No. 17-1678

IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, et al.,
Petitioners,

vs.

JESUS MESA, JR.,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the damages claim in this case may be asserted under *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), in light of the guidance provided by *Ziglar* v. *Abbasi*, 582 U. S. __, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the family of an alien with no ties to the United States, who was likely participating in an illegal alien smuggling operation, seek to force an agent of the Border Patrol into litigation over an incident that had

1. Both parties have filed blanket consents for *amicus* briefs.

No counsel for a party authored this brief in whole or in part. No person or party other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

already been investigated by the Department of Justice and found to be a use of force consistent with the policy and training of his agency. Such an unwarranted expansion of the dubious *Bivens* rule would chill the enforcement of America's border security, contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioners are the parents of 15-year-old Sergio Adrián Hernández Güereca ("Hernández"). *Hernández* v. *Mesa*, 582 U. S. __, 137 S. Ct. 2003, 2005, 198 L. Ed. 625, 627 (2017) (*per curiam*). The petitioners alleged that Hernández, a citizen and resident of Mexico, and his friends were gathered on the Mexican side of a culvert that separates El Paso, Texas, from Ciudad Juaréz, Mexico. *Ibid*. They claim the teens were merely playing a game, running up and back down the incline of the culvert and touching the fence that separates Mexico and the United States. *Ibid*.

United States Border Patrol Agent Jesus Mesa, Jr., arrived at the scene and detained one of Hernández's friends. *Ibid*. Hernández ran and stood by a pillar of the Paso del Norte bridge in Mexico to observe. *Ibid*. While standing in the United States, Agent Mesa fired several shots across the border and struck and killed Hernández. *Ibid*.

The U. S. Department of Justice investigated the incident and reached very different conclusions. At the time of the shooting, Hernández and his friends were human smugglers attempting an illegal border crossing. *Id*., 137 S. Ct., at 2005, 198 L. Ed. 2d, at 627-628. While Agent Mesa attempted to detain Hernández's friend, the teens hurled rocks at Agent Mesa at close range. *Ibid*. After a "comprehensive and thorough investigation," it was determined that Mesa's actions

were consistent with United States Customs and Border Protection policy and training with respect to use of force. U. S. Dept. of Justice, Office of Public Affairs, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca, Press Release (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca (hereinafter "Press Release") (as visited August 27, 2019).[2]

Petitioners sued Agent Mesa and others in Federal District Court claiming, among other contentions, that Agent Mesa was personally liable under *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), for violating Hernández's rights under the Fourth and Fifth Amendments. *Hernández*, 137 S. Ct., at 2005, 198 L. Ed. 2d, at 628. The District Court dismissed all the claims against Agent Mesa. *Ibid*. A divided panel of the Fifth Circuit affirmed in part and reversed in part, and remanded. *Hernández* v. *United States*, 757 F. 3d 249, 280 (CA5 2014) (*Hernández I*). The panel majority found that (1) the Fifth Amendment applied outside the boundaries of the United States for the benefit of a noncitizen, *id*., at 272, (2) the rule of *Bivens* should be extended to this new context, *id*., at 277, and (3) that the conduct *alleged* by Hernández, a supposedly unprovoked shooting, should not qualify for qualified immunity. See *id*., at 279-280.[3] The panel therefore reversed

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2. Evidence indicated that Mesa's "actions constituted a reasonable use of force or would constitute an act of self defense in response to the threat created" by Hernández and his friends. *Ibid*.

3. It bears emphasis at this point that this is a mere allegation, not by any means a fact. Cases such as this involve real people with reputations at stake, and opinions should designate allegation as allegations, not "assumed facts."

the dismissal of the Fifth Amendment claim against Agent Mesa.

The Fifth Circuit reheard the case en banc and in a *per curiam* opinion affirmed the District Court judgment of dismissal in its entirety. *Hernández* v. *United States*, 785 F. 3d 117, 121 (CA5 2015) (*Hernández II*). The en banc court was unanimous that extraterritorial application of the Fifth Amendment in these circumstances was not clearly established for the purpose of qualified immunity. See *id*., at 120-121. The en banc court did not address the *Bivens* question because it resolved the claims on these other grounds. See *id*., at 121, n. 1.

This Court granted certiorari and directed the parties to address whether Petitioners' claims may be asserted under *Bivens*. *Hernández* v. *Mesa*, 580 U. S. __, 137 S. Ct. 291, 196 L. Ed. 2d 211 (2016). While pending, this Court decided *Ziglar* v. *Abbasi*, 582 U. S. __, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017). *Abbasi* held that illegal aliens who were detained after the 9/11 terrorist attacks could not pursue a *Bivens* action challenging their conditions of confinement against executive policymaking officials. *Id.*, 137 S. Ct., at 1863, 198 L. Ed. 2d, at 315-316. Soon thereafter, this Court vacated the *Hernández II* judgment and remanded it to the Court of Appeals so that it could address the availability of a *Bivens* remedy in light of "the reasoning and analysis in" *Abbasi*. *Hernández*, 137 S. Ct., at 2006-2007, 198 L. Ed. 2d, at 629.

On remand to the Fifth Circuit, the en banc court, voting 13-2, again affirmed the District Court's dismissal of Petitioners' claims. *Hernández* v. *Mesa*, 885 F. 3d 811, 823 (CA5 2018) (*Hernández III*). The court held that the "transnational aspect" of the case presented a "new context," *id*., at 814, and that the presence of multiple "special factors" weighed against

extending *Bivens*. *Id*., at 818-823. "[T]his is not a close case." *Id*., at 823.

Petitioners filed a petition for writ of certiorari, which this Court granted on May 28, 2019.

SUMMARY OF ARGUMENT

Judicially created implied causes of action for damages arising directly under the Constitution are a disfavored relic of the past. Over 30 years of this Court's precedents dictate that *Bivens* should be confined to its "precise circumstances." This case falls outside of *Bivens*' narrow scope because it involves a claim of undue force stemming from an injury that occurred on foreign soil against a noncitizen with no connection to the United States. The context in which this case arose is unlike any other that has come before it. This Court has consistently refused to extend *Bivens* liability to new contexts or new categories of defendants.

Federal tort remedies are generally created by Congress, not the judiciary. Congress has not created a remedy for cross-border shootings by federal officials. This Court recently made it clear that separation of powers principles must be central to the question of "who should decide" whether a new cause of action should be created, and that in most instances it is Congress who is best apt to make that decision.

Special factors counsel against commissioning a new cause of action in the circumstances presented by this case. The Judicial Branch should not intrude upon the authority of the Legislative and Executive Branches on matters involving national security and foreign policy. Congress is the proper political branch to decide if noncitizens can recover damages from federal law

enforcement officials for torts that occur in a foreign country.

ARGUMENT

I. Judicially creating an implied cause of action for damages arising directly under the Constitution is a "disfavored judicial activity."

A. Development of Bivens.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971), this Court created an implied private cause of action for damages against federal officials who allegedly violated an individual's constitutional rights while acting under color of federal law, despite the lack of express statutory or constitutional authority to do so. Webster Bivens alleged that several agents of the Federal Bureau of Narcotics entered his New York apartment without a warrant, "manacled" him in the presence of his wife and children, and conducted an exhaustive search of his premises. *Id*., at 389.[4] Mr. Bivens alleged he was arrested and transported to the federal courthouse in Brooklyn where he was interrogated, booked, and strip searched. *Ibid.* Despite the availability of state tort law remedies, Mr. Bivens filed suit in Federal District Court against the narcotics agents for the violation of his Fourth Amendment rights and sought money damages from each of them individually. See *id*., at 389-391.

Noting the general principle that persons who have been injured should have a remedy, and finding "no special factors counselling hesitation in the absence of affirmative action by Congress," *id*., at 396, this Court

4. Because the case was dismissed pretrial, these are allegations, not facts.

found that Mr. Bivens was "entitled to redress his injury through a particular remedial mechanism normally available in the federal courts" if he could demonstrate that the federal agents violated his Fourth Amendment rights. *Id*., at 397 (citing *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964)).

Several years later, this Court was asked if *Bivens'* implied cause of action and damages remedy under the Fourth Amendment can also be implied directly under the Due Process Clause of the Fifth Amendment. *Davis* v. *Passman*, 442 U. S. 228 (1979). In that case, Shirley Davis brought suit against then-Congressman Otto Passman alleging his conduct discriminated against her on the basis of her sex in violation of the Equal Protection component of the Due Process Clause. *Id*., at 230, 235. This Court again looked at the lack of express prohibition by Congress on the subject and utilized its broad remedial authority to "use any available remedy to make good the wrong done," thus permitting Ms. Davis to proceed with her employment discrimination claim. *Id.*, at 245-248 (quoting *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)).

Soon after *Davis* was decided, this Court was again asked if a *Bivens*-type cause of action and remedy could be implied against federal prison officials who allegedly failed to provide medical attention to an asthmatic prisoner in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. *Carlson* v. *Green*, 446 U. S. 14, 16, and n. 1 (1980). By this point, this Court assumed that *Bivens* established a general rule that tort claimants have the right to bring a cause of action and recover damages against federal officials who violated their constitutional rights

unless an exception applies. See *id*., at 18-19.[5] "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Id.*, at 18. This Court limited the right, however, by laying out two situations that may defeat a *Bivens* action:

> "The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' [Citations.] The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Ibid.*

Finding that neither situation applied, this Court again permitted the claim to proceed.[6] See *id*., at 19-23.

After *Carlson*, it appeared as if a *Bivens*-type cause of action and remedy would be routinely applied to nearly all alleged constitutional violations by a federal agent. However, starting with *Bush* v. *Lucas*, 462 U. S. 367 (1983), this Court began its retreat from the doctrine and has steadily declined to fashion an implied constitutional damages remedy to any other new context that has come to this Court's attention. In that case, a federal employee claimed a federal employer demoted him in violation of the First Amendment, but he had other remedies through the civil service system. See *id*., at 388. The Court declined to create a new

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5. "Today we are told that a court must entertain a *Bivens* suit unless the action is 'defeated' in one of two specified ways." *Id*., at 26 (Powell, J., concurring in the judgment).

6. This Court also held that such claims survive the victim's death. *Id*., at 25.

remedy without statutory authority for this situation. *Id*., at 390. The Court has continued that retreat to the present day. See *Chappell* v. *Wallace*, 462 U. S. 296, 297, 305 (1983) (claim by military servicemen that military officers violated various constitutional rights); *United States* v. *Stanley*, 483 U. S. 669, 671, 683-684 (1987) (military soldier secretly given LSD by government while in military to study the effects of the drug on humans claimed violation of various constitutional rights); *Schweiker* v. *Chilicki*, 487 U. S. 412, 414 (1988) (claim of denial of benefits by Social Security disability benefit recipients violated the Fifth Amendment); *FDIC* v. *Meyer*, 510 U. S. 471, 486 (1994) (suit against federal agency rather than federal agent); *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 70-71 (2001) (prisoner sued a private corporation that operated a half-way house under a contract with the federal Bureau of Prisons for injuries sustained there in violation of the Eighth Amendment); *Wilkie* v. *Robbins*, 551 U. S. 537, 561-562 (2007) (landowner claimed government officials unconstitutionally interfered with his property rights in violation of the Fifth Amendment Takings Clause); *Minneci* v. *Pollard,* 565 U. S. 118, 126 (2012) (a prisoner's Eighth Amendment claims against private prison employees).

B. Ziglar v. Abbasi.

In the immediate aftermath of the September 11, 2001 terrorist attacks against the United States, the FBI was bombarded with tips regarding suspected terrorist activities. *Abbasi*, 137 S. Ct., at 1852, 198 L. Ed. 2d, at 303. The FBI's investigation of those tips resulted in the arrest and detention on immigration charges of over 700 individuals who were living in the United States illegally. *Ibid.* Of those 700, approximately 84 were deemed "of interest" and held in

custody without bail pursuant to a "hold-until-cleared policy." The policy authorized the FBI's further investigation into each of those detainee's connections to terrorism. *Id*., 137 S. Ct., at 1851-1852, 198 L. Ed. 2d, at 302-304.

Six of the men who were arrested and detained pursuant to the "hold-until-cleared" policy filed a lawsuit against several senior federal officials after their release from custody and their subsequent removal from the United States.[7] *Id*., 137 S. Ct., at 1853, 198 L. Ed. 2d, at 304. Their complaint alleged that the highly restrictive conditions of their confinement were harsh and the Government had no legitimate reason to detain them in those conditions because it lacked reason to suspect them of any connection to terrorism. *Ibid*. They sought to hold the federal officials personally liable under *Bivens* for various violations of their Fourth and Fifth Amendment rights. *Ibid*. This Court refused to allow their detention policy claims to proceed. *Id*., 137 S. Ct., at 1863, 198 L. Ed. 2d, at 315-316.[8] In so holding, this Court elaborated upon the two-part analytical framework that lower courts must follow when a party asserts a *Bivens*-type implied cause of action under the Constitution: (1) whether the case

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7. The federal officials sued in their official capacities included former Attorney General John Ashcroft, former FBI Director Robert Mueller, former Immigration and Naturalization Service Commissioner James Ziglar, Metropolitan Detention Center Warden Dennis Hasty, and Associate Warden James Sherman. *Id.*, 137 S. Ct., at 1853, 198 L. Ed. 2d, at 304.

8. Petitioners' claims against Warden Hasty were addressed separately and involved allegations of prisoner abuse by the guards. *Ibid.* This Court found that the abuse claims presented a "new context" and remanded them to a lower court so that it could conduct a "special factors" analysis. *Id.*, 137 S. Ct., at 1865, 198 L. Ed. 2d, at 318.

presents a "new context," and if yes, (2) whether "special factors" are present that would cause a court to hesitate before extending *Bivens* into that new context. *Id.*, 137 S. Ct., at 1857, 198 L. Ed. 2d, at 309.

C. Implied Causes of Action Are Disfavored.

In *Bivens,* this Court acknowledged that Congress had neither affirmatively authorized nor explicitly prohibited the recovery of money damages from federal agents who violated an individual's Fourth Amendments rights. See 403 U. S., at 396-397. Furthermore, even though "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," in *Bivens*, this Court created a remedy nonetheless. *Id*., at 396. This Court stated that because historically the invasion of personal liberty interests were remedied monetarily,[9] and that it was " 'well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' " *Ibid*. (quoting *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)).

Judicially implied private causes of action were more freely created during the *Bivens* era because this Court was operating under the theory that " 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001) (quoting *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964)). This view has since been

9. The historical remedy was a civil action in trespass, see Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 786 (1994), which would be brought in state court under state tort law.

"abandoned" by this Court. See *Malesko*, 534 U. S., at 67, n. 3 (quoting *Alexander*). No longer will this Court recognize the practice of creating implied causes of action to enforce rights created by federal statutes. See *Stoneridge Inv. Partners* v. *Scientific Atlanta, Inc.*, 552 U. S. 148, 164-165 (2008); see also *Abbasi*, 137 S. Ct., at 1856, 198 L. Ed. 2d, at 307-308. "Since our decision in *Borak*, we have retreated from our previous willingness to imply a cause of action where Congress has not provided one. . . . [a]nd have repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.' " *Malesko*, 534 U. S., at 67, n. 3 (quoting *Alexander*, 532 U. S., at 287).

This Court's reluctance to "revert" to the era of creating implied causes of action to enforce constitutional rights is evident in the cases that have come to this Court's attention after *Carlson*. *Abbasi*, 137 S. Ct., at 1857, 198 L. Ed. 2d, at 308-309; *Minneci*, 565 U. S., at 124-125. "Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U. S., at 68; see also *Abbasi*, 137 S. Ct., at 1857, 198 L. Ed. 2d, at 308; *Ashcroft* v. *Iqbal*, 556 U. S. 662, 675 (2009).

> "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition. . . . [W]e have abandoned that power to invent 'implications' in the statutory field. . . . [T]here is even greater reason to abandon it in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress." *Malesko*, 534 U. S., at 75 (Scalia, J., concurring.)

It has been over 30 years since this Court implied a *Bivens*-type cause of action and remedy to a new

context. *Abbasi*, 137 S. Ct., at 1857, 198 L. Ed. 2d, at 308. This is because when *Bivens*, *Davis*, and *Carlson* were decided, "[this] Court followed a different approach to recognizing implied causes of action than it follows now" and "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id*., 137 S. Ct., at 1856, 198 L. Ed. 2d, at 308. Expanding *Bivens* to imply a constitutional damages remedy to any new context is now "a 'disfavored' judicial activity." *Id.*, 137 S. Ct., at 1857, 198 L. Ed. 2d, at 308 (citing *Iqbal*, 556 U. S., at 675).

Abbasi made it clear that "separation-of-powers principles are or should be central to the analysis" and that in most instances, Congress is best apt to address whether a damages remedy should be permitted. *Id*., 137 S. Ct., at 1857, 198 L. Ed. 2d, at 309. Congress has enacted no statute that permits a non-United States citizen who was injured outside of the United States to file a damages claim against a federal law enforcement officer. *Hernández III,* 885 F. 3d, at 815. "Relevant statutes confirm that Congress's failure to provide a federal remedy was intentional." *Id.*, at 820.

In Petitioners' initial complaint, they asserted eleven claims against the United States, Agent Mesa, and other unknown federal employees. *Hernández I*, 757 F. 3d, at 255. Seven claims were brought under the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346(b)(1), 2671-2680, and one claim was invoked under the Alien Tort Statute (ATS), 28 U. S. C. § 1350. *Hernández I*, 757 F. 3d, at 255. When *Bivens* was decided, the FTCA did not provide a remedy for torts committed by federal law enforcement officials. The statute was amended in 1974 to allow plaintiffs to seek damages from the United States for certain torts committed by federal employees. See 28 U. S. C. § 2680(h), Pub. L. 93-253, § 2, 88 Stat. 50 (1974); see

also S. Rep. 93-588, 1974 U. S. Code Cong. & Admin. News 2789.

"The FTCA 'is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.' " *Hernández I*, 757 F. 3d, at 257 (quoting *United States* v. *Orleans* 425 U. S. 807, 813 (1976)). However, Congress expressly limited this waiver of sovereign immunity when it excepted "[a]ny claim arising in a foreign country." 28 U. S. C. § 2680(k); *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 700 (2004).

Furthermore, under the ATS, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350; *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 113-114 (2013). The ATS confers statutory jurisdiction only and does not expressly create or authorize a cause of action. *Sosa*, 542 U. S., at 724. Rather, it allows federal courts to recognize private causes of action for a limited number of torts that violate international law. *Ibid*. In *Kiobel*, this Court held that "the presumption against extraterritoriality applies to claims under the ATS" and a "case seeking relief for violations . . . occurring outside the United States is barred." 569 U. S., at 124. Thus, similar to the FTCA, the tortious damages must occur within the United States borders. The fact that Congress has deliberately and expressly excepted the recovery of monetary relief for torts occurring in a foreign country should speak volumes to this Court.

II. This case presents a new *Bivens* context and special factors heavily dictate against extending *Bivens* to claims arising in a foreign sovereign to a noncitizen with no connection to the United States.

A. New Context.

Abbasi directs that the first question that must be addressed is whether the Petitioners' claims against Agent Mesa are encompassed by this Court's prior holdings in *Bivens*, *Davis,* or *Carlson*. Because *Davis* involved a Fifth Amendment employment discrimination claim and *Carlson* involved an Eighth Amendment cruel and unusual punishment claim, those two cases are factually and legally distinguishable and need not be analyzed any further.

Thus, the inquiry turns to whether Petitioners' claims fall within *Bivens*' narrow scope. See *Ziglar* v. *Abbasi*, 582 U. S. __, 137 S. Ct. 1843, 1856-1857, 198 L. Ed. 2d 290, 308 (2017). *Bivens* has "continued force . . . in the search-and-seizure context in which it arose," *ibid*., and it should be confined to its "precise circumstances." See *id*., at 137 S. Ct., at 1870, 198 L. Ed. 2d, at 323 (Thomas, J. concurring in part and concurring in the judgment); *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring). Thus, if this case is to be encompassed within "[t]he settled law of *Bivens,*" *Abbasi,* 137 S. Ct., at 1857, 198 L. Ed. 2d, at 308, and therefore permit a similar judicially created remedy, it must be sufficiently analogous in order to proceed without further analysis. It is not.

Bivens involved a claim of unannounced, unprovoked intrusion into a U. S. citizen's private residence within the United States borders. Mr. Bivens alleged that despite the lack of probable cause, federal officers restrained him, threatened him and his family, and

searched his private dwelling from "stem to stern." *Bivens*, 403 U. S., at 389, and n. 1. He was then arrested, strip searched, interrogated, and jailed. The narcotics agents were acting under claim of federal authority in response to Bivens' "alleged narcotics violations." *Ibid*.

The context in which this case arose is unlike any other that has come before it. The fact that Petitioners contend that this case does not present a new context, but rather falls "squarely within *Bivens*'s analytical and historical core" is mind-boggling. See Petitioners' Opening Brief 22. This case involves a federal border patrol agent who allegedly used excessive force in violation of the Fourth and Fifth Amendments when he shot and killed a Mexican citizen in Mexico who had no ties to the United States.[10] The exact facts that led to

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10. Neither criminal nor federal civil rights charges were pursued against Agent Mesa:

> "The Justice Department conducted a comprehensive and thorough investigation into the shooting, which occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a CBP agent who was attempting to detain a suspect. . . . This review took into account evidence indicating that the agent's actions constituted a reasonable use of force or would constitute an act of self defense in response to the threat created by a group of smugglers hurling rocks at the agent and his detainee. . . .
>
> "The Justice Department also concluded that no federal civil rights charges could be pursued in this matter. Under the applicable civil rights statutes, prosecutors must establish, beyond a reasonable doubt, that a law enforcement officer willfully deprived an individual of a constitutional right, meaning with the deliberate and specific intent to do something the law forbids. This is the highest standard of intent imposed by law. Accident, mistake, misperception, negligence and bad judgment are not sufficient to establish a federal criminal civil rights violation. After a careful and thorough review, a team of experienced federal prosecutors and

the shooting death of Hernández are unclear. A group of Mexican citizens were gathered on the Mexican side of the U. S.-Mexico border. Pet. App. 199; *Hernández I*, 757 F. 3d, at 255. The Mexican teens were either playing a "harmless" game of tag the barbed-wire border fence, *ibid*., or were involved in a much more perilous illegal border smuggling operation, an activity the Border Patrol has a duty to stop. See 6 U. S. C. § 211(c).

Regardless, the factual circumstances undoubtedly present an entirely new context bearing no similarity to *Bivens*. It involves a claim of undue force stemming from an injury that occurred on foreign soil against a noncitizen. It is not, as *amici* Government of the United Mexican States contends, an "ordinary civil claim for damages for unjustified use of force by a law-enforcement officer." Brief for Government of the United Mexican States as *Amicus Curiae* 4.

"If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Abbasi*, 137 S. Ct., at 1859, 198 L. Ed. 2d, at 311. Even though both this case and *Bivens* involve Fourth Amendment claims, see *Graham* v. *Connor*, 490 U. S. 386, 395 (1989) (excessive force claims analyzed under the Fourth Amendment), the facts giving rise to this case and the circumstances and context in which this case arose are "fundamentally different." See *Malesko*, 534 U. S., at 70. Only a small difference is needed to satisfy the new-context inquiry, *Abbasi*, 137 S. Ct., at 1865, 198 L. Ed. 2d 317-318, but

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FBI agents determined that the evidence was insufficient to prove, beyond a reasonable doubt, that the CBP agent acted willfully and with the deliberate and specific intent to do something the law forbids, as required by the applicable federal criminal civil rights laws." Press Release, *supra*, at p. 3.

this case and *Bivens* are miles apart. Thus, this case presents a new context and a "special factors" analysis is necessary. See *Abbasi*, 137 S. Ct., at 1860, 198 L. Ed. 2d, at 312.

B. Special Factors.

Because the circumstances of this case do not fall within *Bivens'* narrow reach, the question turns to whether this Court should create a new, implied cause of action for an alleged "constitutional tort" committed on foreign soil against a noncitizen with no connection to the United States. The answer to that question is a resounding no. The Fifth Circuit correctly held that "[t]he presence of 'special factors' precludes a *Bivens* extension . . . . [T]here is more than enough reason for this court to stay its hand and deny the extraordinary remedy that the [petitioners] seek." *Hernández III,* 885 F. 3d, at 818.

There is no escaping the fact that Congress prohibits monetary recovery for tort claims against the Government that arise in a foreign country due to federal official misconduct. See Part I-C, *supra*, at 11-14; see also *Abbasi*, 137 S. Ct., at 1856, 198 L. Ed. 2d, at 308. That should heavily influence whether "special factors" counsel against commissioning a new cause of action in the circumstances presented by this case. Bedrock principles of separation of powers dictate that "it is ordinarily Congress's role, not the Judiciary's, to create and define the scope of federal tort remedies." *Meshal* v. *Higgenbotham*, 804 F. 3d 417, 429 (D.C. Cir. 2015) (Kavanaugh, J., concurring). This Court understands that the Legislature is in the better position to weigh and appraise the "host of considerations" that must be addressed before a "new substantive legal liability" is imposed. *Abbasi*, 137 S. Ct., at 1857, 198 L. Ed. 2d, at 309 (citations and internal quotation marks omitted).

Furthermore, "[n]ational-security policy is the prerogative of the Congress and President." *Abbasi*, 137 S. Ct., at 1861, 198 L. Ed. 2d, at 313 (citing U. S. Const., Art. I, § 8; Art. II, § 1, § 2).

Congress has not created a remedy for cross-border shootings by federal officials. But, it has expressly prohibited recovery for tort claims that arose in a foreign country. Congress has the authority to indicate whether it intends federal law to apply to damages occurring abroad. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 117-118 (2013). It is not up to the judicial branch to create a cause of action that implicates foreign policy where one does not otherwise exist. See *Meshal* v. *Higgenbotham*, 804 F. 3d 417, 420 (D.C. Cir. 2015) ("federal tort causes of action are ordinarily created by Congress, not by the courts").

> " 'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf. *Bush*, 462 U. S., at 389. And Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie* v. *Robbins*, 551 U. S. 537, 562 (2007).

The security of our country's borders rests primarily with the U. S. Customs and Border Protection Agency ("CBP"). See 6 U. S. C. § 211. One of CBP's many responsibilities is to "detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States, in cases in which such persons are entering, or have recently entered, the United States." 6 U. S. C. § 211(c)(5).

Border Patrol Agents assigned to work in the nine border patrol sectors that are located along the U. S.

southwest border (California, Arizona, New Mexico, and Texas) are responsible for securing approximately 1,900 miles of land.[11] Of those 1,900 miles, Texas shares approximately 1,240 miles with Mexico, which encompasses five of the nine southwest border patrol sectors, and includes 29 official ports of entry.[12] In 2018, Texas had the highest number of alien smuggling offenses in the nation. U. S. Sentencing Commission, Quick Facts, Alien Smuggling Offenses, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Alien_Smuggling_FY18.pdf (as visited September 17, 2019). Of the 2,843 apprehended smugglers, 1,627 were in Texas. *Ibid.*

Thus far in fiscal year 2019 (October 1, 2018, to August 31, 2019), apprehensions of individuals between ports of entry by CBP at the southwest border have totaled over 800,000, which is more than double the amount for all of fiscal year 2018 (396,579).[13] The

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11. World Atlas, U. S. States That Border Mexico, https://www.worldatlas.com/articles/us-states-that-border-mexico.html (hereinafter "World Atlas) (as visited September 17, 2019).

12. World Atlas, *supra*, n. 11; U. S. Department of Homeland Security, U. S. Customs and Border Protection, Border Patrol Sectors, https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors (as visited September 17, 2019); U. S. Department of Homeland Security, U. S. Customs and Border Protection, Locate a Port of Entry in Texas, https://www.cbp.gov/contact/ports/tx (as visited September 17, 2019).

13. U. S. Department of Homeland Security, U. S. Customs and Border Protection, Southwest Border Migration FY 2019, https://www.cbp.gov/newsroom/stats/sw-border-migration (as visited September 17, 2019); U. S. Department of Homeland Security, U. S. Customs and Border Protection, Southwest Border Migration FY2018, https://www.cbp.gov/ newsroom/stats/sw-border-migration/fy-2018 (as visited September 17, 2019).

unprecedented number of individuals who appear at the southwest border on a daily basis has overwhelmed CBP and is best described as a "border security and humanitarian crisis."[14]

Hernández and his friends were suspected human smugglers who were hurling rocks at Agent Mesa at close range from the Ciudad Juaréz, Mexico, side of the border. *Hernández*, 137 S. Ct., at 2005, 198 L. Ed. 2d, at 627-628. In 2018, Ciudad Juaréz, Mexico, was ranked as the fifth most violent city in the world.[15] Human smugglers, with their ties to violent transnational criminal organizations ("TCO"), pose a tremendous threat to our country's national security.

> "TCOs are motivated by money and power and have little regard for human life. Their networks are commodity agnostic—a human being is moved along with no more care than a gun or a bundle of drugs. When aliens enter these networks, they may find themselves beaten, assaulted, raped, and even killed by TCO members.
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> "TCOs are both motivated and ruthless—they are not bound by legitimate business practices or the pace of bureaucracy, and will stop at nothing to

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14. Testimony of Brian S. Hastings & Randy Howe before U. S. Senate Committee on Homeland Security on "Unprecedented Migration at the U. S. Southern Border: The Exploitation of Migrants through Smuggling, Trafficking, and Involuntary Servitude" (June 26, 2019), https://www.hsgac.senate.gov/download/06-26-2019-hastings-testimony- (hereinafter "Hastings & Howe Testimony") (as visited September 24, 2019).

15. Kate Linthicum, Five of the Six Most Violent Cities in the World are in Mexico, Los Angeles Times, March 14, 2019, https://www.latimes.com/world/la-fg-mexico-tijuana-violence-20190314-story.html (as visited August 30, 2019). Tijuana, another border city, was ranked first. *Ibid*.

> gain power and profit. They are agile and adaptable, and are willing to spend countless resources maintaining and expanding control of their criminal enterprises." Hastings & Howe Testimony, *supra*, n. 14.

"Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.' " *Abbasi*, 137 S. Ct., at 1861, 198 L. Ed. 2d, at 313. This is particularly true of money damages claims. *Ibid*. The costs of allowing such claims are substantial.

> "[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation . . . . [T]here are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered." *Id.*, 137 S. Ct., at 1856, 198 L. Ed. 2d, at 307-308.

The federal government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona* v. *United States*, 567 U. S. 387, 394 (2012); U. S. Const., Art. I, § 8, cl. 4. Federal authority over those two areas is "extensive and complex." *Arizona*, *supra*, at 395. The government must deal with foreign countries regarding their citizens with a unified voice. Just as that function must not be interfered with

by the states, see *ibid*., so it must not be interfered with by the judiciary. The Department of Homeland Security ("DHS") is the executive department charged with the responsibility of protecting our nation's security. 6 U. S. C. § 111. Specifically, CBP (an agency within DHS) "is responsible for determining the admissibility of aliens and securing the country's borders." *Arizona*, 567 U. S., at 397.

Border patrol agents are our nation's frontline guards and "perform duties essential to national security." *Hernández III,* 885 F. 3d, at 819; 6 U. S. C. § 211(e)(3). As discussed in Part II-A, *supra*, the facts giving rise to the shooting are unclear. Hernández and his friends were either playing a game or were illegally smuggling humans across the border. The Justice Department determined, after a thorough investigation, that Agent Mesa's actions were consistent "with CBP policy or training regarding use of force." See Press Release, *supra*, at p. 3; 8 C. F. R. § 287.8(a)(2).

Border patrol agents, like police officers, are faced with " 'tense, uncertain, and rapidly evolving' " circumstances and " 'are often forced to make split-second judgments' " on a daily basis. See *Kisela* v. *Hughes*, 584 U. S. __, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449, 453 (2018) (*per curiam*) (quoting *Graham*, 490 U. S., at 396-397). If this Court opens up the ability for them to be held personally liable for those decisions, it would no doubt cause many to "second-guess difficult but necessary decisions concerning national-security policy." *Abbasi*, 137 S. Ct., at 1861, 198 L. Ed. 2d, at 313.

In addition to national security, foreign policy is an additional "special factor" counseling hesitation in this case. Matters involving foreign policy are the " 'province and responsibility of the Executive' " and judicial intrusion is circumspect absent Congressional authority. *Department of Navy* v. *Egan*, 484 U. S. 518, 529-

530 (1988) (quoting *Haig* v. *Agee*, 453 U. S. 280, 293-294 (1981)). The very fact that the Government of Mexico has filed a brief in this case is an indication that this is a matter between sovereigns of the type that "should make courts particularly wary" of interfering. See *Sosa*, 542 U. S., at 727.

In *Chappell* v. *Wallace*, 462 U. S. 296 (1983), and *United States* v. *Stanley*, 483 U. S. 669 (1987), this Court was asked to extend *Bivens* to constitutional torts sustained by soldiers in the course of their military service. In both cases, this Court refused to intrude upon the Congressional and Executive authority over military affairs despite the lack of a "viable cause of action under state or federal law, and no effective remedy from any alternate federal system." Kent, Are Damages Different?: *Bivens* and National Security, 87 S. Cal. L. Rev. 1123, 1151 (2014).

In *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 274-275 (1990), this Court held that the Fourth Amendment does not apply to searches and seizures by United States agents of property located in Mexico and owned by a Mexican citizen. The Court noted that "history and case law [are] against" such application. *Id*., at 273. A contrary rule would have severe consequences.

> "The United States frequently employs armed forces outside this country — over 200 times in our history — for the protection of American citizens or national security. [Citations]. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id*., at 273-274.

Although *Verdugo-Urquidez* did not involve a *Bivens* claim, this Court stated in dicta that if it were to find that the Fourth Amendment applied extraterritorially

in the circumstances presented in that case, then "aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Id.*, at 274 (citing *Bivens*). *Abbasi*'s citation of *Verdugo-Urquidez*, see 137 S. Ct., at 1861, 198 L. Ed. 2d, at 313, indicated that the same considerations that led the *Verdugo* Court not to extend the Fourth Amendment across the border also weigh against extending *Bivens* there.

Special factors weigh heavily against implying a new cause of action to the facts presented in this case. This Court's precedents dictate against creating a new implied cause of action under these circumstances.

This Court should continue its retreat from implying private causes of action directly under the Constitution, continue to limit *Bivens*, *Davis*, and *Carlson* to those specific circumstances, and follow the precedent in *Abbasi*. Congress, not the judiciary, is the proper branch to decide if noncitizens can recover for torts committed by federal law enforcement officials causing damage in a foreign country.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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