No. 17-___

IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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June 15, 2018

QUESTIONS PRESENTED

1. Whether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)?

2. If not, whether the Westfall Act violates the Due Process Clause of the Fifth Amendment insofar as it preempts state-law tort suits for damages against rogue federal law enforcement officers acting within the scope of their employment for which there is no alternative legal remedy.

PARTIES TO THE PROCEEDING

The following Petitioners were plaintiffs in the district court and appellants in the court of appeals: Jesus C. Hernández, individually and as the surviving father of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca; and Maria Guadalupe Güereca Bentacour, individually and as the surviving mother of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca.

Respondent Jesus Mesa, Jr. was a defendant in the district court and an appellee in the court of appeals. The following entities and individuals were parties in two appeals that were consolidated by the court of appeals with the appeal that gave rise to this petition: the United States of America, the U.S. Department of Homeland Security, the U.S. Bureau of Customs and Border Protection, the U.S. Border Patrol, the U.S. Immigration and Customs Enforcement Agency, the U.S. Department of Justice, Ramiro Cordero, and Victor M. Manjarrez, Jr. Those two appeals are not the subject of this petition, and these entities and individuals are not respondents here. (As a courtesy, a copy of this petition has been sent to the Solicitor General.)

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners in this case brought suit alleging that the Respondent, while acting within the scope of his employment as a U.S. Customs and Border Protection agent, "essentially committed a cold-blooded murder" when he shot and killed their unarmed, 15-year-old son. Pet. App. 24 (Dennis, J., concurring in the judgment). This Petition presents the question left open by *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017): Where, as here, plaintiffs plausibly allege that a rogue federal law enforcement officer has violated clearly established constitutional rights for which there is no other possible legal remedy, can and should the federal courts recognize a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)?

On remand after this Court's decision in *Hernandez* v. *Mesa* ("*Hernández I*"), 137 S. Ct. 2003, 2006–07 (2017) (per curiam), a majority of the en banc Fifth Circuit said "no." Pet. App. 1 ("*Hernández II*"). That ruling relied upon reasoning that is inconsistent not only with *Abbasi* (and, thus, this Court's mandate in *Hernández I*), but with *Bivens* itself—and the rich pre-*Bivens* history of judge-made damages remedies for constitutional violations by federal officers.

If left intact, the Court of Appeals' analysis would effectively shut the door on any and all *Bivens* suits that depart in even the slightest, immaterial way from the three specific fact patterns in which this Court has allowed such claims to go forward. *See Bivens*, 403 U.S. 388; *see also Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979). And because state-law damages remedies for federal constitutional

violations by federal officers are no longer available, *Hernández II* would leave victims of many (if not most) constitutional violations by federal officers—especially "individual instances of . . . law enforcement overreach," *Abbasi*, 137 S. Ct. at 1862—with *no* possible legal remedy, such that "the deterrent effect of the *Bivens* remedy would be lost." *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994).

As the second Justice Harlan explained in *Bivens*, "it would be . . . anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." 403 U.S. at 403–04 (Harlan, J., concurring in the judgment). And *Abbasi* itself was clear that "this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. at 1856; *see also id.* at 1857 ("The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.").

At the very least, then, if *Abbasi* requires such an anomalous result for claims against rogue federal law enforcement officers for which there is no other possible legal remedy (and the momentous shift in the structure of government accountability that it would portend), this Court—and not the Fifth Circuit—should be the one to say so. *See Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (lower courts should "leav[e] to this Court the prerogative of overruling its own decisions").

DECISIONS BELOW

The Court of Appeals' decision on remand from this Court is reported at 885 F.3d 811 (5th Cir. 2018) (en banc), and is reprinted in the Appendix at Pet. App. 1.

JURISDICTION

The Court of Appeals entered its decision and final judgment in this case on March 20, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." *Id*. amend. V.

STATEMENT OF THE CASE

As this Court summarized in *Hernández I*, the allegations in Petitioners' complaint "depict a disturbing incident resulting in a heartbreaking loss of life." 137 S. Ct. at 2007; *see* Pet. App. 24 (Dennis, J., concurring in the judgment) ("[A]ccording to the complaint, Mesa essentially committed a cold-blooded murder."). In particular,

> On June 7, 2010, Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, was with a group of friends in the cement culvert that separates El Paso, Texas, from Ciudad Juarez, Mexico. Now all but dry, the culvert once contained the waters of the Rio Grande River. The international boundary runs down the middle of the culvert, and at the top of the

> embankment on the United States side is a fence. According to the complaint, Hernández and his friends were playing a game in which they ran up the embankment on the United States side, touched the fence, and then ran back down. At some point, Border Patrol Agent Jesus Mesa, Jr., arrived on the scene by bicycle and detained one of Hernández's friends in United States territory as the friend ran down the embankment. Hernández ran across the international boundary into Mexican territory and stood by a pillar that supports a railroad bridge spanning the culvert. While in United States territory, Mesa then fired at least two shots across the border at Hernández. One shot struck Hernández in the face and killed him. According to the complaint, Hernández was unarmed and unthreatening at the time.

Hernández I, 137 S. Ct. at 2005.

The Petitioners (Hernández's parents) brought suit against various defendants, alleging, as relevant here, that Respondent violated Hernández's Fourth and Fifth Amendment rights. The U.S. District Court for the Western District of Texas granted Respondent's motion to dismiss. On appeal, a panel of the Fifth Circuit affirmed in part and reversed in part, holding that Hernández lacked Fourth Amendment rights, but that Petitioners were entitled to a *Bivens* remedy—and Respondent was not entitled to qualified immunity—on their Fifth Amendment claims. On rehearing en banc, the Court of Appeals unanimously affirmed the district court's dismissal of Petitioners' claims. In particular, the court held that the Petitioners failed to state a claim for a violation of the Fourth Amendment, and that Respondent was

entitled to qualified immunity on Petitioners' Fifth Amendment claim because, even if a Mexican national standing on Mexican soil could state a claim under the Fifth Amendment, his entitlement to such a claim was not clearly established at the time of the shooting.

In *Hernández I*, this Court unanimously[1] reversed the en banc Fifth Circuit's conclusion that Respondent was entitled to qualified immunity on Petitioners' Fifth Amendment claim, because Respondent did not know at the time he fired his gun that Hernández was a Mexican national lacking substantial voluntary connections to the United States. *Id.* at 2007 ("Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.").

The Court reserved judgment, however, on the two other questions presented—"whether the shooting violated the victim's Fourth Amendment rights," and "whether the [Petitioners] may assert claims for damages against [Respondent] under *Bivens*." *Id.* at 2005. Instead, the majority returned those questions to the Court of Appeals, given that the Fifth Circuit "ha[d] not had the opportunity to consider how the reasoning and analysis in *Abbasi* may bear on this case." *Id.* at 2006.[2]

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1. Justice Gorsuch did not participate. 137 S. Ct. at 2008.

2. Three Justices dissented from different parts of the Court's mandate. Justice Thomas noted that he "would decline to extend *Bivens* and would affirm the judgment of the Court of Appeals on that basis." 137 S. Ct. at 2008 (Thomas, J., dissenting). Justices Breyer and Ginsburg agreed to return the *Bivens* question to the Fifth Circuit in the first instance, but would have "decide[d] the Fourth Amendment question before us," and "conclude that the Fourth Amendment applies." *Id.* at 2011 (Breyer, J., dissenting).

On remand, the en banc Fifth Circuit, by a 13-2 vote, once again affirmed the district court's dismissal of Petitioners' complaint. Writing for 12 judges,[3] Judge Jones focused solely on the *Bivens* question, and held that, in light of *Abbasi*, no cause of action should be recognized. Pet. App. 4–23. Judge Jones's analysis had two main prongs. First, it focused on the "newness of this 'new context,'" *i.e.*, the fact that, unlike prior excessive force claims against rogue law enforcement officers, this case involves a cross-border shooting in which the underlying constitutional rights are not clearly established. That fact "should alone require dismissal of the plaintiffs' damages claims." *Id*. at 11. Second, it highlighted four "special factors" that, in any event, militated against recognition of a judge-made damages remedy: national security, foreign affairs, the absence of statutory remedies, and extraterritoriality. *Id*. at 13–18. Thus, the majority concluded, "this is not a close case." *Id*. at 22.

Writing for himself and Judge Graves, Judge Prado dissented, noting that, although the majority was correct that "this case presents a new context," it erred in its analysis of special factors by invoking the "empty labels of national security, foreign affairs, and extraterritoriality. These labels—as we say in Texas—are all hat, no cattle." *Id*. at 26 (Prado, J., dissenting). As the dissent explained, "[n]ot only are all four of [the majority's] special factors notably absent here, but this case also presents the limited circumstances in which *Abbasi* indicated a *Bivens* remedy would exist." *Id*. at 29.

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3. Judge Dennis again voted to affirm the district court's dismissal on the basis of qualified immunity. Pet. App. 23–25 (Dennis, J., concurring in the judgment).

REASONS FOR GRANTING THE PETITION

In writing for the four-Justice majority in *Abbasi*, Justice Kennedy emphasized that the ruling was "not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. at 1856. Instead, "[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it *in that sphere*." *Id*. at 1856–57 (emphasis added). Only one of the six Justices who participated in *Abbasi* disagreed. *See id*. at 1869–70 (Thomas, J., concurring in part and concurring in the judgment).

By refusing to recognize a *Bivens* remedy based upon the facts as plausibly alleged in Petitioners' complaint, the Fifth Circuit failed to heed *Abbasi*'s teachings, and thereby flouted this Court's mandate in *Hernández I*. More than that, the Court of Appeals' misapplication of *Abbasi* would not only have the effect of limiting *Bivens* to its facts (and dramatically reducing its value as a deterrent); it would also provoke serious constitutional questions that this Court did not consider in *Abbasi*.

Certiorari is therefore warranted in order for this Court to decide whether there are indeed contexts beyond the specific facts of *Bivens*, *Davis*, and *Carlson* in which judge-made damages remedies for constitutional violations by federal officers should still be available, especially where plaintiffs have no other legal remedy to seek redress for unconstitutional misconduct by a rogue law enforcement officer—and to address the constitutional implications if, as the Fifth Circuit held in this case, the answer is no.

I. The Fifth Circuit Repeatedly Misinterpreted and Misapplied *Abbasi*

In *Hernández I*, this Court returned Petitioners' claims to the Court of Appeals "to consider how the reasoning and analysis in *Abbasi* may bear on this case." 137 S. Ct. at 2006. Although the Fifth Circuit purported to apply *Abbasi* on remand, Judge Jones's majority opinion misinterpreted and misapplied this Court's instructions in at least three different—but equally significant—respects. First, it read *Abbasi* as closing the door on *Bivens* remedies in *any* "new context," a term the Court of Appeals defined with remarkable capaciousness. Pet. App. 11. Second, the special factors the Court of Appeals identified in the alternative were little more than empty talismans, *id.* at 13–23 (majority opinion)—exactly the concern about which this Court warned in *Abbasi*. *See* 137 S. Ct. at 1862. Finally, although it acknowledged that, unlike in *Abbasi*, the Petitioners here have no alternative legal remedy, it dismissed that concern by invoking other potential disincentives for such misconduct by officers like Respondent, *see id.* at 18–19, one of which is non-existent and the other of which would prove too much. The Court of Appeals thus "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

A. "New Context"

In its discussion of *Abbasi*, the Fifth Circuit in *Hernández II* started from the proposition that this case presents a "new context," and that "[t]he newness of this 'new context' should *alone* require dismissal of the plaintiffs' damages claims." Pet. App. 11 (emphasis added). In both of these conclusions, the

Fifth Circuit materially departed from this Court's analysis in *Abbasi*.

With regard to identifying whether a particular case arises in a "new context" for purposes of *Bivens* the *Abbasi* Court went out of its way to clarify the answer:

> A case might differ in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or [7] the presence of potential special factors that previous *Bivens* cases did not consider.

Abbasi, 137 S. Ct. at 1860. Thus, this Court concluded in *Abbasi* that the case presented a "new context" because the plaintiffs were suing senior government officials for high-level policy decisions made in the aftermath of the September 11 attacks, and seeking relief under different constitutional provisions than those that had been used previously to advance similar claims. Needless to say, none of those considerations are presented here.

The Fifth Circuit nevertheless held that Petitioners' complaint presents a "new context" because "the very existence of any 'constitutional' right benefitting [Hernández] raises novel and disputed issues." Pet. App. 8. That conclusion is not remotely responsive to *Abbasi*. The Petitioners'

complaint alleges that a rogue federal law enforcement officer, acting in violation of federal regulations, *see* 8 C.F.R. § 287.8(a)(2)(ii), used excessive force in a context in which he did not (and could not) know whether the victim had clearly established constitutional rights. Put another way, "[t]his case simply involves a federal official engaged in his law enforcement duties acting on United States soil who shot and killed an unarmed fifteen-year-old boy standing a few feet away." Pet. App. 42 (Prado, J., dissenting). And as this Court emphasized in *Abbasi*, "[s]ome differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." *Abbasi*, 137 S. Ct. at 1865. The only material difference the Court of Appeals identified between this case and those in which *Bivens* remedies have been recognized, in other words, is uncertainty over whether Respondent's alleged misconduct was, in fact, unconstitutional. If that's a "new context" after *Abbasi*, then everything is.

In any event, the Fifth Circuit not only failed to follow this Court's definition of a "new context"; it misunderstood its implications. For the *Hernández II* majority, the (erroneous) conclusion that this case presented a "new context" was dispositive of whether a *Bivens* remedy should be recognized. *Abbasi* could not have been clearer, in both word and deed, that such reasoning is incorrect. Recognizing a *Bivens* remedy in a "new context" may be "disfavored." *Abbasi*, 137 S. Ct. 1857. But it is not precluded.

To that end, *Abbasi* itself refused to foreclose the plaintiffs' prisoner abuse claim against their prison warden—even though, with respect to that claim, "the new-context inquiry is easily satisfied." *Id.* at 1865. Instead, this Court returned that claim to the lower

courts (over Justice Thomas's express objection), to conduct a proper analysis of whether, given the properly identified new context, "special factors" counseled hesitation against recognition of a *Bivens* remedy. *Id.*; *see id.* at 1870 (Thomas, J., concurring in part and concurring in the judgment).[4] The Fifth Circuit thus not only wrongly determined that this case presents a "new context," but it wrongly implied that such a determination was conclusive. Both of those misreadings of *Abbasi* warrant reversal.

B. "Special Factors"

Separate from wrongly finding (and then conclusively relying upon) a "new context," the four "special factors" that the Fifth Circuit identified as also counseling against judicial recognition of a *Bivens* remedy in this case all fail to withstand any meaningful scrutiny. Three of them are little more than superficial and unsubstantiated platitudes; and the fourth would swallow *Bivens* whole.

1. National Security.

The first special factor identified by the Fifth Circuit is "national security," and the concern that extending *Bivens* to Petitioners' claims "threatens the political branches' supervision of national security." Pet. App. 13. *Abbasi* itself warned against the invocation of "national-security concerns" as a "talisman used to ward off inconvenient claims," 137 S. Ct. at 1862, but that's exactly how the Fifth Circuit deployed that argument below.

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4. Resolution of that issue on remand is currently pending before the district court. *See Turkmen* v. *Ashcroft*, No. 02-2307 (E.D.N.Y. argued Mar. 15, 2018).

The allegations in Petitioners' complaint are that a rogue law enforcement officer, in violation of his own departmental regulations (along with the Fourth and Fifth Amendments), used excessive force in shooting an unarmed 15-year-old boy. Unlike in *Abbasi*, Petitioners are not challenging a high-level Executive Branch policy or the actions of senior (or line) government officials in responding to an urgent national security crisis—or even, as the Fifth Circuit put it, the "political branches' supervision of national security" more generally. Pet. App. 13. As such, "[i]f 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." *Id.* at 33 (Prado, J., dissenting); *see also id.* at 35 ("[T]his case more closely resembles ordinary civil litigation against a federal agent than a case involving a true inquiry into sensitive national security and military affairs.").

The *Hernández II* majority's only response was to concede that national security would not be a "special factor" if Hernández had been standing on U.S. soil at the moment he was shot. *Id.* at 14 n.14 (majority opinion) (citing *De La Paz* v. *Coy*, 786 F.3d 367, 374 (5th Cir. 2015)). In other words, national security was a "special factor" for the Court of Appeals solely because of where Respondent's bullet landed. *Abbasi* rejected exactly such a vacuous invocation of "national-security concerns" as a "special factor." 137 S. Ct. at 1862.

2. Foreign Affairs and Diplomacy.

The second "special factor" identified below was "foreign affairs and diplomacy." Specifically, the

Hernández II majority asserted that "[i]t would undermine Mexico's respect for the validity of the Executive's prior determinations if, pursuant to a *Bivens* claim, a federal court entered a damages judgment against Agent Mesa." Pet. App. 16. As the dissenters pointed out, though, this reasoning again "proves too much," *id.* at 36 (Prado, J., dissenting), because it would equally apply to the same use of force against a Mexican national standing on U.S. soil—and to any violation of a foreign national's constitutional rights anywhere in the United States.

More fundamentally, the Fifth Circuit's analysis confuses the presence of a foreign *fact* for the existence of genuine foreign affairs *concerns*. The claim here has nothing to do with the substance or conduct of U.S. foreign (or even immigration or border) policy—and, if anything, implicates foreign relations only insofar as there has been *no* remedy for Hernández's killing. *See* Brief of the Government of the United Mexican States as *Amicus Curiae* at 3, *Hernández I*, 137 S. Ct. 2003 ("When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico's jurisdiction, it is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims."). To that end,

> [i]t is unclear how recognizing a *Bivens* remedy for the unconstitutional conduct of a single federal law enforcement officer acting entirely within the United States would suddenly inject this Court into sensitive matters of international diplomacy. Much as with national security, "the Executive's mere incantation of . . . 'foreign affairs' interests do not suffice to override constitutional rights."

Pet. App. 37 (Prado, J., dissenting) (quoting *Def. Distrib.* v. *U.S. Dep't of State*, 838 F.3d 451, 474 (5th Cir. 2016) (Jones, J., dissenting)).

3. Extraterritorality.

A third "special factor" summarily invoked by the Court of Appeals is "extraterritoriality," specifically that "[t]he presumption against extraterritoriality accentuates the impropriety of extending private rights of action to aliens injured abroad." Pet. App. 21. The Fifth Circuit did not elaborate, but even if it had, its reasoning would have been unavailing, because neither of the reasons that courts interpret statutes against that background presumption apply here. *See, e.g.*, *Morrison* v. *Nat'l Austl. Bank*, 561 U.S. 247, 255 (2010).

First, the presumption against extraterritorial application of statutes "avoid[s] the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). Again, though, "international discord" in this case comes from the potential *unavailability* of civil remedies under U.S. law, not from the proposition that the Constitution might constrain the U.S. government's conduct even as against non-citizens outside the territorial United States. *Cf. Al Bahlul* v. *United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014) (en banc) (holding that the Ex Post Facto Clause applies to non-citizens detained at Guantánamo).

Second, the presumption "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *RJR Nabisco*, 136 S. Ct. at 2100 (citation omitted). No similar notion applies to constitutional interpretation,

where this Court is not simply acting as the agent of the legislature, but is acting in a manner that can "presumably not even be repudiated by Congress." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). In addition, the defendants in such cases must necessarily be officers or agents of the federal government. Thus, so long as the relevant constitutional provisions apply extraterritorially, and so long as their application does not portend undue judicial interference with foreign policy or national security, extraterritoriality, by itself, is no reason to deny judicial recognition of a constitutional remedy. *See Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008).

4. Congressional Inaction.

Finally, the Fifth Circuit invoked Congress's refusal to enact a more specific remedy as its own "special factor" militating against recognition of a *Bivens* claim. Pet. App. 17 ("Congress's failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation."). Here, again, the Court of Appeals materially misunderstood this Court's analysis in *Abbasi*. As Justice Kennedy explained for the majority,

> In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. Congressional interest has been "frequent and intense," and some of that interest has been directed to the conditions of confinement at issue here. . . .
>
> This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in

> circumstances like these, it is much more difficult to believe that "congressional inaction" was "inadvertent."

137 S. Ct. at 1862 (citation omitted).

In this case, in contrast, there has been no congressional interest in cross-border shootings in general, or in this "individual instance[] of . . . law enforcement overreach," *id*., in particular. It is therefore "more likely that congressional inaction is inadvertent rather than intentional," Pet. App. 39 (Prado, J., dissenting), as will almost always be the case when misconduct by rogue federal law enforcement officers is alleged. To that end, if the Court of Appeals was correct that Congress's silence here was its own "special factor," then it would be a special factor in *every* case, since Congress has never "provide[d] a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government." *Abbasi*, 137 S. Ct. at 1854. *Abbasi* itself unambiguously forecloses that conclusion.

C. Alternative Remedies

Finally, the Fifth Circuit gave short shrift to the most important difference between this case and *Abbasi*—the absence of any alternative legal remedy. As this Court explained in *Abbasi*, "[i]t is of central importance" to a court's refusal to recognize a *Bivens* remedy not only that the case presents both a "new context" and "special factors counseling hesitation," but *also* that the plaintiffs could have brought a legal challenge to the same allegedly unconstitutional governmental misconduct through some other remedial vehicle (in *Abbasi*, suits for injunctive relief or habeas petitions). *See* 137 S. Ct. at 1862–63; *see*

also id. at 1863 ("[W]hen alternative methods of relief are available, a *Bivens* remedy usually is not.").

The Fifth Circuit acknowledged that, unlike in *Abbasi*, the plaintiffs here have no alternative legal remedy, but dismissed the analytical significance of that fact by asserting that "the absence of a federal remedy does not mean the absence of deterrence." Pet. App. 18. The only sources of such deterrence that the Court of Appeals identified, however, were "[t]he threat of criminal prosecution" and the specter of a "state-law tort claim." *Id*. at 19.

This Court has never suggested that criminal liability is a sufficient deterrent to militate against allowing for private enforcement of constitutional rights against federal officers, and for good reasons: The Executive Branch has unreviewable authority over whether to bring a criminal prosecution (including, as in this case, against one of its own officers), and it declined to do so here. *Id*. at 31 & n.3 (Prado, J., dissenting). Nor, of course, do all (or even most) violations of the federal Constitution give rise to criminal liability. As for the Court of Appeals' cursory nod toward a "state-law tort claim," it is impossible to see how the specter of such relief could deter a federal officer, since it is categorically unavailable today for torts arising within the scope of a federal officer's employment (and has been since 1988). 28 U.S.C. § 2679(b)(2)(A); *see also* Part II.B, *infra*.

In contrast to *Abbasi*, then, this case truly *is* one in which the choice is between "damages or nothing." 137 S. Ct. at 1862 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)). And that is more than just a factual distinction; in *Abbasi*, this Court concluded that the "balance . . . between

deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril" weighed against recognition of a judge-made damages remedy. *Id*. at 1863. Properly understood, the balance in this case should tip in precisely the opposite direction. But rather than consider whether the absence of alternative remedies thereby militated in *favor* of a judge-made damages remedy, the Court of Appeals simply asserted that other disincentives would adequately deter Respondent and similarly situated federal officers from again engaging in the allegedly unconstitutional misconduct at issue here. It thereby ignored, once again, this Court's guidance in *Abbasi*.

* * *

This Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010). As the dissent observed below, "[n]ot only are all four of [the] special factors [identified in *Abbasi*] notably absent here, but this case also presents the limited circumstances in which *Abbasi* indicated a *Bivens* remedy would exist." Pet. App. 29 (Prado, J., dissenting). The Fifth Circuit's numerous, material misreadings and misapplications of *Abbasi* therefore warrant this Court's intervention.

II. This Case is a Proper Vehicle for Reaffirming *Bivens* Claims Against Rogue Law Enforcement Officers

The Fifth Circuit's repeated errors in its interpretation and application of *Abbasi* are problematic not only in their own right, but because of the impact they would have, if left intact, on future

Bivens claims—limiting *Bivens*, *Davis*, and *Carlson* "to the precise circumstances that they involved." *Malesko*, 534 U.S. at 75 (Scalia, J., concurring). Not only is that the exact result that this Court declined to reach in *Abbasi*, but it would raise serious constitutional questions about the Westfall Act that this Court has not previously considered. This case is therefore a proper vehicle for this Court to not only correct the Fifth Circuit's repeated misapplication of this Court's precedents, but to reaffirm the availability and propriety of *Bivens* claims against rogue law enforcement officers in cases in which no alternative legal remedy exists.

A. *Hernández II* Limits *Bivens* To Its Facts

Taking the Fifth Circuit's decision in *Hernández II* at face value,

- *Bivens* remedies will never be available in a "new context." Pet. App. 11.
- *Bivens* remedies will also never be available in any case in which "special factors" are "present." *Id.* at 11–12.
- The mere invocation of "national security," "foreign affairs," or "extraterritoriality," without more, will be a "special factor" sufficient to preclude recognition of a *Bivens* remedy. *Id.* at 13–16, 19–23.
- Congressional silence is its own "special factor" precluding recognition of a *Bivens* remedy. *Id.* at 16–17.
- The possibility that federal officers could be liable under federal criminal and state tort law provides an adequate deterrent even in cases in

which plaintiffs have no alternative federal legal remedy. *Id.* at 18–19.

As noted above, these holdings are flatly inconsistent with *Abbasi*, and, if left intact, would effectively preclude recognition of any *Bivens* claims beyond the precise facts of *Bivens*, *Davis*, and *Carlson*. *See* Part I, *supra*. One Justice urged exactly this result in *Abbasi*. *See* 137 S. Ct. at 1869–70 (Thomas, J., concurring in part and concurring in the judgment); *see also Hernández I*, 137 S. Ct. at 2008 (Thomas, J., dissenting). Five did not. Instead, the majority opinion in *Abbasi* repeatedly distinguished cases just like this one—in which a rogue law enforcement officer is sued for "individual overreach" in the "search-and-seizure context." As Justice Kennedy emphasized, there are "powerful reasons to retain [*Bivens*] in that sphere." *Abbasi*, 137 S. Ct. at 1857.

Those reasons are especially pronounced in cases, like this one, in which there is no alternative remedy—in which "it is damages or nothing." *Id.* at 1862 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)). That was not the case in *Abbasi*, where this Court noted that the plaintiffs had "alternative remedies available" to them, including "an injunction . . . or some other form of equitable relief," which, the Court explained, ordinarily "precludes a court from authorizing a *Bivens* action." 137 S. Ct. at 1865. But the Petitioners here could not have sought any injunction or other equitable relief prohibiting Respondent (or other CBP agents) from shooting at Hernández without cause. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (plaintiffs seeking an injunction must identify a likelihood of a future injury). In such circumstances, "[t]here is a persisting concern . . . that absent a

Bivens remedy there will be insufficient deterrence to prevent officers from violating the Constitution." *Id.* at 1863; *see Meyer*, 510 U.S. at 485 ("[T]he purpose of *Bivens* is to deter *the officer*.").

To be sure, in circumstances in which the allegedly unconstitutional misconduct is unlikely to recur, it might be easier to abide the absence of any meaningful deterrent. But the tragic facts of this case are, unfortunately, not the least bit aberrational. *See, e.g.*, *Rodriguez* v. *Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (denying a motion to dismiss a *Bivens* suit arising out of a CBP agent's allegedly unconstitutional cross-border killing of an unarmed Mexican national);[5] *see also* Matthew Haag, *Border Patrol Agent Kills Woman Who Crossed Into Texas Illegally, Authorities Say*, N.Y. TIMES, May 24, 2018 (reporting on another allegedly unprovoked fatal shooting by a CBP agent). *See generally* Brief of *Amici Curiae* Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners at 5–11, *Hernández I*, 137 S. Ct. 2003 (documenting—and describing the causes of—the systematic increase in uses of excessive force by CBP officers).[6]

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5. The defendant in *Rodriguez* has appealed the denial of qualified immunity (and the recognition of a *Bivens* remedy) to the Ninth Circuit, which, after hearing oral argument, deferred submission pending this Court's decisions in *Abbasi* and *Hernández I*. *See Rodriguez* v. *Swartz*, No. 15-16410 (9th Cir. argued Oct. 21, 2016). A decision in that appeal remains outstanding.

6. The uptick in excessive uses of force by CBP agents comes alongside findings that CBP has repeatedly inflated and otherwise overestimated the number of incidents in which its officers have come under assault. *See, e.g.*, John Burnett & Richard Gonzales, *Border Patrol Shooting Death of Immigrant*

Yet if the Court of Appeals' analysis is left intact, there will be little deterrent for law enforcement officers in Louisiana, Mississippi, and Texas—to say nothing of other jurisdictions that choose to follow *Hernández II*—with regard to uses of excessive force.[7] In *Malesko*, Chief Justice Rehnquist observed that this Court has extended *Bivens* "to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." 534 U.S. at 70; *see Minneci* v. *Pollard*, 565 U.S. 118, 131 (2012) (holding that the availability of state tort remedies against a private prison guard militated against recognition of a *Bivens* claim).

The Fifth Circuit's refusal to recognize a *Bivens* remedy in a case in which *both* of those considerations are satisfied thus presents "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

Woman Raises Tensions in South Texas, NPR ALL THINGS CONSIDERED, May 24, 2018, https://perma.cc/8ZCB-2P8D.

7. Despite the skepticism of new *Bivens* remedies reflected in this Court's jurisprudence, a recent empirical study found that, "*Bivens* cases are much more successful than has been assumed by the legal community, and . . . in some respects they are nearly as successful as other kinds of challenges to governmental misconduct." Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010).

There is therefore good reason to believe that substantial daylight exists between the current state of *Bivens* doctrine and a doctrine under which *Bivens* is limited to its facts.

B. The Decision Below Raises Constitutional Concerns Not Present in *Abbasi*

Finally, by effectively closing the door to *Bivens* claims in virtually all cases in which plaintiffs allege violations of clearly established constitutional rights for which there is no other legal remedy, the Fifth Circuit's reasoning raises a serious constitutional question that this Court did not consider in *Abbasi*—*i.e.*, whether the Westfall Act violates the Due Process Clause of the Fifth Amendment by preempting suits under *state* tort law for scope-of-employment constitutional violations by federal officers where no other alternative remedy exists. Whatever the answer to that question, its significance provides an additional basis for granting certiorari.

Marbury v. *Madison* recognized the "general and indisputable rule," foundational to our constitutional system, "that where there is a legal right, there is also a legal remedy." 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23). Although that rule is often honored in the breach, from the Founding up through (and after) *Bivens*, judge-made damages suits against federal officers for constitutional violations were routinely available (derived from state, rather than federal law). *See, e.g.*, Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 87–90, 135–37 (1997); *see also* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 10 (2017) ("[T]he antebellum model of government accountability extended to a broad range of federal official misconduct.").

To that end, the early pages of the *U.S. Reports* are replete with decisions in which this Court awarded (or

upheld awards of) damages against federal officers—invariably through judge-made remedies, rather than pursuant to a statutory cause of action. *See, e.g.*, *Maley* v. *Shattuck*, 7 U.S. (3 Cranch) 458 (1806); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806); *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *see also The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824). *See generally* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010).

Because of since-abolished constraints on federal jurisdiction, such claims were, at least as an original matter, primarily the province of state courts. *See Slocum* v. *Mayberry*, 15 U.S. (2 Wheat.) 1, 10 (1817) ("[I]f the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law . . . for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved . . . could be prosecuted only in the state court."); *cf. Teal* v. *Felton*, 53 U.S. (12 How.) 284 (1852) (holding that federal jurisdiction in damages suits against federal officers was not exclusive). But even as the enactment—and gradual enlargement—of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), eventually cleared the way for most of these cases to be resolved in federal court, as late as 1963, this Court continued to emphasize that, "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law." *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963) (citing *Slocum*, 15 U.S. (2 Wheat.) at 10, 12).

In *Bivens*, this Court shifted direction when it concluded that the tort liability of federal law enforcement officers for certain constitutional violations should *also* be a matter of federal law.[8] But even after *Bivens*, victims of constitutional violations by federal officers could still pursue relief under state law separate and apart from a damages claim grounded directly in the Constitution. *See, e.g.*, PFANDER, *supra*, at 103 & 206 n.5; *see also Westfall* v. *Erwin*, 484 U.S. 292, 297–98 (1988) (detailing the immunity questions that arose in such state-law tort suits).

That changed in 1988, when Congress enacted the Westfall Act, which specifies that the Federal Tort Claims Act "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee." 28 U.S.C. § 2679(b)(1). The Westfall Act expressly carved out "a civil action against an employee of the government . . . which is brought for a violation of the Constitution of the United States." *Id*. § 2679(b)(2)(A).

Nevertheless, courts and commentators have generally assumed that this language only preserves *Bivens* suits—and not state-law constitutional tort suits against federal officers that are consistent with

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8. The Solicitor General took the position that there was no need to recognize an "additional" damages remedy directly under the Fourth Amendment in *Bivens* because the federal defendants could be held liable under New York trespass law. *See* Brief for the United States at 34–38, *Bivens* (No. 301), 1970 WL 116900. A federal remedy should be recognized, the Solicitor General argued, only if it was "indispensable for vindicating constitutional rights." *Id*. at 24.

the pre-*Bivens* model. *See* PFANDER, *supra*, at 103–04. *See generally Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010) (noting the Westfall Act's "explicit exception for *Bivens*"). So construed, the Westfall Act has had the effect of eliminating all state-law constitutional tort claims against federal officers within the scope of their employment. As a result, in cases in which there is no alternative federal legal remedy for the violation, the Westfall Act does not just leave *plaintiffs* with a choice between "damages or nothing," *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment); it leaves *courts* to choose between *Bivens* or nothing.

This Court has never considered whether the Westfall Act raises serious constitutional problems in a case in which no other legal remedy is available—and in which the statute's effect is to cut off access to any judicial forum for a colorable constitutional claim for which *some* legal remedy had previously been available dating all the way back to the Founding. In cases in which *Bivens* remedies—or an alternative—are available, it follows that the Westfall Act's displacement of state-law tort remedies raises no such constitutional concern. *See, e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 658–62 (1996).

But whatever valence those constitutional concerns might otherwise have in a case presenting the special factors this Court identified in *Abbasi* (and, unlike *Abbasi*, no alternative remedy), they are necessarily at their zenith in a case like this one—in which the underlying claim is for a classical common-law tort, *i.e.*, excessive force by a rogue law enforcement officer, for which no other legal remedy is, or could have been, available. *See Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal

statute were construed to deny any judicial forum for a colorable constitutional claim" (quoting *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986))). *see also Bartlett ex rel. Neuman* v. *Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987) ("[I]t has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.").

Thus, in addition to the reasons outlined above, certiorari is also warranted because whether Congress did—and could—completely close the courthouse doors to a constitutional tort claim like the one at issue here is "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c). And because of the Court of Appeals' evisceration of *Bivens* in *Hernández II*, this case properly presents that important question.

* * *

Read together, the effect of the Court of Appeals' ruling in *Hernández II* and the Westfall Act is to foreclose many (if not most) judicial remedies for even the most egregious violations of clearly established constitutional rights by rogue federal law enforcement officers, and to drive home the concern that "absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution." *Abbasi*, 137 S. Ct. at 1863.

Nothing in *Abbasi* requires such a counterintuitive result, and there are compelling doctrinal, prudential, and constitutional reasons to conclude to the contrary. But even if a majority of this Court agrees that *Bivens*

can—and should—be limited to its facts (and the facts of *Davis* and *Carlson*), it should be for it, and not the Fifth Circuit, to say so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 15, 2018