No. 17-1678

IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

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)?

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 original 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 case, and these entities and individuals are not respondents here.

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INTRODUCTION

From this country's earliest moments, courts have played a central role in holding rogue federal officers accountable—including, when necessary, using judge-made tort remedies to do so. This tradition has extended from state courts to federal courts; from breaches of common-law duties to violations of constitutional rights; and from torts committed within the United States to torts committed abroad. This tradition is also reflected in dozens of this Court's decisions, such as *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824), in which a U.S. customs officer was held liable for unlawfully seizing a French ship in Spanish waters. As Justice Story wrote, whatever the political considerations in such cases, "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *Id.* at 367.

Petitioners plausibly allege that Respondent violated clearly established constitutional rights when he shot and killed their unarmed, 15-year-old son without provocation. *See* Pet. App. 24 (Dennis, J., concurring in the judgment) ("[A]ccording to the complaint, Mesa essentially committed a cold-blooded murder."). But the Westfall Act, 28 U.S.C. § 2679(b), preempts the Texas tort remedy to which Petitioners could otherwise have resorted. *See Minneci* v. *Pollard*, 565 U.S. 118, 126 (2012). Thus, like many victims of constitutional violations by rogue federal law enforcement officers today, for Sergio Hernández, it is *Bivens* or nothing. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) ("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.").

For that reason, this Court has emphasized the "continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose," *id.* at 1856. Unlike other misconduct, "individual instances of . . . law enforcement overreach . . . are difficult to address except by way of damages actions after the fact." *Id.* at 1862.

Despite this guidance, the en banc Fifth Circuit held that Petitioners lack a cause of action to sue the officer who shot and killed their son. *See* Pet. App. 1. That decision ignored the substance and spirit of this Court's decision in *Abbasi*, and it made nonsense of the rich history of cases imposing common law tort liability against rogue federal law enforcement officers in the search-and-seizure context. Nor is the Fifth Circuit alone in depriving *Bivens* of any continued meaning. Since *Abbasi*, the Third Circuit has held that *Bivens* remedies are unavailable against rogue Transportation Security Administration officers, *see Vanderklok* v. *United States*, 868 F.3d 189 (3d Cir. 2017), and the Fourth Circuit has foreclosed *Bivens* claims against rogue Immigration and Customs Enforcement officers. *See Tun-Cos* v. *Perrotte*, 922 F.3d 514 (4th Cir. 2019). As these decisions suggest, lower courts have (wrongly) read *Abbasi* to effectively shut the door on *all Bivens* claims—and, for the first time, to leave plaintiffs challenging unconstitutional conduct by rogue federal law enforcement officers with no possible recourse.

This case is therefore not only about *Bivens* remedies for unconstitutional cross-border shootings; it is about whether unconstitutional conduct by rogue federal law enforcement officers will be subject to *any* redress going forward—and what it would mean for the Constitution and the country if the answer is "no."

DECISION 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 Petition 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 "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." *Id.* amend. V.

The Westfall Act provides that the Federal Tort Claims Act is the exclusive remedy "for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," 28 U.S.C. § 2679(b)(1), unless the claim is brought for a violation of the Constitution or a statute "under which such action against an individual is otherwise authorized." *Id.* § 2679(b)(2).

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. 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.

Id. at 2005.[1]

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1. In its *amicus* brief at the certiorari stage, the United States, like the Court of Appeals, attempted to dispute the allegations in Petitioners' well-pleaded complaint. U.S. CVSG Br. 2–3; *see also* Pet. App. 3. This case is on appeal from the district court's grant of Respondent's motion to dismiss, however, so the plausible allegations in Petitioners' complaint must be taken as true. *See, e.g.*, *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1927 (2019).

The Petitioners (Hernández's parents) brought suit against various defendants, alleging, as relevant here, that Respondent violated Hernández's Fourth and Fifth Amendment rights. *See* Pet. App. 193. The U.S. District Court for the Western District of Texas granted Respondent's motion to dismiss. *Id*. at 159. 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 on their Fifth Amendment claims, from which Respondent was not entitled to qualified immunity. *Id*. at 100. On rehearing en banc, the Court of Appeals unanimously affirmed the district court's dismissal of Petitioners' claims. 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. *Id*. at 43.

In *Hernández I*, this Court 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. *See Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam) ("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.[2] 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.[3]

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,[4] Judge Jones decided only the *Bivens* question, and held that, in light of *Abbasi*, "this is not a close case." Pet. App. 22. The court'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 were not, in the court's view, clearly established. For the court, that fact "should alone require dismissal of the plaintiffs'

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2. The petition in *Hernández I* did not raise a *Bivens* question. This Court added it to the questions presented when it granted certiorari. *See Hernandez* v. *Mesa*, 137 S. Ct. 291, 291 (2016) (mem.).

3. Three Justices dissented from different parts of this Court's decision in *Hernández I*. 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 Ginsburg and Breyer 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[d] that the Fourth Amendment applies." *Id.* at 2011 (Breyer, J., dissenting).

4. 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).

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, extraterritoriality, and congressional inaction. *Id*. at 13–18.

Writing for himself and Judge Graves, Judge Prado dissented, noting that, although he agreed with the majority that "this case presents a new context," the majority erred in its analysis of the special factors flagged by Respondent 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. From that decision, Petitioners timely petitioned for certiorari.

SUMMARY OF ARGUMENT

In *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a cause of action for damages against rogue federal law enforcement officers who violate the Fourth Amendment. Although *Bivens* was the first case in which this Court recognized a damages remedy directly under the Constitution, it was, in context, a modest variation on an old theme—the long and consistent tradition of state and federal courts recognizing judge-made tort remedies for federal official misconduct, including violations of the Constitution. *See Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that

courts will be alert to adjust their remedies so as to grant the necessary relief."). That tradition is also reflected in dozens of decisions by this Court, beginning with *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804), both of which awarded tort damages against government officers for *ultra vires* seizures of foreign vessels.

Against that backdrop, the question this Court confronted in *Bivens* was whether the liability of rogue federal officers should be left, as it previously had been, to "the vagaries of [state] common-law actions," 403 U.S. at 409 (Harlan, J., concurring in the judgment), or whether a uniform federal remedy was preferable. Although the federal government unsuccessfully argued for the former, it agreed that a federal judge-made remedy would be appropriate "in the rare case where such a remedy was indispensable for vindicating constitutional rights." Brief for Respondents at 40, *Bivens*, 403 U.S. 388 (No. 301), 1970 WL 116900. Neither the government nor the dissenting Justices suggested that victims of constitutional violations by rogue federal law enforcement officers should be left with nothing.

Because the Westfall Act preempts all state tort suits against federal officers acting within the scope of their employment today, for Petitioners here (unlike in *Bivens*), it is *Bivens* or nothing. And yet, the Court of Appeals chose to leave Petitioners with nothing. It held that a *Bivens* remedy is unavailable because this case arises in a "new context," and because, in any event, "national security," "foreign affairs," "extraterritoriality," and "congressional inaction" are all "special factors" militating against judicial recognition of a damages remedy. Pet. App. 4–23.

On each of these points, the Court of Appeals was wrong. This Court's jurisprudence makes clear that Petitioners' claims do not arise in a "new context" merely because of uncertainty as to their merits. And even if this case does present a "new context" for a *Bivens* remedy, the special factors on which the Fifth Circuit relied do not actually militate against recognition of a damages remedy *here*. Petitioners are not challenging government policies, nor are they alleging misconduct by high-level government officials. Instead, they are pursuing a conventional excessive force claim against a rogue federal law enforcement officer. *See, e.g.*, *Rodriguez* v. *Swartz*, 899 F.3d 719, 745 (9th Cir. 2018) ("[N]o one suggests that national security involves shooting people who are just walking down a street in Mexico.").

For all of these reasons, this Court has emphasized the "continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Abbasi*, 137 S. Ct. at 1856. To nevertheless deny Petitioners a *Bivens* remedy here would radically depart from the historical tradition of judge-made tort remedies against rogue federal officers. It would frustrate *Bivens*'s "core deterrent purpose" in countless cases of federal official misconduct. *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001). And it would call into serious question the constitutionality of the Westfall Act, which eliminates the only other remedy historically available to Petitioners—and, in cases like this one, fails to provide any alternative. That is why "this case . . . presents the limited circumstances in which *Abbasi* indicated a *Bivens* remedy would exist," Pet. App. 29 (Prado, J., dissenting), and it is why this Court should reverse the Fifth Circuit's erroneous decision to the contrary.

ARGUMENT

I. JUDGE-MADE TORT REMEDIES AGAINST ROGUE FEDERAL OFFICERS HAVE A LONG AND CONSISTENT TRADITION

Throughout this country's first two centuries, rogue federal officers were routinely subjected to common law tort liability for their misconduct, whether in state or federal court. This history helps to put *Bivens* into its proper context and to frame the choice it presented to this Court. More fundamentally, though, this tradition also underscores the extent to which the Court of Appeals' refusal to recognize a damages remedy in this case radically departs from the longstanding (and long-settled) judicial practice—a departure that would have troubling ramifications far beyond the U.S.-Mexico border.

A. Before *Bivens*, Federal Officers Were Routinely Subjected to Judge-Made Tort Liability for Unlawful Conduct

"The founding generation inherited a system of . . . law that ensured government accountability through judicial processes and protected the role of the general assembly in the payment of public claims." 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, 1871 (2010); *see also id.* at 1873 (noting the rise of judge-made remedies under state law after the Revolutionary War). The Constitution preserved that system, while also creating (and authorizing Congress to expand) an independent federal judiciary with the power to impose remedies for malfeasance by government officers. And in a series of cases across a range of contexts, this Court repeatedly recognized

common law damages claims against rogue federal officers who had acted unlawfully.

In *Little*, for example, this Court held a U.S. Navy officer liable for trespass after he seized a neutral ship pursuant to an invalid presidential order. As Chief Justice Marshall explained: "If [an officer's] instructions [from the Executive Branch] afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him . . . ." 6 U.S. (2 Cranch) at 178; *see also Charming Betsy*, 6 U.S. (2 Cranch) at 125 (permitting claim against U.S. federal official for improper seizure); *Maley* v. *Shattuck*, 7 U.S. (3 Cranch) 458, 490, 492 (1806) (same). The source of the tort remedy that this Court sustained was unquestionably the common law, even though the lower federal courts had jurisdiction over the disputes because they sounded in admiralty. *See S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 215–16 (1917) (discussing the historical relationship between maritime law and common law remedies).

To similar effect was *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806). There, this Court considered an action for trespass *vi et armis*, where the defendant federal officer had entered the plaintiff's home to collect a fine that had been (improperly) imposed by a court-martial. Because the court-martial had no jurisdiction, "[t]he court and the officer [were] all trespassers." *Id*. at 337.

This Court followed this practice throughout the Republic's early years. *Slocum* v. *Mayberry*, 15 U.S. (2 Wheat.) 1 (1817), held that a customs officer who had no authority to seize cargo was properly subject to suit in Rhode Island state court. As Chief Justice Marshall wrote for a unanimous Court, "the act of congress

neither expressly, nor by implication, forbids the state courts to take cognizance of suits instituted for property in possession of an officer of the United States not detained under some law of the United States; consequently, their jurisdiction remains." *Id.* at 12.

And in considering a tort action brought by the master of a French ship that had been seized by a U.S. official while in Spanish waters, Justice Story observed that "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *The Apollon*, 22 U.S. (9 Wheat) at 367. Because the seizure in question was "wholly without justification under our laws," *id.* at 372, the U.S. official could not avoid plaintiff's common law damages claim—even though the seizure took place outside the territorial United States.[5]

Similarly, in *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137 (1836), this Court reviewed an assumpsit claim against a customs official who had collected duties from the plaintiff, despite the plaintiff's challenge to the collection. Because the relevant statute did not authorize the collection, this Court held that the defendant was personally liable. *Id.* at 158. And *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1852), likewise affirmed a jury verdict awarding damages in a diversity case against a U.S. Army lieutenant colonel who, pursuant to direction from his commanding officer, unlawfully seized the plaintiff's goods. There, the Court observed that "the law did not

5. As in *Little*, *Charming Betsy*, and *Maley*, federal jurisdiction in *The Apollon* was grounded in admiralty. *See* 22 U.S. (9 Wheat.) at 365–66.

confide to [the defendant's commanding officer] a discretionary power over private property"; as such, the order was "to do an illegal act; to commit a trespass upon the property of another." *Id.* at 137.

There was no suggestion in any of these early, seminal cases that federal courts lacked the authority or ability to fashion such judge-made tort remedies against rogue federal officers—including, in the years after *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), remedies arising under general common law rather than state law. *See* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1131–35 (1969).[6] The only recurring issue in these cases was whether the claims properly belonged in state or federal court.[7]

Actions against federal officials for common law torts remained routine throughout the nineteenth century. For example, in *Buck* v. *Colbath*, 70 U.S. (3

6. As Professor Woolhandler has explained, after *Swift*, this Court was willing "to ignore both state statutes and common law in areas that were 'general' rather than 'local,'" because "general law was the appropriate choice of law for actions involving citizens of different states," or "the application of state law might exceed the territorial limits of state power in such cases." Ann Woolhandler, *The Common-Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 87 (1997); *see also id.* at 110–11 ("[T]he federal courts in both law and equity showed considerable independence as to . . . elements of underlying causes of action.").

7. The same year as *Mitchell*, this Court reaffirmed the ability of state courts to hear an action in trover against a federal postmaster, rejecting the argument that federal jurisdiction in such cases must be exclusive. *See Teal* v. *Felton*, 53 U.S. (12 How.) 284 (1852); *see also Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876) ("[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.").

Wall.) 334 (1866), this Court affirmed the plaintiff's ability to bring a trespass action against a federal marshal, "[seeing] nothing . . . to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying [the writ] upon the property of a man against whom the writ did not run, and on property which was not liable to it." *Id.* at 347. And in *Bates* v. *Clark*, 95 U.S. 204 (1877), this Court affirmed a judgment finding U.S. Army officers liable for trespass when they seized the plaintiff's goods without lawful authority. *Id.* at 209.

Twenty years later, this Court again reiterated that federal officials could be held personally liable for actions exceeding their authority. In *Belknap* v. *Schild*, 161 U.S. 10 (1896), the plaintiff sued U.S. naval officers for patent infringement. As Justice Gray wrote in sustaining the plaintiff's claims,

> the exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Such officers or agents . . . are therefore personally liable to be sued for their own personal infringement of a patent.

Id. at 18 (citation omitted).

Of course, *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), held that "[t]here is no federal general common law," *id.* at 78, and that judge-made state law therefore applied in diversity actions in federal courts as it applied in state courts. But *Erie* had no effect on the tort liability of rogue federal officers other than to clarify that federal courts were bound by judge-made

state law in diversity cases. After *Erie*, state and federal courts alike continued to entertain common-law damages actions against rogue federal officers. Thus, summarizing this history in 1963, this Court cited *Slocum* for the proposition 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).[8]

In case after case, this Court saw no problem with lower state and federal courts fashioning judge-made tort remedies against rogue federal officers. Indeed, "the Court [also] appears to have treated trespass remedies against the wrongdoing governmental actor—with their deep roots in the common law—as existing independent of the will of the legislature and as resistant to state legislative and judicial uprooting." Woolhandler, *supra*, at 123 (footnote omitted). Remedies against federal officers were therefore not viewed as being committed to the states' grace, and in some cases, the Court suggested that "the existence of the common law tort action for certain types of official invasions of liberty or property may *itself* be a constitutional requirement." *Id.* at 121 (citing *Poindexter* v. *Greenhow*, 114 U.S. 270, 303 (1885) (emphasis added)); *cf. Harper* v. *Va. Dep't of Taxation*, 509 U.S. 86, 101 (1993) (holding that the Due Process Clause of the Fourteenth Amendment

8. This local law was applied by both state and federal judges—especially after 1948, when Congress expanded the federal officer removal statute, 28 U.S.C. § 1442(a), to reach all claims against federal officers "for or relating to any act under color of such office." *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 853–55 (7th ed. 2015); *see also Willingham* v. *Morgan*, 395 U.S. 402, 405–06 (1969) (tracing the "long history" of § 1442(a)).

requires states without adequate pre-deprivation tax refund remedies "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation" (internal quotation marks omitted)).

This pattern of judge-made tort remedies against rogue federal officers included cases in which the plaintiff's underlying claim was that the defendant had violated the Constitution.[9] As this Court wrote in 1949, "if [wrongful actions by federal officers] are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not . . . forbid a court from taking jurisdiction over a suit against him." Indeed, "the principle that an agent is liable for his own torts is an ancient one and applies even to certain acts of public officers or public instrumentalities." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686–87 (1949) (citations omitted). Federal officers might have *defenses* to such actions arising under the Constitution, statutes, or the common law, *see, e.g.*, *Barr* v. *Matteo*, 360 U.S. 564 (1959), but the power of the courts to recognize a common law cause of action was taken as a given. *Cf. Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (noting the "long history of judicial review of illegal executive action, tracing back to England").

All of this history is relevant here in at least three distinct respects. First, it demonstrates the pivotal role that judge-made tort remedies originally played, and long played, in holding rogue federal officers to account. Second, it speaks to a consensus that there

9. The Constitution typically entered these common law tort suits by negating an officer's defense of justification or public authority.

were no constitutional or prudential problems with the federal courts imposing judge-made tort liability against federal officers—regardless of the source of law from which the tort derived. Third, it puts *Bivens* into its proper context—as a decision that was not a bolt from the blue, but rather a new variation on an old (and well-established) theme.

B. The Choice This Court Faced in *Bivens* Was Thus Between Judge-Made State and Judge-Made Federal Tort Remedies

In *Bivens*, this Court granted certiorari to decide whether, even after *Erie*, there were circumstances in which an allegation that a rogue federal officer had violated the Constitution stated a *federal* cause of action for damages—not just a claim under *state* law. *See Bell*, 327 U.S. at 684 (reserving this question). In arguing that the answer was no, the Solicitor General repeatedly pointed to the tradition of holding federal officers to account under state law—and why that tradition rendered a federal remedy unnecessary. *See, e.g.*, U.S. *Bivens* Br., *supra*, at 33–38.

In contrast, where a federal remedy was *necessary* to vindicate a plaintiff's constitutional rights, including where a plaintiff had no state tort remedy against the offending federal officer, the Solicitor General agreed that federal courts had the power—and obligation—to fashion such relief on their own, and, indeed, that they had been doing so for decades. *See, e.g.*, *id.* at 19 ("[T]he judicially created federal remedy under the Constitution was essential to protect against infringement of secured rights."); *id.* at 24 ("[C]auses of action under the Constitution in the absence of a statutory basis have been created only in the rare case where such a remedy was

indispensable for vindicating constitutional rights."); *id*. at 40 ("In the absence of implementing legislation, judicial creation of a new, affirmative remedy to enforce a constitutional right should not be undertaken unless such a remedy is absolutely necessary."). The question in *Bivens* was therefore whether a *federal* damages remedy truly was "indispensable" for vindicating constitutional rights. On the government's view, the availability of New York tort law proved that the answer was "no."

This Court disagreed that the availability of a state claim precluded a judge-made federal damages remedy. But as Justice Harlan pointed out in his opinion concurring in the judgment, the dispute the Court was resolving was therefore one grounded in federalism more than the separation of powers—whether the liability of federal officers for violations of the Constitution should depend upon 50 different state tort regimes or one uniform body of federal judge-made law. Framed in those terms, the case for a federal remedy was, in Harlan's view, compelling:

> It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs.

Bivens, 403 U.S. at 409 (Harlan, J., concurring in the judgment) (citations omitted); *see also id*. (questioning "the desirability of leaving the problem of federal

official liability to the vagaries of common-law actions").

Whoever had the better of the argument concerning whether a judge-made federal remedy was preferable to a judge-made state remedy, the relevant point for present purposes is that no one in *Bivens* thought that the choice this Court was making was between a *Bivens* remedy and nothing.

C. Texas Law Expressly Recognizes a Tort Remedy for Petitioners' Allegations Here

The fact that Hernández was killed on Mexican soil would not have precluded Petitioners from proceeding against Respondent under Texas tort law. "Texas state law explicitly provides that, under specified conditions, an individual may bring an action for personal injury damages in Texas although the wrongful act causing the injury took place in a foreign country." *Delgado* v. *Zaragoza*, 267 F. Supp. 3d 892, 898 (W.D. Tex. 2016) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 2008)). *See generally Dow Chem. Co.* v. *Castro Alfaro*, 786 S.W.2d 674, 675–76 (Tex. 1990) (summarizing the history and purpose of § 71.031).

Indeed, the reason why Petitioners cannot avail themselves of a state-law tort remedy against Respondent is because Congress has preempted it. The Westfall Act, enacted in 1988, preempts all state-law tort claims against federal officers acting within the scope of their employment. *See, e.g.*, *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425–26 (1995). And the Act further provides that, except for *Bivens* remedies or claims expressly authorized by federal statute, 28 U.S.C. § 2679(b)(2), the Federal Tort Claims Act (FTCA) is the "exclusive remedy" for scope-

of-employment torts committed by federal officers. *Id.* § 2679(b)(1); *see Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010) (noting "[t]he Westfall Act's explicit exception for *Bivens* claims").

Even if the FTCA could theoretically provide an adequate alternative to a *Bivens* remedy for misconduct by rogue federal officers, *but see Carlson* v. *Green*, 446 U.S. 14, 18–23 (1980) (holding that the FTCA does not displace *Bivens*), it is not available to Petitioners here because the underlying tort—the killing of their son—"ar[ose] in a foreign country." 28 U.S.C. § 2680(k); *see United States* v. *Smith*, 499 U.S. 160, 167 (1991) (concluding that the Westfall Act "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability"). *Bivens* is therefore the only possible remedy available to Petitioners in this case—and the only means of preserving the rich tradition surveyed above, through which state and federal courts have held rogue federal officers to account through judge-made tort remedies.

II. THIS CASE SATISFIES ALL OF THIS COURT'S CRITERIA FOR RECOGNIZING A *BIVENS* CLAIM

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 ways. First, it read *Abbasi* as closing the door on *Bivens* remedies in *any* "new context," a term the Court of Appeals defined in a way that could apply to any case involving a rogue law enforcement officer. Pet. App.

11. Second, the special factors the Court of Appeals identified as reasons not to recognize a *Bivens* remedy in this case were little more than empty talismans. *Id.* at 13–23 (majority opinion). This Court warned against such abstract and amorphous invocations of special factors in *Abbasi*, 137 S. Ct. at 1862, lest they militate against recognizing *Bivens* remedies even in cases, like this one, in which they are not actually implicated. Finally, the Court of Appeals failed to appreciate the significance of the fact that, unlike in *Abbasi*, the Petitioners here have no alternative legal remedy. *See* Pet. App. 18–19; *see also Abbasi*, 137 S. Ct. at 1863 ("[W]hen alternative methods of relief are available, a *Bivens* remedy usually is not.). Simply put, if a *Bivens* remedy is not appropriate even on the allegations of Petitioners' well-pleaded complaint, it is difficult to identify circumstances in which it will ever be appropriate going forward.

A. Excessive Force by a Rogue Federal Law Enforcement Officer is Not a "New Context"

The Fifth Circuit started from the proposition that this case presents a "new context" for recognizing a *Bivens* remedy, and then reasoned that "[t]he newness of this 'new context' should *alone* require dismissal of the plaintiffs' damages claims." Pet. App. 11 (emphasis added). Both of these conclusions are wrong. Petitioners' complaint does not present a "new context" for purposes of *Bivens*, and even if it does, the existence of a new context, by itself, is not dispositive of whether a *Bivens* claim can and should be recognized.

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 violation of the Fourth and Fifth Amendments, in a context in which he did not (and could not) know whether the victim had clearly established constitutional rights. *See Hernández I*, 137 S. Ct. at 2007. As the dissenting judges put it in the Court of Appeals, "[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).

The Fifth Circuit has previously explained that "[t]he classic *Bivens*-style tort" is one "in which a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines." *Sutton* v. *United States*, 819 F.2d 1289, 1293 (5th Cir. 1987); *see also Meshal* v. *Higgenbotham*, 804 F.3d 417, 429 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("The classic *Bivens* case entails a suit alleging an unreasonable search or seizure by a federal officer in violation of the Fourth Amendment."). Not only do these claims resemble the specific facts of *Bivens*; they also more generally resemble common law trespass, the archetypal example of a pre-*Bivens* state-law tort claim against a rogue federal officer. Taking the plausible allegations in Petitioners' well-pleaded complaint as true, this case therefore does not arise in a "new context" for purposes of *Bivens*; it is squarely within *Bivens*'s analytical and historical core.

Abbasi only reinforces this analysis. In identifying whether a *Bivens* claim arises in a "new context," this Court outlined the following factors:

> 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 that some of the claims in *Abbasi* 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 sought relief under different constitutional provisions than those that gave rise to *Bivens* claims in the Court's previous cases. Needless to say, those considerations are not present where, as here, plaintiffs challenge excessive force by a single, rogue federal law enforcement officer, and do so under two of the three constitutional provisions from which this Court has inferred *Bivens* remedies—the Fourth Amendment and the Due Process Clause of the Fifth Amendment. *See Davis* v. *Passman*, 442 U.S. 228 (1979) (Due Process Clause); *Bivens*, 403 U.S. 388 (Fourth Amendment).

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 related to whether this case presents a new context for purposes of *Bivens*. The Fifth Circuit's

analysis confuses the availability of a cause of action with the merits of a plaintiff's claim; it also conflates the availability of a cause of action with the potential availability of an affirmative defense of official immunity.

The existence of a cause of action allows a court to decide whether a plaintiff's claim has merit; that this latter issue is in question does not—and cannot—mean that a plaintiff lacks a cause of action. There will always be at least some uncertainty as to whether a plaintiff is ultimately going to prevail on his constitutional claims, even (if not especially) in excessive force cases.[10] Official immunity defenses, as well, routinely lead courts to not even *reach* the merits of a plaintiff's constitutional claims. *See, e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223 (2011).

Thus, for example, in *Mullenix* v. *Luna*, 136 S. Ct. 305 (2015) (per curiam), this Court held that an officer who shot and killed a fleeing fugitive during a high-speed car chase had not violated clearly established law, noting that "excessive force cases involving car chases reveal the hazy legal backdrop against which [the officer] acted." *Id.* at 309. That "hazy legal backdrop" goes to when rogue officers can be held liable; it does not in any way bear upon whether plaintiffs plausibly *alleging* a constitutional violation may sue in the first place. To conclude, as the Fifth Circuit did, that such uncertainty is nevertheless fatal

10. Excessive force claims often turn on whether the use of force was reasonable under the circumstances, a matter that can seldom be adjudicated solely on the basis of allegations in a plaintiff's complaint. *See, e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citing *Graham* v. *Connor*, 490 U.S. 386 (1989)).

to the existence of a cause of action is to put the cart well before the horse, for if uncertainty on the merits is a "new context" after *Abbasi*, then everything is.

Instead, the *Bivens* analysis turns on whether, putting the merits aside (and assuming the plaintiff is going to prevail if the merits are reached), the case presents a novel type of *Bivens* claim. If Petitioners are correct that Respondent, a rogue law enforcement officer, used unconstitutionally excessive force in killing their son, then their claims do not present a "new context" for a *Bivens* remedy.

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 majority in the Court of Appeals, 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* said, 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 simply because "the new-context inquiry [was] easily satisfied." *Id.* at 1865. Instead, this Court discussed the potential "special factors" that might counsel hesitation against extending *Bivens* into that new context, and ultimately remanded that claim to the lower courts (over Justice Thomas's express objection), to conduct the "special factors" analysis in the first instance. *Id. But see id.* at 1870 (Thomas, J.,

concurring in part and concurring in the judgment).[11] The Fifth Circuit thus not only wrongly determined that this case presents a "new context," but it also wrongly implied that such a determination was conclusive. Even if this case presents a "new context" under *Bivens*, that conclusion is not dispositive of the propriety of recognizing a judge-made damages remedy.

B. No "Special Factors" Counsel Hesitation

Separate from wrongly finding (and then conclusively relying upon) the existence of a "new context," the Fifth Circuit also identified four "special factors" that, in its view, counsel against judicial recognition of a *Bivens* remedy—"national security," "foreign affairs and diplomacy," "extraterritoriality," and "congressional inaction." Despite this Court's warning against invoking amorphous special factors as a "talisman used to ward off inconvenient claims," *Abbasi*, 137 S. Ct. at 1862, that is exactly how the Fifth Circuit deployed these arguments below.

1. National Security.

For instance, in holding that "national security" is a special factor counseling hesitation, the Court of Appeals started by relying upon a categorical claim unmoored to the specific allegations in Petitioners' complaint—asserting that extending *Bivens* to Petitioners' claims "threatens the political branches' supervision of national security." Pet. App. 13; *see id.* ("National-security concerns are hardly 'talismanic' where, as here, border security is at issue."). By that

11. Resolution of that claim on remand is currently pending before the district court. *See Turkmen* v. *Ashcroft*, No. 02-2307, 2018 WL 4026734 (E.D.N.Y. Aug. 13, 2018).

logic, *all Bivens* claims against CBP officers should be foreclosed, because all such claims, regardless of their specific features, "threaten[] the political branches' supervision of national security." *See id.* at 33 (Prado, J., dissenting) ("If recognizing a *Bivens* remedy in this context implicates border security or the Border Patrol's operations, so too would any suit against a Border Patrol agent for unconstitutional actions taken in the course and scope of his or her employment.").

That is not how the *Bivens* special factor analysis operates. Were it otherwise, there would be no *Bivens* remedy available against a CBP officer who participated in the unconstitutional search of a home alongside FBI officers, even though there would be *Bivens* remedies against the FBI officers. And there would be no *Bivens* remedy available against a CBP officer who summarily executed an American citizen on American soil. As in those hypothetical cases, under a properly contextualized special factors analysis, this case does not implicate anything remotely related to national security.

The allegations in Petitioners' complaint are that a rogue law enforcement officer, in violation of 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. Nor are they challenging the actions of senior (or even line) government officials in responding to an urgent national security crisis.

It is therefore more than a little difficult to see how recognizing a *Bivens* remedy here would undermine the government's ability to secure the border, to say nothing of the nation. As Judge Kleinfeld explained in

rejecting a similar argument in *Rodriguez*, "[w]e recognize that Border Patrol agents protect the United States from unlawful entries and terrorist threats. Those activities help guarantee our national security. But no one suggests that national security involves shooting people who are just walking down a street in Mexico." 899 F.3d at 745 (footnotes omitted); *see also* Pet App. 35 (Prado, J., dissenting) ("[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."); *Lanuza* v. *Love*, 899 F.3d 1019, 1029 (9th Cir. 2018) (recognizing a *Bivens* claim against a rogue immigration officer "does not threaten the political branches' supervision of national security and foreign policy").

Implicitly conceding that its categorical approach was too broad, the Court of Appeals responded that "national security" would *not* be a "special factor" if Hernández had been standing on U.S. soil when Respondent shot him. Pet. App. 14 n.14 (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* disclaimed exactly such a vacuous invocation of "national-security concerns" as a "special factor." 137 S. Ct. at 1862; *see also Rodriguez*, 899 F.3d at 745 ("Here, 'national-security concerns' are indeed waved before us as such a 'talisman.'").

2. Foreign Affairs and Diplomacy.

As with "national security," the second special factor identified by the Court of Appeals—"interference with foreign affairs and diplomacy," Pet.

App. 15—was also invoked without any regard for the specific context of Petitioners' claims. The Court of Appeals wrote that "the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil. These are often delicate diplomatic matters, and, as such, they 'are rarely proper subjects for judicial intervention.'" *Id*. (quoting *Haig* v. *Agee*, 453 U.S. 280, 292 (1981)).

This cursory 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) policy; it has to do with the allegedly unconstitutional actions of a single, rogue federal law enforcement officer acting in violation of the only government policy squarely on point—CBP's excessive-force regulation, 8 C.F.R. § 287.8(a)(2)(ii).

Again, implicitly recognizing the flaw in its categorical analysis, the Court of Appeals retreated to a more case-specific argument—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 Respondent." Pet. App. 16. (Those prior determinations were the federal government's decisions to not prosecute Respondent and to refuse Mexico's extradition request.)

This argument is a nonsensical non sequitur. Awarding civil damages to the victims of a government officer's misconduct hardly undermines the "validity" of the government's decisions to not criminally prosecute or extradite the officer. And in any event, if the broader concern is that *Bivens* claims

might "interfere[] with foreign affairs and diplomacy," that has been true in this case only insofar as there has been *no* remedy for Hernández's killing—as the Mexican government has made clear in its *amicus* filings both in this Court and below. *See, e.g.*, 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." (emphasis added)).

Ultimately, "the only [foreign] policy interest that the United States has put forward—maintaining dialogue with the Mexican government—shows that our government wants to *reduce* the number of cross-border shootings." *Rodriguez*, 899 F.3d at 747. Thus,

> [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" invoked by the Court of Appeals without any analysis is "extraterritoriality." As Judge Jones wrote, "[t]he presumption against

extraterritoriality accentuates the impropriety of extending private rights of action to aliens injured abroad." Pet. App. 21. This Court has identified two reasons why courts generally presume that, absent clear indication of legislative intent to the contrary, federal statutes only apply domestically. *See Morrison* v. *Nat'l Austl. Bank*, 561 U.S. 247, 255 (2010). Neither applies here.

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, any "international discord" in this case comes from the potential *unavailability* of civil remedies under U.S. law. Neither the Court of Appeals nor the federal government has suggested that "international discord" would follow from extraterritorial application of the Constitution itself; it is difficult to understand how fashioning a remedy for a rogue officer's unconstitutional misconduct would somehow be worse.

Second, the presumption "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Id.* (citation omitted). No similar notion applies to constitutional interpretation, where this Court is not acting as the agent of the legislature, and, if anything, is acting in a manner that can "presumably not even be repudiated by Congress." *Malesko*, 534 U.S. at 75 (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).

In any event, even if this Court were inclined to map the statutory presumption onto constitutional claims, that presumption would be overcome here because Respondent's allegedly unconstitutional actions "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2012). As the *Rodriguez* court explained, where a CBP agent is sued for allegedly unconstitutional conduct undertaken within the scope of his employment on U.S. soil, the claim independently satisfies *Kiobel*'s "touch and concern" test. *See* 899 F.3d at 747–48; *see also Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516, 528–31 (4th Cir. 2014) (elaborating on the touch-and-concern test).

4. Congressional Inaction.

The Fifth Circuit also 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.").

But congressional inaction, in general, cannot be a special factor. Were it otherwise, courts could *never* recognize *Bivens* remedies (including in *Bivens* itself), because 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.

Instead, congressional inaction counsels hesitation only in contexts in which Congress has otherwise *been active*—so that the implication is that the absence of a federal remedy is the result of more than just legislative quiescence. In *Abbasi*, for instance, congressional inaction was telling because of both the number of statutes Congress had passed relating to the government's response to September 11 and the fact that some of those statutes were so closely related to the subject matter of the plaintiffs' claims:

> 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.

Indeed, since *Bivens* was decided, Congress has specifically addressed the tort liability of rogue federal law enforcement officers only once—in a 1974 amendment to the FTCA. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h)). For the first time, the "Law Enforcement Proviso" waived the United States' sovereign immunity for intentional torts by its officers within the scope of their employment, authorizing suit for six different intentional torts when committed by federal "investigative or law enforcement officers."[12] In the process, Congress expressly rejected the Department of Justice's proposal to make such FTCA claims exclusive of *Bivens* remedies. *See* Jack Boger, Mark Gitenstein, & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 510–17 (1976); *see also* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 131 (2010) ("In doing so, Congress deliberately retained the right of individuals to sue government officers for constitutional torts."). Insofar as congressional action is relevant, then, it points in exactly the opposite direction from what the Court of Appeals concluded.

C. Petitioners Have No Alternative Remedy

Finally, the Fifth Circuit gave short shrift to the most important difference between this case and *Abbasi*, and the critical feature of this case that makes it a core *Bivens* claim—the absence of any alternative

12. "For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h).

legal remedy for Petitioners. As this Court explained in *Abbasi*, "[i]t is of central importance" to a court's refusal to recognize a *Bivens* remedy 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*, Petitioners 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 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).[13]

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13. As one of the *amicus* briefs noted in *Hernández I*, there has been an alarming uptick in excessive force claims against CBP officers in recent years. *See* 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. Among other things, that uptick provides another reason to

Nor, of course, do all (or even most) violations of the federal Constitution give rise to criminal liability. And perhaps most importantly, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment); *see also id.* ("[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will . . . ."). To conclude that the hypothetical threat of the Executive Branch prosecuting its own officers is sufficient to deter unconstitutional conduct is to miss the simple but critical fact that "[a] criminal charge is the *government*'s remedy, not the victim's." *Rodriguez*, 899 F.3d at 742 (emphasis added).

As for the Court of Appeals' cursory nod toward a "state-law tort claim," it is impossible to see how the threat 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). *See* 28 U.S.C. § 2679(b).

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. There, it was "of central importance" that

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doubt that criminal prosecution is a meaningful deterrent in this context.

the plaintiffs could have brought a legal challenge to the same allegedly unconstitutional governmental misconduct through some other remedial vehicle. *See id.* at 1862–63. Here, it is "of central importance" that Petitioners do not challenge any governmental policy, and *Bivens* provides the only legal remedy for the unlawful killing of their son. The same balance should therefore tip in precisely the opposite direction here.

* * *

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 Proj.*, 561 U.S. 1, 34 (2010). And as Chief Justice Rehnquist wrote for the Court in *Malesko*, judicial recognition of *Bivens* remedies is appropriate "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. This case presents both of those justifications for a judge-made damages remedy. *See* Pet. App. 29 (Prado, J., dissenting) ("Not 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."); *see also Rodriguez*, 899 F.3d at 748 ("[D]espite our reluctance to extend *Bivens*, we do so here: no other adequate remedy is available, there is no reason to infer that Congress deliberately chose to withhold a remedy, and the asserted special factors either do not apply or counsel in favor of extending *Bivens*.").

To decline to recognize a *Bivens* remedy in these circumstances would not only depart from this Court's precedents; it would deprive *Bivens* of any meaningful force going forward.

III. AFFIRMING THE DECISION BELOW WOULD PROVOKE GRAVE CONSTITUTIONAL QUESTIONS AND ALARMING PRACTICAL CONSEQUENCES

This Court has never previously considered a case in which a plaintiff plausibly alleged that a rogue federal law enforcement officer violated clearly established constitutional rights for which there is no other legal remedy—such that the dispute presented a choice between *Bivens* or nothing. To affirm the decision below and hold that Petitioners are entitled to "nothing" would also provoke grave constitutional questions and alarming practical consequences

A. Denying a Legal Remedy Would Undermine *Bivens*'s "Core Deterrent Purpose"

As Justice Thomas wrote for the Court in *Meyer*, "[i]t must be remembered that the purpose of *Bivens* is to deter *the officer*." 510 U.S. at 485; *see also id.* (expressing skepticism of legal regimes through which "the deterrent effects of the *Bivens* remedy would be lost"). In this respect, *Bivens*'s "core" purpose is centrally implicated where, as here, tort liability has historically provided a deterrent, but no other legal remedies are currently available. *Malesko*, 534 U.S. at 71 ("*Bivens* from its inception has been based . . . on the deterrence of individual officers who commit unconstitutional acts.").

Thus, in *Abbasi*, this Court explained that it was "of central importance" that the plaintiffs had alternative remedies available to them, including "an

injunction . . . or some other form of equitable relief." The existence of those alternative remedies, *Abbasi* explained, "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—and killing—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." *Abbasi*, 137 S. Ct. at 1863.

Unfortunately, the inability of a particular plaintiff to obtain an injunction against future excessive force by CBP agents does not mean that such force is in fact unlikely to recur. The tragic facts of this case are not the least bit aberrational. *See, e.g.*, *Rodriguez*, 899 F.3d 719 (affirming denial of a motion to dismiss a *Bivens* suit arising out of a CBP agent's allegedly unconstitutional cross-border killing of an unarmed Mexican national); *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).[14] If a *Bivens* remedy is ever going to serve the doctrine's "core . . . purpose," it

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

would be in a case like this one—in which it would ensure that federal law enforcement officers cannot use unconstitutionally excessive force with impunity. *See, e.g.*, *Malesko*, 534 U.S. at 70 ("[T]he threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity's policy." (citations omitted)).[15]

B. Absent a *Bivens* Remedy, the Westfall Act's Preemption of State Law Would Raise Serious Constitutional Questions

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 need to 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 remedy exists. Although this Court declined to grant certiorari on that question in this case, refusing to recognize a *Bivens* remedy on the facts as alleged in

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15. 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). As Reinert suggests, in contexts in which *Bivens* remedies have been upheld, much of their impact comes behind the scenes—before cases are brought or in cases that settle before going to trial.

Petitioners' complaint would force the issue—requiring the lower courts, and, potentially, this Court, to reach this question in a future case.

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 rogue federal officers for constitutional violations were routinely available. *See, e.g.*, Woolhandler, *supra*, at 87–90, 135–37; *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.").

As noted above, the Westfall Act has had the effect of eliminating all state-law constitutional tort claims against federal officers within the scope of their employment. *See ante* at 19–20; *see also Minneci*, 565 U.S. at 118. 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.

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 this Court has never considered whether the Westfall Act raises serious

constitutional problems in a case in which the statute's effect is to deny access to any judicial forum for a colorable constitutional claim.

Those constitutional concerns are necessarily at their zenith in a case like this one, in which the underlying claim is a common law tort (trespass by a rogue federal officer) that had historically been actionable, and for which no other legal remedy is available today. *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.").

* * *

The Constitution's federalist system assumed that state courts would play a central role in holding the federal government to account—including through state tort claims against rogue individual federal officers. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) ("In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."); *see also Browder* v. *City of Albuquerque*, 787 F.3d 1076, 1084 (10th Cir. 2015) (Gorsuch, J.,

concurring) ("Often, after all, there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that's been battle tested through the centuries.").

Petitioners plausibly allege—and so this Court must assume—that Respondent violated the Constitution when he shot and killed their 15-year-old son. Congress, however, has closed the doors of state courthouses to tort claims in such cases. For this Court to also close the door to the federal courts would effectively limit *Bivens* to its facts (if not further), and it would provoke a serious constitutional question that this Court has assiduously avoided ever having to answer. It would also leave countless federal officers (to say nothing of the federal government itself) with little reason to avoid one-off violations of the Constitution going forward.

In *Bivens* itself, the government argued that, "judicial creation of a new, affirmative remedy to enforce a constitutional right should not be undertaken unless such a remedy is absolutely necessary." U.S. *Bivens* Br., supra, at 41. If ever it is "absolutely necessary" to recognize a judge-made federal damages remedy to enforce the Constitution, it is in this case, where the common law afforded Petitioners a remedy against the rogue federal law enforcement officer who shot and killed their son without provocation, where Congress took that remedy away, and where neither the Constitution nor this Court's precedents support leaving Petitioners with nothing at all.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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