No. 17-1678

IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF COUNCIL ON AMERICAN-ISLAMIC RELATIONS AND ANAS ELHADY AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI CURIAE[1]

A. The Council on American-Islamic Relations

Founded in 1994, the Council on American-Islamic Relations has a mission to enhance understanding of Islam, protect civil rights, promote justice, and empower American Muslims. As part of that mission, CAIR represents Muslim-Americans who have suffered injury at the hands of their government. This includes cases where they or their friends and family have been put on a secret government watchlist, coerced into acting as Government spies, impaired in their efforts to travel, immigrate, or obtain citizenship, or otherwise retaliated against because of their religious beliefs or associations.

Often when CAIR defends Muslim rights, obtaining a non-damages remedy for the harm inflicted is almost impossible. Often there is no pre-deprivation process. And the Government's assertion of national security typically prevents any inquiry into its policies or internal practices.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel funded its preparation or submission. Both parties have filed blanket consents.

CAIR's ability to hold Government officials accountable in damages for the ultimate injuries to Muslim-Americans' civil rights thus hinges on an effective damages remedy. Similarly, CAIR believes such a remedy is often the only deterrent the Government faces when desiring to violate Muslim-Americans' and others' constitutional rights.

B. Anas Elhady

Anas Elhady is a Yemeni-born United States citizen. Elhady was a 22-year-old student at Henry Ford University in the spring of 2015 when he went to Canada for a brief vacation. When he returned to the United States, Elhady—who was placed on the Government's secret terrorism watchlist without ever being charged with or even suspected of any [terrorist-related] crime—was forcibly detained at the Ambassador Bridge Port of Entry upon his return to the United States. Elhady was kept in a small, brightly lit holding cell without a jacket or shoes overnight. Although he complained that he needed medical attention, his pleas were ignored until he fell unconscious. He was then handcuffed and taken to a nearby hospital where he was treated for hypothermia. He was then returned to the Ambassador Port of Entry holding facility—still handcuffed—where he was ultimately released.

Elhady has brought *Bivens* claims against the officers responsible for his treatment that night. Those claims survived a motion to dismiss. The Court specifically found that while Elhady's *Bivens* claim constituted a new context, special factors did not counsel against *Bivens*' reasonable extension. His case is currently proceeding in discovery.

The Court's decision here could have a fundamental impact on the viability of his case.

SUMMARY OF ARGUMENT

This Court has warned that the "special factors" test for determining whether Courts may extend *Bivens* liability to a new context should occur at varying levels of generality based on the policy concern at issue and the context in which that policy comes up in the case. The Fifth Circuit ignored this warning, and determined that Border Patrol agents should be exempt from *Bivens* liability without regard to context, and also that national security concerns counsel against extending *Bivens* liability whenever the Border Patrol's conduct is at issue. But this was at too high a level of generality.

As Mr. Elhady's own case against the Border Patrol highlights, Border Patrol agents may commit constitutional violations in situations that are no different than other *Bivens* actions. And when they do,

nothing about the Border Patrol agent's title or employer implicates national security concerns or otherwise counsels against extending *Bivens* liability. While amici take no position on whether the facts here counsel against extending *Bivens*, the Court should decide this issue based on the particular context of those facts rather than rely solely on Mesa's status as a Border Patrol agent and the Government defendant's mere assertion of a national security interest.

Meanwhile, Hernandez argues here that his lack of an alternative remedy under the FTCA should counsel in favor of extending Bivens. Respect-fully, this Court has long held that the existence of an FTCA remedy generally has no bearing on whether a *Bivens* remedy exists. Hernandez claims that the Court should treat this as a special factor in order to avoid rendering the Westfall Act constitutionally suspect. But the canon of interpreting statutes to avoid constitutional problems is a canon of statutory interpretation. It has no bearing on interpreting a common-law *Bivens* action.

Any special factor analysis based on the existence or nonexistence of an alternative remedy should be done at a very narrow level of generality. And the Court should not retreat from its position that the presence or absence of FTCA is normally irrelevant to the *Bivens* special factor test.

ARGUMENT

I. BORDER PATROL AGENTS SHOULD NOT BE EXEMPT FROM *BIVENS* LIABILITY

A. There is no Justification for a per se Rule Shielding Border Agents from *Bivens* Liability

The Court of Appeals below held that Agent Mesa's status as a Border Patrol agent alone constituted a "special factor" counseling against extending *Bivens* liability to the context here. *Hernandez v. Mesa*, 885 F.3d 811, 819-20 (5th Cir. 2018); *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-96 (1971) (citation omitted). The Court of Appeals did so in large part by relying on broad statements which apply to Border Patrol agents generally, such as the Border Patrol's mission statement, the general interest in "border security," "the likelihood that Border Patrol agents will 'hesitate in making split second decisions,'" and the "'systemwide' impact," of *Bivens* liability. *Hernandez*, 885 F.3d at 819 (citations omitted).

The Court should reject the Court of Appeals' analysis and instead follow the Ninth Circuit's approach in *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018). The Ninth Circuit in *Rodriguez* noted that Congress

may have replaced the *Bivens* scheme with "discretionary administrative payments" for "the Drug Enforcement Administration, State Department, and military personnel." *Id.* at 743.

But Congress did not do so for Border Patrol agents. And for good reason. "[U]nlike the Border Patrol, those [other] agencies routinely operate and maintain an extended presence abroad." *Id.* So Congress, by its conduct, has intentionally left Border Patrol agents exposed to liability, including *Bivens*. As a result, a Border Patrol agent's status itself did not counsel against extending *Bivens*.

Applying *Bivens* liability to a Border Patrol agent for constitutional violations would not deter Border Patrol agents from performing their duties. *Id.* at 746-47. Instead, insulating the Border Patrol from liability for misconduct that does not implicate any national security concerns would have perverse incentives that are incongruent with certain Custom and Border Protection's current organizational issues.

As a recent audit report of the Department of Homeland Security's Office of Inspector General detailed, "the Joint Intake Center for U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) received more than 16,368 allegations of misconduct and other reportable information in fiscal year 2014 alone." DHS OIG Report, *DHS Needs to Improve Its Oversight of Miscon-*

duct and Discipline (June 17, 2019), at 1.[2] Yet, the Inspector General found, DHS "does not have sufficient policies and procedures to address employee misconduct." *Id.* at 2. DHS does not have "procedures for reporting allegations of misconduct, clear and specific supervisor roles and expectations, or clearly defined key discipline terms used across the components." *Id.* In fact, nearly half of all CBP employees do not believe "employees at all levels are held accountable for conduct at their component." *Id.* at 10.

Bivens actions are necessary to protect Americans and others who interact with Border Patrol agents from the harmful results of misconduct. FTCA remedies, even when they exist, may simply be inadequate. *See Carlson v. Green*, 446 U.S. 14, 20 (1980); *Bush v. Lucas*, 462 U.S. 367, 378 (1983). And the threat of *Bivens* remedies help encourage further DHS reform, as the Government often defends and indemnifies its employees when they are subject to *Bivens* claims.

The Court should adopt *Rodriguez* and reject the Court of Appeals' decision below.

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[2] *Available at* https://*www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-48-Jun19.pdf and http://tiny.cc/OIGReport.

B. If the Court Considers Mesa's Border Patrol Status a Special Factor, It Should Limit its Holding to the Narrow Transnational Context

Even if this Court rejects *Rodriguez* and finds the Court of Appeals properly considered Mesa's Border Patrol status as a factor counseling against extending *Bivens*, it should limit its determination to the narrow context of the facts here. An overly generalized analysis of the special factors is inappropriate when not compelled by the policy reason for the special factor. *United States v. Stanley*, 483 U.S. 669, 681-82 (1987); *Rodriguez*, 899 F.3d at 744. Here, although the Court of Appeals limited its holding to the "transnational context," 885 F.3d at 819, its actual analysis failed to do so. *See id.* at 828 (Prado, J., dissenting) ("If recognizing a *Bivens* remedy in this context implicates border security or the Border Patrol's operations, so too would any suit against a Border Patrol agent for unconstitutional actions taken in the course and scope of his or her employment.").

Agent Mesa was stationed at the Southern border but was not near any port of entry. *Hernandez*, 885 F.3d at 814. He was guarding the border from Mexican citizens who may have been encroaching the border without permission to enter. *Id.* If extending

Bivens in this context is a problem, it is because of actions Agent Mesa was taking at the time. *But see* Brief of Amici Curiae American Immigration Council, et al., *Hernandez v. Mesa*, No. 15-118 ("AIC Brief") at 11-15 (arguing that the act of actually patrolling borders should not be a special factor counseling against a *Bivens* remedy). In other contexts, Border Patrol agents are not functionally different from any other domestic law enforcement officers. And in those situations, there is no good reason not to extend *Bivens* liability.

Take Elhady's case. *See Elhady v. Pew*, 370 F. Supp. 3d 757 (E.D. Mich. 2019). Elhady, a United States citizen, was detained in an American detention facility after arriving in the United States at a formal port of entry. *Id.* at 761. There was no probable cause nor reasonable suspicion to believe he committed any crime. Yet he was detained for more than four hours in freezing cold conditions. *Id.* As a result, he suffered life-threatening hypothermia. *Id.*

There is no excuse or hardship that can justify the Border Patrol's inability to maintain adequate detention processes at the border, at least for United States citizens. And there is nothing special about their position or employer which would make *Bivens* liability particularly problematic for conditions-of-confinement claims at established port of entry detainment facilities. *Elhady*, 370 F. Supp. 3d at 771 ("Defendants essentially seek immunity for any CBP action taken

against a United States citizen at the border. *Ziglar* [*v. Abbasi*, 137 S. Ct. 1843 (2017)] disavows such an attempt, and the Court will not allow that argument to win the day in this case."); *see also* AIC Brief at 11. The Border Patrol defendants in Elhady's case were acting as imprisoners. Elhady was incapacitated and detained—he was not a threat. And unlike Agent Mesa, there was no reason to be concerned about protecting the border from illegal entry because Elhady is a United States citizen (and therefore had an unqualified right of entry), who legally entered through an authorized port of entry. In Elhady's case, at least, the defendants' status as Border Patrol agents raises no policy concerns related to *Bivens*.

In the past, the Court has counseled hesitation to extend *Bivens* liability to superior officers and policymakers, as opposed to officers and private corporations. But thus far the Court has not determined *Bivens* liability solely by the agency of the defendant. In *Abbasi*, the Court declared the claims against high-level Government officials were beyond the scope of *Bivens*. *Abbasi*, 137 S. Ct. at 1849. But the claim against the warden, whose direct actions were implicated in a traditional sense, was not as clear. The Court noted that there were significant parallels between the claim against the warden and the claim at issue in *Carlson v. Green*, 446 U.S. 14 (1980). *Abbasi*, 137 S. Ct. at 1850. That said, in *Carlson* the claim turned on the Eight Amendment while in *Abbasi* the

claim turned on the Fifth Amendment, and therefore the claim against the warden presented a new *Bivens* context. *Id.* So the Court's analysis of the claim against the warden (who was not a policymaking official) did not turn on the "category of defendants," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

The Court should continue to decline to create categorical exemptions from *Bivens* based on the employing agency, at least when it comes to Border Patrol.

Even the Fifth Circuit made clear that its analysis finding Border Patrol agents in a "transnational context" would not extend to "claims where constitutional violations by the Border Patrol are wholly domestic." *Hernandez*, 885 F.3d at 819 & n.14. If the Court follows the Court of Appeals' approach, it should, at a minimum, do the same. And unlike the Court of Appeals' unnuanced analysis, it should carefully perform its special factor analysis accordingly.

II. NATIONAL SECURITY DETERMINATIONS ARE CONTEXTUAL, NOT CATEGORICAL

The Court of Appeals also found a "special factor" in that "the threat of *Bivens* liability could undermine the Border Patrol's ability to perform duties essential to national security." *Id.* at 819. Whether or not Hernandez's *Bivens* claim against Mesa implicates national security, the Court of Appeals ignored this

Court's warning in *Abbasi* that the judiciary should not simply defer to the Government and their holding should not stand. *See Abbasi*, 137 S. Ct. at 1862 ("national-security concerns must not become a talisman used to ward off inconvenient claims"); *Meshal v. Higgenbotham*, 804 F.3d 417, 445 (D.C. Cir. 2015) (Pillard, J., dissenting) ("If Article III judges must sometimes cede our rights-protective role in deference to the political branches on matters of national security, we should do so only with a responsible official's authoritative and specific assurance of the imperative of doing so. . . . Before declining to recognize a cause of action because of national security concerns, the court should require the government to provide a concrete, plausible, and authoritative explanation as to why the suit implicates national security concerns.")

The Court of Appeals' approach to "national security" concerns often failed to limit its reach to the factual context of Hernandez's shooting. Instead, the Fifth Circuit primarily relied on Congressional language as to the Border Patrol's basic mission. *Hernandez,* 885 F.3d at 819.

The Court of Appeals was on somewhat firmer ground when it discussed "interference with foreign affairs and diplomacy more generally." *Id.* There, the Court of Appeals tied its analysis of the factor to "the United States government['s] … responsib[ility] to foreign sovereigns when federal officials injure foreign

citizens on foreign soil." *Id.* Whether the factual context here requires hesitation due to national security concerns is not a question Amici is opining on. The key is that neither the defendant's mere allegation of "national security" nor the agency the defendant belongs to are decisive.

The facts in *Elhady* are again illustrative. There, as here, the defendants were part of Customs and Border Patrol. There, like here, the Government asserted national security. But there, the district court correctly dismissed the defendants' assertions:

> Notably, unlike in the three cases that declined to extend *Bivens*, Elhady does not challenge the action that does touch upon national security, i.e., his detention. That is to say, he does not argue that he was impermissibly detained. Rather, Elhady challenges only the conditions of his detention, and Defendants have offered no plausible explanation why intentionally placing a detainee in a freezing-cold holding cell protects national security. *Elhady*, 370 F. Supp. 3d at 770-71.

Once again, the warning of *Stanley* to determine "special factors" at the right level of generality comes into play. In *Stanley*, the level of generality was high

because the Court tied the analysis to specific Congressional authority to regulate the conduct of the military. *Stanley*, 483 U.S. at 682-83. But while there is Congressional authority to regulate uniform rules regarding naturalization and to impose specific customs, there is no equal grant to Congress to regulate the conduct of Customs and Border Patrol generally. So the need to act at such a high level of generality does not exist. Instead, the Court should tie the application of a "national security" special factor to the national security concerns created by the specific extension of *Bivens* sought in that particular case. *See Elhady*, 370 F. Supp. 3d at 771; *see also Hernandez*, 885 F.3d at 829 (Prado, J., dissenting) (warning against national security immunity for illegal actions beyond those "undertaken in ostensibly in defense of the nation") (citation omitted).

III. THE PRESENCE OR ABSENCE OF AN FTCA REMEDY DOES NOT CONSTITUTE A SPECIAL FACTOR IN NORMAL CIRCUMSTANCES ABSENT CONGRESSIONAL INTENT TO DO SO

Hernandez notes that there is no other remedy for Mesa's unlawful conduct here, even under the FTCA. Hernandez claims that such a lack of remedy supports extending *Bivens*. Whether or not this is correct in

Hernandez's specific context, the Court should continue to follow its conclusion in *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001), that the presence or absence of an FTCA remedy is not a special factor counseling against extending *Bivens*.

A special factor may exist if there "is an alternative remedial structure present in a certain case." *Abbasi*, 137 S. Ct. at 1858. But whether an alternative remedy is relevant is essentially a matter of Congressional intent. *Id.* at 1857-58.

Sometimes, if Congress has provided an alternative remedy, even one without damages, it can be implied that Congress intended to replace the Bivens remedy with the new scheme. *Bush*, 462 U.S. at 378. And other times Congress might specifically exempt a remedy from the FTCA (for instance) because Congress intended for there to be no remedy at all in the exempted situations. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). This may be the case, for example, for quarantines or war. 28 U.S.C. §§ 2680(f) and (j). It appears not to be the case for 28 U.S.C. § 2680(k), the exemption which leaves Hernandez with no FTCA remedy. That exemption from the FTCA was instead concerned with the application of foreign law in American courts. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

But the presence of an FTCA remedy itself tells the Court nothing. This is because "Congress did not intend to limit respondent to an FTCA action." *Carlson*,

446 U.S. at 20–21. Instead, it is "crystal clear" that Congress intended the FTCA and Bivens to serve as "parallel" and "complementary" sources of liability. *Malesko*, 534 U.S. at 68 (citing *Carlson*, 446 U.S. at 20). So, in a *Bivens* analysis, "the presence of an FTCA remedy is entitled to little, if any, weight." *Linlor v. Polson*, 263 F. Supp. 3d 613, 621 (E.D. Va. 2017) (citing *Bush*, 462 U.S. at 378). This should continue to be the rule.

Hernandez claims that unless the Court considers the lack of an alternative remedy as a special factor, the Westfall Act may be unconstitutional. But there are two problems with Hernandez's argument. First, Hernandez misses that for constitutional claims, it is likely that state law claims would not be a remedy even absent the Westfall Act. Second, Hernandez' suggested rule would create a *Bivens* remedy when an FTCA claim does not exist even if Congress had specifically eliminated an FTCA remedy in order to insulate a federal officer.

Before the Westfall Act's passage there was no specific Congressional prohibition on state tort claims being brought in state court. Hernandez Br. at 19-20. In *Bivens* itself, this Court recognized *Bivens* actions as essentially a replacement for state torts when the state claim depended on a constitutional violation. The Court reasoned that due to the Supremacy Clause, *see In re Neagle*, 135 U.S. 1, 62 (1890), deter-

mining whether a federal officer violated the constitution was "both necessary and sufficient to make out the plaintiff's cause of action." *Bivens*, 403 U.S. at 395 (citation omitted); c*f. Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968) (explaining how preemption protects "the primacy of the federal judiciary in deciding questions of federal law") (quoting *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-16 (1964)). So, regardless of the Westfall Act, *Bivens* set in motion the constitutional impermissibility of a state court remedy for claims that turn on the constitutionality of a government official's actions.

Yet the Westfall Act did nothing to disturb this. It specifically states that its exclusion "does not extend or apply to a civil action against an employee of the Government—which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). And the legislative history bears out "that the exclusive remedy expressly does not extend to so-called constitutional torts." H.R. Rep. 100-700 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5950. *See Meshal*, 804 F.3d at 436.

Second, Hernandez's Constitutional-avoidance argument is aimed at the wrong target. Constitutional avoidance is a matter of statutory interpretation. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Yet this case does not turn on the interpretation of the

Westfall Act. It turns on the interpretation of *Bivens*. There is no constitutional avoidance rule here.

Hernandez is correct that denying a *Bivens* remedy when there is no other valid action would be constitutional anathema. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). But Hernandez provides the wrong solution. If the FTCA or the Westfall Act are constitutionally suspect, then three other solutions exist.

For instance, the Court could walk away from the path it described in *Bivens* itself. 28 U.S.C. § 2679(b)(2)(A) should be interpreted to permit state law tort claims when liability for the tort depends on "a violation of the Constitution of the United States." This would be consistent with Hernandez's tracing of the historic compatibility of state damages actions for constitutional violations. In fact, by doing so, perhaps the Court could ultimately walk away from the whole *Bivens* endeavor, allowing state law claims against federal officers to proceed upon a violation of constitutional law until Congress consciously and constitutionally preempts those claims by providing an alternate forum for those claims.

Alternatively, the Court could double down on *Bivens*, and walk away from its limiting of *Bivens* claims in the first instance. After all, *Bivens* was not designed to create a new cause of action so much as replace state law actions with federal ones. Further

limiting *Bivens* is inconsistent with that purpose unless one simultaneously opens the door to the state tort law *Bivens* displaced.

Or the court may invoke the canon of constitutional avoidance, but in a different way. It is possible to resolve Hernandez's constitutional concerns by interpreting 28 U.S.C. § 2680(k) itself as showing an intent to extend *Bivens* liability to Hernandez's claim. As explained in *Sosa*, the reason behind 28 U.S.C. § 2680(k) was "Congress's "unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power." 542 U.S. at 707 (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)). But a *Bivens* analysis would still turn entirely on a constitutional violation and thus American, rather than foreign, law. And so 28 U.S.C. § 2680(k) indicates an affirmative Congressional intent to leave *Bivens* as the sole remedy for constitutional violations that fall within its ambit. See *Abbasi*, 137 S. Ct. at 1857-58 (alternative remedy factor turns on Congressional intent). Such an intent should be compelled by the constitutional avoidance canon, which presumes that Congress did not intend to "infringe constitutionally protected liberties" in passing legislation. *DeBartolo Corp.*, 485 U.S. at 575. And if Congress intended in passing 28 U.S.C. § 2680(k) to provide a *Bivens* remedy, the Court should not lightly repeal that intent. *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

Amici is understandably sensitive that Hernandez's lack of an FTCA remedy may be arbitrary, and without a parallel *Bivens* remedy, may leave Hernandez in an unexpected gap in terms of constitutional rights and remedies. This should pose a constitutional problem. But Hernandez's solution is not justified by any coherent legal principle. So unless the Court finds that Congress intended by passing 28 U.S.C. § 2680(k) that no gap should exist, the gap's existence or nonexistence should not be a special factor in *Bivens*. To say otherwise would ultimately make the FTCA displace *Bivens*, in part or in whole.

* * *

The Court should be mindful of what it stated in *Stanley*. The "special factors" analysis must occur at varying levels of generality depending on the situation. So it may make sense to apply a very specific "special factor" analysis when an exception to the FTCA applies, based on the very narrow meaning of that exception and the Congressional intent that can be divined from that exception. But in general, the Court should be mindful of the general rule that FTCA and *Bivens* are typically parallel, independent remedies. And at that high level of generality, no weight should be given as a "special factor" against a *Bivens* remedy when a general FTCA remedy applies.

CONCLUSION

For the reasons outlined above, this Court should neither approve of the special factors analysis applied by the Court of Appeals nor consider the lack of an FTCA remedy as a special factor except perhaps in a manner strictly limited to the specific factual context of this case.

Respectfully submitted,

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