquiry must concentrate on whether the Judiciary is well suited, absent

congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. The court may not infer a *Bivens* action if "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Id.* at 1858.

In conducting that inquiry, "our watchword is caution." *Hernandez*, 140 S. Ct. at 742. Thus, if the court has any "reason to pause before applying *Bivens*," then it must "reject the request" to infer a new cause of action. *Id.* at 743. As this Court has stated, if there is reason to believe that "Congress *might doubt* the need for an implied damages remedy," then the judiciary ought not create one. *Tun-Cos v. Perrotte*, 922 F.3d 514, 525 (4th Cir. 2019).

3. Applying that framework from *Abbasi* and *Hernandez*, this Court has consistently declined to extend *Bivens* to new contexts. In *Tun-Cos*, 922 F.3d at 517-18, the plaintiffs asserted *Bivens* claims against agents of U.S. Immigration and Customs Enforcement, alleging that the agents unconstitutionally seized them and invaded their homes without warrants or probable cause. Although the district court recognized that this was a new context for *Bivens*—because the defendants were immigration agents operating under a different statutory scheme than *Bivens*—it concluded

that no special factors counseled against inferring a *Bivens* cause of action. *Id.* at 519-20.

This Court reversed with instructions to dismiss the complaint, holding that there were multiple special factors that prohibited extending *Bivens* in the immigration context. *Tun-Cos*, 922 F.3d at 525-28. Because the claims were based on the conduct of the agents in enforcing the immigration laws, a *Bivens* claim would have "the natural tendency to affect diplomacy, foreign policy, and the security of the nation," which "counsel[ed] hesitation in extending *Bivens*." *Id.* at 526. And while Congress had frequently legislated in the area of immigration, and even provided non-monetary remedies in constructing an administrative review scheme, there was no indication that Congress "want[ed] a money damages remedy against [immigration] agents for their allegedly wrongful conduct." *Id.* at 527. That too, was a "factor counseling hesitation" because "institutional silence speaks volumes and counsels strongly against judicial usurpation of the legislative function." *Id.* Accordingly, the Court declined to "extend *Bivens* into [this] new context." *Id.* at 528.

Subsequent decisions of this Court have followed suit. In *Doe v. Meron*, 929 F.3d 153, 169-70 (4th Cir. 2019), the Court declined to extend *Bivens* to claims against military officers, based on alleged conduct that

occurred overseas, where Congress had created an alternative remedial scheme. In *Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019), the Court affirmed dismissal of a *Bivens* claim against the Attorney General and Postmaster General for allegedly unconstitutional surveillance, noting that "various 'special factors' identified in the *Abbasi* decision counsel hesitation against recognizing a *Bivens* claim here."

Likewise, in *Earle v. Shreves*, 990 F.3d 774, 781 (4th Cir. 2021), the Court refused to extend *Bivens* to cover a prisoner's claim for First Amendment retaliation, explaining that a contrary holding "would work a significant intrusion into an area of prison management that demands quick response and flexibility, and [] could expose prison officials to an influx of manufactured claims." And in *Annappareddy v. Pascale*, 996 F.3d 120, 134-35 (4th Cir. 2021), the Court declined to infer a *Bivens* action against federal investigators and prosecutors for allegedly destroying and fabricating evidence in a criminal case, because a *Bivens* action would pose a "risk of intrusion on executive-branch authority to enforce the law and prosecute crimes." Although the Court could "think of [] policy reasons for making such a remedy available," it recognized that there were countervailing special factors, and so the decision of whether to create a

damages cause of action was "'for the Congress to make, not the courts.'" *Id.* at 138 (quoting *Abbasi*, 137 S. Ct. at 1860).

B. The National Security Concerns in TSA Airport Screening And Other Special Factors Strongly Counsel Against Inferring A *Bivens* Action In This Context

Here, the district court correctly concluded that Dyer's complaint seeks to extend *Bivens* to a new context—airport security screening conducted by TSA screening agents. JA101, 105. But the district court erred in concluding that there were "[n]o [s]pecial [f]actors" that might "counsel against implying a damages remedy" in the context of TSA security screening. JA101, 105. That holding conflicts with the only court of appeals' decision on the issue—*Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017)—and the district court's reasoning is incompatible with both how this Court and the Supreme Court have analyzed the existence of special factors.

1. There are significant special factors that counsel against recognizing personal liability against TSA screeners for Dyer's First and Fourth Amendment claims—chiefly, the national security interests inherent in TSA's screening procedures at U.S. airports. The Supreme Court has recognized the "particularly acute" security interest at airport checkpoints. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000); *see also United*

States v. Herzbrun, 723 F.2d 773, 775 (11th Cir. 1984) ("Due to the intense danger of air piracy," airport security checkpoints are "'critical zones' in which special fourth amendment considerations apply"). TSA was created and charged with airport security screening as a direct response to the national security threat posed by terrorists, and the work of TSA screening agents is essential to detecting and deterring threats to aviation security.

TSA agents perform critical screening duties that are necessary to fulfill Congress's directive that TSA provide a safe and secure civil air transportation system by screening all passengers and carry-on luggage at a secure checkpoint within the airport. *See supra* pp. 1-4; 49 U.S.C. § 44901(a). When it created TSA, Congress was keenly aware of the importance of these screening responsibilities—and the catastrophic consequences of any screening failures. *Airport Security: Hearing before the S. Comm. on Commerce, Science, and Transp.*, 107th Cong. 64 (2001) (statement of Charles M. Barclay, President of Am. Ass'n of Airport Executives) ("In light of the hijackings that occurred last week, it is now more important than ever that steps be taken to improve the way we screen passengers and their carry-on baggage"). In that context, TSA screening agents must make "decisions about safety and security in a fast-moving environment, with little margin for error." *Airline Security: Special Joint*

Hearing before the H. and S. Comms. on Appropriations, 107th Cong. 2 (2001) (opening statement of Sen. Murray). TSA agents must address dangerous, rapidly evolving threats that can arise from the possible presence of weapons, explosives, or even an individual's use of "intimidation" to gain control of a situation. *Id.* at 34 (prepared statement of Hank Queen, Vice-President of Boeing, listing threats to commercial aviation).

As such, TSA screening agents need to be vigilant about passengers who behave in an intentionally disruptive manner. A passenger who draws attention to themselves through a variety of possible actions can compromise checkpoint security—a disruption in one part of the screening area can distract a TSA agent monitoring another part of the screening area. 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002) ("Checkpoint disruptions potentially can be dangerous" because a "disruptive individual may be attempting to discourage the screener from being as thorough as required" and "turn [the screener] away from his or her normal duties"). And because the TSA secure screening area is a "uniquely sensitive setting," conduct that could be considered "relatively benign elsewhere might work to disturb the peace at these locations." *Mocek v. City of Albuquerque*, 813 F.3d 912, 924 (10th Cir. 2015).

Accepting Dyer's allegations as true for the purposes of this appeal, it may well be that the individual defendants acted inappropriately in allegedly ordering him to stop recording and to delete the video. TSA policies permit videotaping, so long as it is not disruptive and does not impede screening. The government does not condone the behavior alleged by Dyer.

But even so, that does not compel the conclusion that the Court should infer a cause of action to subject these TSA screening agents to individual liability. The Supreme Court has recognized "the danger that fear of being sued will 'dampen the ardor of all but the most resolute * * * in the unflinching discharge of their duties.'" *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). That is a serious concern for TSA screeners, who must accurately and quickly conduct a high volume of screenings while maintaining checkpoint security. If a TSA agent is subject to potential liability for misperceiving passenger behavior as disruptive at the checkpoint, the agent may be less likely to intervene or confront the passenger. *See Chappell*, 462 U.S. at 304 (refusing to infer a *Bivens* action given "the need for unhesitating and decisive action"). That reluctance to act, in turn, may jeopardize the effectiveness of the security screening throughout the checkpoint, because other agents may be distracted by or

drawn to the behavior in question. That potential for "a TSA agent [to] hesitate in making split-second decisions about suspicious passengers * * * is surely a special factor that gives us pause." *Vanderklok*, 868 F.3d at 207.

2. In *Vanderklok*, the Third Circuit considered whether to extend *Bivens* to the context of TSA security screening. The plaintiff, Roger Vanderklok, alleged that a TSA screening agent maliciously and falsely accused him of making a bomb threat during security screening, and then reported that false accusation to local law enforcement, causing Vanderklok's arrest. *Vanderklok*, 868 F.3d at 194-95. Vanderklok sued under *Bivens*, alleging violations of his First and Fourth Amendment rights. *Id.* at 196. The district court concluded that such an action was cognizable under *Bivens* and denied the TSA agent's motion for summary judgment and qualified immunity. *Id.*

The Third Circuit reversed and held that there were multiple special factors that precluded extending *Bivens* to the context of TSA security screening. *Vanderklok*, 868 F.3d at 209.[2] A *Bivens* action against TSA screening agents for their conduct in screening passengers "can be seen as implicating 'the Government's whole response to the September 11 attacks,

[2] The Third Circuit considered only Vanderklok's First Amendment claim, concluding that it lacked jurisdiction over the Fourth Amendment claim. *Vanderklok*, 868 F.3d at 197-98.

[and] thus of necessity requiring an inquiry into sensitive issues of national security.'" *Id.* at 206 (quoting *Abbasi*, 137 S. Ct. at 1861). Accordingly, the Third Circuit was disinclined to extend *Bivens* to the TSA screening context, which involves "[n]ational-security policy" that "is the prerogative of the Congress and President." *Id.* at 207.

In addition to these national security concerns, the Third Circuit identified other special factors that counseled against extending *Bivens*. Congress had, for instance, restricted the scope of judicial review for TSA actions, *see Vanderklok*, 868 F.3d at 208 (citing 49 U.S.C. § 46110(c)), and chosen to circumscribe the "remedies [available] in the airport security context," *id.* For instance, Congress directed TSA and the Department of Homeland Security to establish an administrative process to redress passengers who "were wrongly identified as a threat" by TSA. *Id.* at 204 (citing 49 U.S.C. § 44926(a)). That process, the Department of Homeland Security's Traveler Redress Inquiry Program, allows passengers to submit administrative complaints if they believe their "civil rights have been violated because [the] questioning or treatment during screening was abusive or coercive," but it does not provide for money damages. *Id.* at 205. And although Congress has considered a number of measures to alter TSA security screening and oversight, it has not enacted any measures that

would impose a damages cause of action against TSA employees.[3] That "failure to provide a damages remedy" was "more than mere oversight," *id.* at 208, particularly given the reticulated remedial scheme that Congress had created for torts by federal employees in the Federal Tort Claims Act, *see id.* at 200-03 (analyzing that statutory scheme).

The Third Circuit also harbored a "practical concern with establishing" individual liability on TSA screening agents, who "typically are not law enforcement officers and do not act as such." *Vanderklok*, 868 F.3d at 208. TSA screening agents conduct "administrative searches," looking for items that may pose a security risk if brought through the checkpoint, but they "are not trained on issues of probable cause, reasonable suspicion, and other constitutional doctrines that govern law enforcement officers." *Id.* at 208-09. Accordingly, *Bivens* claims are "poorly suited to address wrongs by line TSA employees" who are alleged to

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[3] *See, e.g.*, *Strengthening Oversight of TSA Employee Misconduct Act*, H.R. 1351, 115th Cong. (2017); H.R. Rep. No. 115-226, at 3 (2017) (explaining that the H.R. 1351 was designed to better position TSA to respond to employee misconduct); *FAST Redress Act of 2013*, H.R. 1583 § 2, 113th Cong. (2013) (proposing to create a TSA Office of Appeals and Redress); *RIGHTS Act*, S. 2207 § 2, 112th Cong. (2012) (proposing to create a TSA Ombudsman's Office to "record complaints from the general public regarding [TSA] screening practices" and "resolve passenger complaints at airports accusing TSA employees of mistreatment"); *Air Travelers' Bill of Rights Act of 2012*, S. 3302, 112th Cong. (2012).

have lacked the constitutional requisites for a particular action—such as ordering a passenger to stop filming checkpoint procedures. *Id.* at 209.

Ultimately, the Third Circuit concluded that "the role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context. The dangers associated with aircraft security are real and of high consequence." *Vanderklok*, 868 F.3d at 209. That holding in no way condoned bad behavior by TSA employees, but instead recognized that Congress was the appropriate branch of government to weigh the competing priorities and strike the proper balance in determining whether to create a damages cause of action. *Id.*

3. *Vanderklok*'s holding is entirely consistent with this Court's precedents, and this Court has quoted *Vanderklok* favorably in explaining that national security concerns are a special factor that counsel against extending *Bivens* to new contexts. *See Tun-Cos*, 922 F.3d at 526 (quoting *Vanderklok*, 868 F.3d at 209). And like *Vanderklok*, this Court has held that Congress's creation of alternative, non-monetary remedial schemes and frequent legislative interventions are special factors that counsel against an extension of *Bivens*. *Tun-Cos*, 922 F.3d at 526-27 (identifying, as special factors, the administrative review scheme for immigration cases and Congress's frequent amendments of the immigration laws); *Attkisson*,

925 F.3d at 621-22 (identifying Congress's enactment of alternative remedial schemes as evidence that Congress's choice not to provide a damages action in another context "is 'more than inadvertent' and strongly counsels hesitation").[4]

Other courts too, have favorably applied *Vanderklok*'s analysis that *Bivens* should not be extended to the TSA screening context. In the court of appeals' decision underlying *Hernandez*, 140 S. Ct. 735, the Fifth Circuit explained that *Bivens* action against a Border Patrol agent for shooting a person across the U.S.–Mexico border necessarily raises national security concerns. *Hernandez v. Mesa*, 885 F.3d 811, 818-19 (5th Cir. 2018). Relying on *Vanderklok*'s holding that extending *Bivens* to TSA screening would implicate "'a critical aspect of national security,'" the Fifth Circuit held that the "same logic applies here" to a *Bivens* action involving Border

[4] This Court has, in a 2013 case, proceeded on the assumption that there may be a *Bivens* action available based on the conduct of TSA screeners at an airport checkpoint. *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013) (denying qualified immunity). But the parties in *Tobey* did not brief the threshold question of whether *Bivens* should be extended to the TSA context, and Judge Wilkinson recognized that the question was "not before us." *Id.* at 404 n.* (Wilkinson, J., dissenting). Four years after *Tobey*, the Supreme Court issued its opinion in *Abbasi*, directing the courts to consider whether there are special factors before extending *Bivens* to any contexts not previously recognized by "this [Supreme] Court," *Abbasi*, 137 S. Ct. at 1859, which necessarily includes the context of TSA security screening.

Patrol agents. *Id.* at 819 (quoting *Vanderklok*, 868 F.3d at 207). Inferring a *Bivens* action would "increase[] the likelihood that Border Patrol agents will 'hesitate in making split second decisions,'" which, when applied on a "systemwide" basis, would assuredly provide a "sound reason[] to think Congress might doubt" the efficacy of a damages action against government employees. *Id.*; *accord Hernandez*, 140 S. Ct. 745-46 (affirming that holding).

Likewise, the Ninth Circuit acknowledged the "practical concerns raised in *Vanderklok*," which counseled against inferring a *Bivens* action against TSA screeners who were not trained on probable cause or reasonable suspicion standards. *Rodriguez v. Swartz*, 899 F.3d 719, 746 n.175 (9th Cir. 2018), *vacated on other grounds by Swartz v. Rodriguez*, 140 S. Ct. 1258 (2020).

4. The district court engaged with none of this reasoning. Instead, it concluded that extending *Bivens* here would "not hamper TSA's efficacy" because individuals could still "record, from a distance, TSA agents performing their duties" without interfering with TSA screening procedures. JA102. But that cursory analysis fails to appreciate that there can be instances where a passenger's video recording or behavior can genuinely disrupt TSA's security screening at the checkpoint. *E.g.*, *Mocek*,

813 F.3d at 923-24 (failing to provide identification and recording TSA agents). Considering the full spectrum of potentially disruptive behavior, TSA screening agents must act appropriately and make sound judgments—but the threat of personal liability if they err is exactly the kind of policy-laden decision that is best left to Congress. Thus, "[t]he question is not whether national security requires" TSA agents to allegedly order an unjustified cessation of video recording, because "of course[] it does not." *Hernandez*, 140 S. Ct. at 746. Instead, the question for *Bivens* purposes is "whether the Judiciary should alter the framework established by the political branches for addressing cases in which" a TSA screening agent is alleged to have behaved improperly. *Id.* And that balancing of interests—weighing a personal money damages remedy against the potential negative consequences for security screening—is a quintessential legislative judgment.

5. The district court likewise erred in assessing the remaining special factors. The court mistakenly believed that Congress's failure to provide for a damages remedy could be understood to "likely indicate[] implicit permission for such actions," JA103, and thought that the administrative remedies might not apply to Dyer's case, JA104-05. But Congress's failure to provide a money remedy when it has actively legislated in an area like

airport security and provided other remedies instead "strongly counsels hesitation before creating" a new *Bivens* action. *Attkisson*, 925 F.3d at 621. Moreover, even if the administrative remedies for air traveler redress might not apply to Dyer, that only underscores that Congress chose to provide for *limited* administrative remedies in *certain* circumstances, and did not authorize free rein to create damages actions outside of its circumscribed choices.

The district court also misunderstood the significance of the role TSA screening agents play and their lack of training on constitutional standards under the Fourth Amendment. The court seemed to believe this was an argument that TSA agents could not be sued "because their employer has not provided adequate training," JA104, but that is not the case. TSA agents receive adequate training on how to maintain a secure checkpoint, screen passengers and luggage, and communicate with local law enforcement as appropriate. But because TSA agents engage in administrative searches and generally lack authority to make arrests, seize evidence, or otherwise engage in law enforcement actions, they are not trained to evaluate their actions based on probable cause or reasonable suspicion—their mandate is to screen everyone and everything that comes through the checkpoint. Imposing personal liability on TSA agents for

actions that might be taken honestly—but mistakenly—in an effort to preserve airport security will complicate the ability of TSA agents to fully achieve that mandate. *Vanderklok*, 868 F.3d at 208-09. And that is exactly the kind of policy consideration appropriately left to the political branches. *See Tun-Cos*, 922 F.3d at 523 ("If any such 'special factors' do exist, a *Bivens* action is not available.").

CONCLUSION

The Court should reverse the district court's order denying the defendants' motion to dismiss and remand with instructions to dismiss the complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,861 words. 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 2016 in Georgia 14-point font, a proportionally spaced typeface.

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