

KAIRYS, RUDOVSKY, MESSING, FEINBERG & LIN LLP

Law Offices

The Cast Iron Building
718 Arch Street
Suite 501 South
Philadelphia, PA 19106

David Rudovsky
Paul Messing
Jonathan H. Feinberg
Susan M. Lin
Grace Harris
Ilene Kalman (1985-1996)
David Kairys
Of Counsel
Tanya Alexander
Office Manager

Phone (215) 925-4400
Fax (215) 925-5365
drudovsky@krlawphila.com

www.krlawphila.com

September 8, 2022

Via ECF

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. United States*, No. 21-2798 (3d Cir.)

Dear Ms. Dodszuweit:

Plaintiffs write pursuant to Fed. R. App. P. 28(j) to notify the Court of the recent decision in *Greenpoint Tactical Income Fund LLC v. Pettigrew*, 38 F.4th 555 (7th Cir. 2022).

Greenpoint held that a cause of action was available under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), for a challenge to an FBI agent’s fabrication of evidence in a search warrant affidavit. 38 F.4th at 564. The court explained that the fraudulent procurement of a search warrant, leading to an unconstitutional search, was “the sort of Fourth Amendment violation familiar to federal courts and close to the heart of *Bivens*.” *Id.* Furthermore, a “domestic search authorized pursuant to a fabricated warrant affidavit . . . does not raise questions of foreign policy or national security.” *Id.* Therefore, a *Bivens* remedy was available under “the line of cases recognizing Fourth Amendment *Bivens* claims based on fabricated warrant affidavits and/or grand jury testimony.” *Id.*

The Seventh Circuit acknowledged that the Supreme Court had “cut[] back on the scope of *Bivens*” in *Egbert v. Boule*, 142 S. Ct. 1793 (2022), but stated that

the Supreme Court’s recent decision, “d[id] not change [the court’s] understanding of *Bivens*’ continued force in its domestic Fourth Amendment context.” *Greenpoint*, 38 F 4th at 564 n. 2. The court concluded that *Egbert* did not preclude a *Bivens* remedy for a challenge to a fabricated affidavit. *Id.*

As in *Greenpoint*, Professor Xi challenges an FBI agent’s fabrications in a search warrant affidavit. The Seventh Circuit’s *Bivens* analysis thus supports Professor Xi’s arguments that his case presents ordinary law enforcement misconduct squarely within *Bivens*.

Greenpoint was ultimately dismissed on qualified-immunity grounds because the plaintiffs did not allege any falsifications of critical inculpatory facts in the affidavit and the omitted evidence would not have negated probable cause. 38 F.4th at 569. But, as explained previously, the same cannot be said here: Professor Xi asserts seven discrete intentional, knowing, and/or reckless false statements material to the probable cause finding, without which there was no basis for an indictment or search warrant. *See* Opening Br. 22–29

Sincerely,

/s/ David Rudovsky
David Rudovsky
Jonathan H. Feinberg
Susan M. Lin
KAIRYS, RUDOVSKY, MESSING,
FEINBERG & LIN LLP
718 Arch Street, Suite 501 South
Philadelphia, PA 19106
(215) 925-4400

Patrick Toomey
Ashley Gorski
Sarah Taitz
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Jonathan Hafetz
SETON HALL LAW SCHOOL
One Newark Center
Newark, NJ 07102
(917) 355-6896

Counsel for Appellants