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 *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES, THE ACLU OF SAN DIEGO & IMPERIAL COUNTIES, THE ACLU OF TEXAS, THE ACLU OF ARIZONA, AND THE ACLU OF NEW MEXICO, IN SUPPORT OF PETITIONERS

Mitra Ebadolahi
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138

Andre I. Segura
Edgar Saldivar
ACLU FOUNDATION OF TEXAS
5225 Katy Freeway, Suite 350
Houston, TX 77007

Marty Lieberman
Molly Brizgys
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, AZ 85014

Leon Howard
Maria Martinez Sanchez
ACLU OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103

Cody Wofsy
Counsel of Record
Cecillia Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770
cwofsy@aclu.org

Lee Gelernt
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU Foundation of Arizona, the ACLU Foundation of New Mexico, the ACLU Foundation of San Diego and Imperial Counties, and the ACLU Foundation of Texas are the four ACLU state affiliates along the U.S.-Mexico border.

The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. Amici have a longstanding interest in enforcing constitutional and statutory constraints on the federal government's immigration enforcement activities at the border.

The ACLU represents Araceli Rodriguez in her claims against U.S. Border Patrol Agent Lonnie Swartz for the cross-border shooting of her teenage son, J.A., a Mexican national who was in Nogales, Sonora, Mexico at the time of the shooting. *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), *cert. pending*, No. 18-309. Amici have expertise more generally regarding *Bivens* issues, including having filed an amicus brief in *Bivens* itself. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,

[1] The parties have consented to the filing of this brief. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than amici, its members, and its counsel

403 U.S. 388 (1971). The ACLU has also litigated numerous other *Bivens* cases before this Court and the lower courts.

Because amici represent Araceli Rodriguez and because this case raises important questions regarding the availability of *Bivens* remedies, its proper resolution is a matter of great concern to the ACLU, its affiliates, and its members.

SUMMARY OF ARGUMENT

This Court's decision in *Bivens* recognized the crucial part that damages remedies play in ensuring that constitutional rights are meaningfully enforced—especially where, as in this case, it is "damages or nothing." Since *Bivens*, the Court has recognized several limitations on the availability of *Bivens* remedies, but it has consistently reinforced that the kinds of wrongs at issue in *Bivens* itself continue to give rise to a remedy. The claims in this case fall within that heartland of *Bivens*, which this Court identified in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017): search-and-seizure claims to remedy and deter unlawful overreach by individual federal law enforcement agents. *Bivens* remains a vital check on unconstitutional acts by federal agents in that context.

There should be no dispute that if Agent Mesa had shot and killed Sergio Hernandez a few feet north, in the United States instead of just over the border in Mexico, a *Bivens* action would lie. Using lethal force against an individual who poses no imminent threat to the officer's or anyone else's safety violates both the Fourth and Fifth Amendments. Yet the court of appeals concluded

that no *Bivens* remedy could be provided for *this* shooting. That ruling, based on overly general concerns that are not in any way presented by the facts of this case, should be reversed.

Petitioner has explained why this is not a new context at the first step of this Court's *Bivens* analysis. Brief for Petitioners at 21-26. Amici will not address that argument, but instead explain why, even assuming this is a new context, a *Bivens* remedy is available.

The court of appeals raised concerns about interfering with national security or foreign relations as "special factors" counseling against recognizing a *Bivens* remedy. But providing a *Bivens* remedy for this tragic and unconstitutional shooting would not in any way implicate national security, nor is there any reason to believe that it would interfere with foreign affairs. In ruling otherwise, the court of appeals invoked justifications that would apply to all claims against Border Patrol agents or that might become the subject of dialogue with foreign countries. But such sweeping rationales could eliminate virtually all *Bivens* remedies involving federal agencies charged with law enforcement or touching on the interests of foreign countries, even as to U.S. citizens and residents harmed on U.S. soil. The court's broad-brush reasoning proves too much.

The fact that this case involves a cross-border shooting also does not constitute a special factor warranting denial of a remedy. Assuming that the statutory presumption against extraterritoriality applies at all, as the Fifth Circuit believed, it is rebutted because a federal agent on U.S. soil shooting just across the border is closely connected to

the United States. Moreover, the court of appeals' analysis improperly double counts extraterritoriality by discussing it as part of the special factors analysis, when it is fully and properly addressed on the merits of the constitutional question. The court of appeals' criticism of extraterritoriality doctrine as uncertain reflects nothing more than disagreement with this Court's functional, rather than formalist, approach, and is an invalid basis for declining to entertain a *Bivens* claim at the threshold. While the extraterritorial character of an unconstitutional act may sometimes caution against a *Bivens* remedy, in this instance it does not.

The court of appeals was also wrong in asserting that the lack of a statutory remedy meant Congress had actually considered the issue and decided against a remedy here. There is no evidence to support that claim. The court also incorrectly maintained that the theoretical possibility of criminal charges establishes a sufficient deterrent. The possibility of a prosecution and conviction is vanishingly small. And criminal charges under the civil rights statutes are theoretically available for nearly every *Bivens* case, so that rationale would broadly eliminate *Bivens*.

In short, the court of appeals painted with an erroneously broad brush in its *Bivens* analysis, one that would deny any remedy whatsoever to a wide range of victims of unconstitutional government conduct, when it serves no valid purpose under this Court's *Bivens* precedents to do so. When the more discriminating approach that this Court has itself applied is undertaken, there is no basis to deny a *Bivens* remedy for the egregious killing at issue here.

ARGUMENT

I. *BIVENS* PLAYS AN ESSENTIAL PART IN THE ENFORCEMENT OF CONSTITUTIONAL RIGHTS AND THE ADMINISTRATION OF JUSTICE.

For nearly a half century, *Bivens* has provided a critical check on unconstitutional conduct by federal officers. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, this Court afforded a damages remedy for alleged violations of the Fourth Amendment committed by federal narcotics agents. The Court underscored the immense "capacity for harm" posed by an "agent acting—albeit unconstitutionally—in the name of the United States." *Id.* at 392. And it ensured a vitally necessary remedy to vindicate the rights of an individual harmed by "the most flagrant abuses of official power," but who had no access to other forms of redress. *Id.* at 410 (Harlan, J., concurring in the judgment). As Justice Harlan put it: "For people in Bivens' shoes, it is damages or nothing." *Id.*

In the years since, this Court has afforded remedies for other violations. *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980). And it has declined to extend *Bivens* only to distinct situations, including suits against private entities and their employees, *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001), *Minneci v. Pollard*, 565 U.S. 118, 120 (2012); against federal agencies in their own right, *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994); which involve military affairs, *Chappell v. Wallace*, 462 U.S. 296, 305 (1983); *United*

States v. Stanley, 483 U.S. 669, 683-84 (1987); and where an adequate alternative remedy is available, *Bush v. Lucas*, 462 U.S. 367, 388 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988).

Even as it has thus clarified the boundaries of *Bivens*, however, the Court has underscored its vitality as a check on unconstitutional law enforcement. The Court has repeatedly emphasized the role of *Bivens* in "deterring individual officers from engaging in unconstitutional wrongdoing," *Malesko*, 534 U.S. at 74, and providing redress where the plaintiff lacks "any alternative remedy against individual officers," *Minneci*, 565 U.S. at 127.

Most pointedly, this Court recently underscored the "continued force" and "necessity" of *Bivens* "in the search-and-seizure context in which it arose." *Abbasi*, 137 S. Ct. at 1856. In *Abbasi*, this Court was clear that it was not disturbing this core holding of *Bivens*:

> . . . it must be understood 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. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. 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.

Id. at 1856-57.

If *Bivens* remains essential when officers unconstitutionally search a home and effect an arrest, surely it remains necessary when they use lethal force to kill an unarmed person. Indeed, *Bivens* claims have proven to be a crucial mechanism to deter and remedy unlawful deadly force by federal agents. *See, e.g.*, *Jacobs v. Alam*, 915 F.3d 1028, 1033-34 (6th Cir. 2019) (plainclothes deputy U.S. Marshals shot man with holstered pistol); *Schultz v. Braga*, 455 F.3d 470, 474 (4th Cir. 2006) (FBI agent shot innocent man in the face); *Harris v. Roderick*, 126 F.3d 1189, 1205 (9th Cir. 1997) (sniper shooting in Ruby Ridge standoff); *Ting v. United States*, 927 F.2d 1504, 1508 (9th Cir. 1991) (shooting by FBI SWAT team).

The vital need for such a remedy for unjustified shootings is illustrated by the facts of *Rodriguez v. Swartz*, a parallel case in which amici represent the mother of a teenaged boy also killed in a cross-border shooting by a Border Patrol agent. The child victim in that case, J.A., was shot walking down the street just on the Mexico side of the border. 899 F.3d 719, 727 (9th Cir. 2018). He posed no threat to the life or physical safety of anyone. *Id.* The Border Patrol agent nonetheless unleashed a fusillade of between 14 and 30 bullets through the border fence, and hit J.A. with 10, mostly in the back. *Id*. When the agent fired, he was standing on the U.S. side of the border, on ground 25 feet higher than where J.A. died, behind a 20 to 25-foot fence made of thick, closely spaced beams. *Id*.

J.A. was killed in Nogales, Sonora in Mexico, by bullets shot by a U.S. agent standing just on the

other side of the border in Nogales, Arizona. "Nogales, Mexico, and Nogales, Arizona, are in some respects one town divided by the border fence." *Id.* The region was, in fact, "formerly called 'ambos Nogales,' or 'both Nogales,' referring to the adjacent towns of Nogales, Arizona and Nogales, Sonora—once adjacent cities flowing into one-another, now divided by a fence." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015). Calle Internacional, the street where J.A. died, is in many respects no different from any street in America. It "is a main thoroughfare lined with commercial and residential buildings" where Mexican residents and U.S. citizens and residents mingle, shop, and visit. *Rodriguez*, 899 F.3d at 727. Because this busy street runs directly parallel to, and only a few feet from, the border fence, Mexican citizens will always be in close proximity to U.S. border agents simply by virtue of going about their everyday lives. They should not lack a remedy if they are unjustifiably killed in their home town directly across the border.

The contrast between such individual unjustified shootings and the claims in *Abbasi* is instructive. *Abbasi* concluded that a *Bivens* remedy was not appropriate in a challenge to "high-level executive policy created in the wake of a major terrorist attack on American soil." 137 S. Ct at 1860. This case, by contrast, involves no claim that "call[s] into question the formulation and implementation of a general policy." *Id.* Here, as in *Rodriguez,* the plaintiffs challenge only the unlawful conduct of a single line-level agent who personally and directly violated federal policy and the Constitution in using deadly force. *See Rodriguez*, 899 F.3d at 745 ("federal regulations expressly *prohibited* [the agent]

from using deadly force in the circumstances alleged"). And the claims at issue here—that a law enforcement officer used deadly force in the course of his duties without provocation or justification—fall squarely within the "search-and-seizure context" of *Bivens* and its progeny. *Abbasi*, 137 S. Ct. at 1856; *see also Bivens*, 403 U.S. at 389 (claims included "unreasonable force"); *Jacobs*, 915 F.3d at 1038 (*Bivens* remedy was available for deadly force claim involving not "overarching challenges to federal policy in claims brought against top executives, but . . . claims against three individual officers") (citing *Abbasi*, 137 S. Ct. at 1862). As *Abbasi* emphasized, *Bivens* remains available to remedy "individual instances of . . . law enforcement overreach" by federal agents. 137 S. Ct. at 1862. That is precisely what is at issue here.

II. NO SPECIAL FACTORS WARRANT THE DENIAL OF A *BIVENS* REMEDY.

The court of appeals wrongly held that "special factors" warranted the denial of a *Bivens* remedy in this case—relying on analysis the United States has endorsed. *Hernandez v. Mesa*, 885 F.3d 811, 818 (5th Cir. 2018) (en banc); Brief for United States as Amicus Curiae regarding Certiorari at 15-18. But *Abbasi*'s highly fact-intensive reasoning demonstrates that this special-factors analysis should be undertaken with specific focus on the facts of the particular case. *See Rodriguez*, 899 F.3d at 744 (noting that the "special factors analysis is almost always performed at a high level of specificity," and collecting cases). The court of appeals, by contrast, considered the question from the 10,000-foot perspective, and accordingly most of

its rationales would effectively eliminate *Bivens* for huge swaths of federal law enforcement activity.

The fact that this dispute involves a cross-border shooting likewise poses no barrier to a remedy in the circumstances of this case. While the court of appeals invoked the statutory presumption against extraterritoriality, a federal agent on U.S. soil shooting through a fence at a teenager just across the border is so closely connected to the United States that any presumption is rebutted. Moreover, the Fifth Circuit's reliance on extraterritoriality impermissibly double counts the constitutional merits question as a reason to deny a *Bivens* remedy.

A. The Court Of Appeals Invoked National Security And Foreign Affairs As Talismans, But This Case Poses No Such Concerns.

The court of appeals' lead rationale was that, because this case involved a Border Patrol agent shooting a foreign national, a *Bivens* remedy "could undermine . . . national security" and "risks interference with foreign affairs and diplomacy." *Hernandez*, 885 F.3d at 819-20. Those conclusions are unsupported by the facts of this case, and would undermine accountability for patently unlawful conduct by Border Patrol agents across the board, and possibly for federal law enforcement agents generally.

The circumstances of this case involve no threat to national security. The mere fact that this incident occurred across a border does not change that fact; as *Rodriguez* observed, "no one suggests that national security involves shooting people" who

pose no threat. *See Rodriguez*, 899 F.3d at 745. Likewise, neither the court of appeals nor the United States has ever been able to point to any concrete way in which a remedy in this case would impair the foreign policy of the United States. Indeed, "the only 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." *Id.* at 747.

Unable to point to any actual national security or foreign policy problems engendered by this particular case, the court of appeals zoomed out to the most abstract level. "National security" was a special factor, it held, because "border security is at issue" and Border Patrol agents "perform duties essential to national security." *Hernandez*, 885 F.3d at 819. And, similarly, it concluded that "foreign affairs and diplomacy" were a special factor because the United States and Mexico engage in "dialogue" about border shootings, including this one. *Id.* at 819-20.

This analysis cannot be squared with *Abbasi*. There, this Court examined the particular circumstances at issue—namely, that the case called into question "major elements of the Government's whole response to the September 11 attacks." 137 S. Ct. at 1861. In that context, this Court held that certain *Bivens* claims would require "an inquiry into sensitive issues of national security." *Id.* In addition, those claims challenged high-level policy decisions and would involve intrusive discovery into Executive decision-making. *Id.* at 1860-61. And the Court concluded that Congress had carefully

considered the conduct giving rise to the claims, and declined to provide a remedy, suggesting the inappropriateness of the Court recognizing a *Bivens* remedy. *Id*. at 1862. Yet the Court also declined to foreclose a related claim against the warden of the facility where the plaintiffs had been held, instead remanding that claim to the court of appeals to conduct the special factors analysis. *Id*. at 1863-65.

As this reasoning suggests, the mere fact that the agencies in *Abbasi* had national security responsibilities was not a sufficient reason to deny a remedy; otherwise, this Court would have had no need to engage in this detailed and circumstance-specific analysis. To the contrary, the Court specifically warned against just such broad-brush analysis divorced from the particular circumstances of the case: "[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 523 (1985)). Here, the court of appeals did just that, invoking national security concerns in a setting that in fact presented none. As Judge Prado explained, such reliance on "empty labels" cannot justify the denial of a remedy for *this* unjustified shooting. *Hernandez*, 885 F.3d at 825 (Prado, J., dissenting).

The court of appeals' reliance on foreign affairs in the abstract is equally incompatible with *Abbasi*'s analysis. *See Rodriguez*, 899 F.3d at 746 (warning against similarly talismanic reliance on "the magic words 'foreign policy'"). The claims in *Abbasi* had obvious connections to various diplomatic discussions and relationships; yet this Court did not even

mention that fact as a special factor warranting hesitation. The existence of "dialogue" cannot be enough to warrant denial of a *Bivens* remedy. Our government discusses an enormous number of subjects with foreign countries around the world and, on the court of appeals' rationale, could eliminate *Bivens* claims whenever they might potentially be the subject of bilateral communication.

Because it was untethered to any relevant facts in this case, moreover, the court of appeals' reasoning sweeps far beyond this case. "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"—even committed against U.S. citizens and residents on U.S. soil. *Hernandez*, 885 F.3d at 828 (Prado, J., dissenting). It could always be said in a Border Patrol *Bivens* case that "Congress has expressly charged the Border Patrol with 'deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband.'" *Id.* at 819 (majority opinion) (quoting 6 U.S.C. § 211(e)(3)(B)). And the court of appeals' reliance on transnational dialogue likewise "proves too much"; as Judge Prado asked in dissent, "Isn't the United States equally answerable to foreign sovereigns when federal officials injure foreign citizens on domestic soil?" *Id.* at 829 (Prado, J., dissenting).

Moreover, the court of appeals' reasoning is not limited to Border Patrol; many if not most federal law enforcement agencies have duties that encompass national security matters, affect foreign nationals, and may be the subject of bilateral

dialogue. Certainly, that is true of the FBI—as illustrated by the national security activities this Court highlighted in *Abbasi*. 137 S. Ct. at 1852, 1861. And the same could have been said of the Federal Bureau of Narcotics, the agency at issue in *Bivens* itself, as well as its successor, the Drug Enforcement Agency.[2]

The court of appeals suggested that "the transnational context" meant that this reasoning had no effect on "*Bivens* claims where constitutional violations by the Border Patrol are wholly domestic." *Hernandez*, 885 F.3d at 819 n.14. But as already explained, the court's national security and foreign affairs reasoning do not turn on the particular circumstances of this case. *See id.* at 819 & n.15 (relying on *Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017), which involved *domestic* air travel). Its rationales would apply to a Border Patrol agent shooting and killing a Mexican national on the United States side of the border. And they would

[2] *See, e.g.*, About DEA, *available at* https://www.dea.gov/about (last visited Aug. 7, 2019) (defining DEA's "core mission" as "enforcing the nation's drug laws and enhancing public health, safety, and national security"); DEA Mission Statement, *available at* https://www.dea.gov/mission (last visited Aug. 7, 2019) (mission includes coordination and cooperation with foreign governments, training of foreign officials, and international drug intelligence collection); DEA History—The Early Years at 16, *available at* https://www.dea.gov/documents/1919/12/17/dea-history-early-years (last visited Aug. 7, 2019) (explaining that founding and longtime Commissioner of Federal Bureau of Narcotics viewed the "main enforcement problem" as "outside the U.S." and he "spen[t] much of his time overseas" and "reached personal agreements with the heads of twenty counterpart agencies in foreign countries to exchange intelligence").

likewise apply equally to any *Bivens* case against a Border Patrol agent or involving international dialogue, and might conceivably arise in any case involving a foreign national, as well as any case involving an agency whose conduct may be of interest to a foreign sovereign. Such sweeping rationales cannot be squared with *Bivens'* goal of accountability or the context-specific analysis that the "special factors" inquiry demands. If accepted, the court of appeals' reasoning would spell the end of *Bivens* for Border Patrol agents—and quite possibly for all federal agents.

B. Extraterritoriality Is Not A Special Factor Justifying Denial Of A *Bivens* Remedy.

The court of appeals also relied on the extraterritorial aspect of this case as a special factor justifying the denial of relief. That conclusion was erroneous and improperly duplicated consideration of the constitutional merits as part of the *Bivens* special factor analysis.

As an initial matter, the court's importation of the presumption that statutes do not apply outside the United States was flawed. Even if that canon of statutory construction could be meaningfully applied in this context, the presumption is rebutted when the particular challenged actions are closely tied to the United States. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) (where circumstances "touch and concern the territory of the United States . . . with sufficient force" they "displace the presumption"). Agent Mesa was a federal agent, standing on U.S. soil, acting within the scope of his federal employment, and fully subject to federal law

when he shot and killed Sergio Hernandez just over the border in Mexico. Any presumption is therefore amply rebutted, as the circumstances of this case plainly "touch and concern the territory of the United States." *Rodriguez*, 899 F.3d at 747 (quoting *Kiobel*, 569 U.S. at 124-25).

The court of appeals asserted, however, that "the novelty and uncertain scope of an extraterritorial *Bivens* remedy counsel hesitation." *Hernandez*, 885 F.3d at 822. But that argument cannot support the denial of a remedy.

Certainly, there is nothing novel about a deadly force claim—particularly one with allegations of such an obvious violation. This Court has articulated the standard for such claims, and they are routinely litigated by the federal courts. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

Nor can the court of appeals' observation that courts have at times declined to permit a *Bivens* remedy in certain extraterritorial contexts warrant denial of a remedy here as too "novel." *See Hernandez,* 885 F.3d at 822. If mere novelty of a *Bivens* claim could be a special factor foreclosing a remedy, claims deemed "new" at the first *Bivens* step would fail for that reason alone, and the second step of the analysis would be totally superfluous.[3]

---

[3] Indeed, the court of appeals specifically suggested that because the context of this case is new, there was no need to engage in the second step of the *Bivens* analysis. *Hernandez,* 885 F.3d at 818. That is plainly wrong under this Court's precedents.

Ultimately, the court of appeals' argument was bottomed on its fear of "the uncertain scope of an extraterritorial *Bivens* claim," warning that a remedy in this case could mean that, for example, a U.S. operator of a drone overseas would be liable. *Hernandez*, 885 F.3d at 822 n.22. But, as Judge Prado observed, that situation is "unlikely to materialize," as this case is easily distinguishable from such operations, so a remedy here would not open the door to many others. *Id.* at 832 (Prado, J., dissenting) (noting that such claims, unlike this one, would likely implicate military affairs and national policy).

In any event, any uncertainty with regard to the extraterritorial application of constitutional rights simply reflects the functional approach taken in this Court's extraterritoriality jurisprudence, not a reason to deny a remedy. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court rejected a bright-line rule against extraterritorial application—one which would have been quite certain and "administrabl[e]," *Hernandez*, 885 F.3d at 822. Rather, the Court surveyed its cases over the past century and explained that it had consistently rejected categorical rules in the extraterritoriality context. *Boumediene*, 553 U.S. at 755-64. Summing up those decisions, *Boumediene* explained that the "common thread" was "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. The court of appeals' decision to adopt a bright line rejecting all extraterritorial *Bivens* claims is at odds with *Boumediene*'s rejection of just such a formalist approach, and its reliance on uncertainty regarding the constitutional merits to deny a remedy amounts

to disagreement this Court's functional jurisprudence.

The court of appeals' reliance on extraterritoriality as a special factor amounts, moreover, to a second bite at the apple. As the original Fifth Circuit panel in this case rightly recognized, an analysis that would "double count" extraterritorial considerations at both the *Bivens* threshold and on the merits is "improper." *Hernandez v. United States*, 757 F.3d 249, 276 n.12 (5th Cir. 2014). Where the nature of the right and the circumstances of the case justify extraterritorial application of the Constitution, they offer "no additional reason to hesitate in granting a remedy for that right." *Id.*; *see Boumediene*, 553 U.S. at 767 (extraterritoriality analysis); *cf. Davis v. Passman*, 442 U.S. 228, 246 (1979) (rejecting the argument that *Bivens* should not apply to a Congressman's official conduct because the asserted "special concerns" were "coextensive with the protections" already afforded under the Speech or Debate Clause).

The court of appeals contended that *Davis*'s prohibition on double counting is limited to "constitutional immunity" and has no application to the question whether a constitutional right applies, pointing to *United States v. Stanley*, 483 U.S. at 686. *See Hernandez*, 885 F.3d at 821. But *Stanley* also militates against double counting here. In that case, this Court distinguished *Davis* because it involved a constitutional rule—the Speech or Debate Clause—while the corresponding immunity invoked in *Stanley* was merely a non-constitutional "court-created" doctrine. 483 U.S. at 685-86. Here, the court of appeals imported the *constitutional*

extraterritoriality analysis as a *Bivens* "special factor"—precisely what *Davis* rejected.

Indeed, permitting this form of double counting could eliminate *Bivens* altogether. Nearly every constitutional analysis involves competing considerations that, in the abstract, could be reframed as "special factors." *Cf. Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (noting that Eighth Amendment prison condition claim implicated "the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system"); *Carlson v. Green*, 446 U.S. 14, 19 (1980) (holding that such prison conditions claims "involve[] no special factors counseling hesitation" in granting a *Bivens* remedy). Yet again, the court of appeals' reasoning proves too much.

As *Rodriguez* observed, the United States has "a compelling interest in regulating our own government agents' conduct on our own soil." 899 F.3d at 747. "Presumably, that is why the United States was willing to apply its criminal law 'extraterritorially' in charging [Border Patrol Agent] Swartz with homicide, even while simultaneously arguing that the presumption against extraterritoriality precludes the *Bivens* claim here because the injury happened a few feet onto the other side of the border." *Id.* at 747-48. But the court of appeals' blanket rule against extraterritorial *Bivens* actions would effectively immunize *all* violations of constitutional rights abroad, including those directed against U.S. citizens. While extraterritoriality may weigh against *Bivens* actions in some settings, in particular those involving military action, it does not

caution against recognizing a *Bivens* remedy "for this senseless cross-border shooting at the hands of a federal law enforcement officer" taking action on U.S. soil. *Hernandez*, 885 F.3d at 832 (Prado, J., dissenting).

C. Congress Did Not Intend To Foreclose A Remedy Here, And The Theoretical Possibility Of Criminal Prosecution Is An Inadequate Deterrent.

The court of appeals acknowledged that, apart from *Bivens*, the plaintiffs "lack[ed] a damages remedy." *Id.* at 821. *Rodriguez* likewise addressed various proffered alternative remedies and explained why none could provide adequate relief. *Rodriguez*, 899 F.3d at 739-44. Indeed, as this Court recently observed, challenges to "individual instances of . . . law enforcement overreach" are by "their very nature . . . difficult to address except by way of damages actions after the fact." *Abbasi,* 137 S. Ct at 1862. Thus, unlike *Abbasi*, there is no alternative remedy available here. *See id.* (explaining that the availability of alternatives to a damages remedy was "of central importance" to the denial of a *Bivens* remedy in that case). As in *Bivens* itself, here "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment). The court of appeals discounted that lack of a remedy, however, for two reasons. Both are flawed.

1. The court of appeals concluded that "Congress's failure to provide a damages remedy in these circumstances" was a special factor "counseling

hesitation." *Hernandez*, 885 F.3d at 820. That was erroneous.

The court pointed to *Abbasi*'s observation that "Congress's silence *may* be 'relevant[ ] and . . . telling,' especially where 'Congressional interest' in an issue 'has been frequent and intense.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1862) (emphasis added). In *Abbasi*, the government, "at Congress' behest," had "compiled a 300–page report" documenting the very problems challenged in the suit. *Abbasi*, 137 S. Ct. at 1862. Because of this *specific* congressional focus, the Court found it "difficult to believe" that the lack of a remedy was "inadvertent." *Id.* (internal quotation marks omitted).

Here, by contrast, there is no evidence of specific congressional intent to foreclose a remedy. And such evidence would be necessary to infer from Congressional inaction that it had actually considered and rejected a remedy. *See United States v. Wells*, 519 U.S. 482, 495-96 (1997) (observing that "the significance of . . . congressional . . . inaction necessarily varies with the circumstances" and it is "at best treacherous" to rely on "congressional silence") (internal quotation marks omitted). "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940) (Frankfurter, J.); *see also id.* at 121 (to interpret silence that may well involve nothing more than inattention is to "walk on quicksand").

The exception to the Federal Tort Claims Act ("FTCA") for "claims based on any injury suffered in

a foreign country, regardless of where the tortious act or omission occurred," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004), is not evidence that Congress sought to foreclose *Bivens* here. "[W]hat Congress intended to avoid by the foreign country exception" was the "application of foreign substantive law" in FTCA cases. *Id.* at 707. That concern is simply inapplicable: Here, the Fourth Amendment supplies the substantive rule of decision, not Mexican tort law. *Rodriguez*, 899 F.3d at 740.

Likewise, 42 U.S.C. § 1983 is irrelevant. The court of appeals reasoned that when § 1983 was enacted, Congress considered the possibility of extraterritorial violations by state officers and sought to foreclose such claims by providing a remedy to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." *Hernandez*, 885 F.3d at 820 (internal quotation marks omitted). That is a highly dubious imputation of Congressional purpose. Far more likely, Congress included "other person[s]" within the United States to *expand* the protection of the statute against unlawful state conduct, at a time when the citizenship of former slaves was only a recently settled question. *See Hernandez*, 885 F.3d at 830 (Prado, J., dissenting). In stark contrast to the congressional focus in *Abbasi*, it is simply not plausible that, in adopting this language, "Congress thought about (and deliberately excluded liability for) cross-border incidents involving federal officials." *Rodriguez*, 899 F.3d at 742.

Nor does the Torture Victim Protection Act, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992), bear on this case. That statute is uniquely focused

on torture committed by *foreign* officials, and implies nothing about unconstitutional acts by U.S. officials. *Rodriguez*, 899 F.3d at 743. Likewise, extrajudicial payments in the context of the military or other unrelated federal agencies have no bearing on whether Congress intended to foreclose a remedy here. *Id.* Thus, that all these various "other statutes were silent in unrelated circumstances is irrelevant: here, '[a]s is often the case, [C]ongressional silence whispers' only 'sweet nothings.'" *Id.* at 739 (quoting *La. Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529, 537 (5th Cir. 2006)) (alterations in original).

2. Despite acknowledging the lack of any remedy, and in the absence of any actual evidence of congressional intent to foreclose a remedy, the court of appeals deemed a *Bivens* remedy unnecessary because, it asserted, the possibility of "criminal investigations and prosecutions are already a deterrent." *Hernandez*, 885 F.3d at 821. That argument is unfounded and, like many of the others the court advanced, would leave *Bivens* a dead letter.

Criminal prosecutions against federal officials for unconstitutional actions are often theoretically available, but in practice are extremely rare. Thus, as in the vast majority of alleged constitutional violations by federal agents, the Department of Justice declined to prosecute Agent Mesa here for possible violations of federal criminal statutes. *See id.* at 827 n.3 (Prado, J., dissenting). But even when the government decides to bring charges—as it did, for the first time ever for a cross-border shooting, against Agent Swartz in *Rodriguez*—a conviction remains far from a certainty. The burden of proof for

a criminal conviction and the legal standards governing criminal liability are much more demanding than for civil liability. *Rodriguez*, 899 F.3d at 742. Indeed, the agent in *Rodriguez* was ultimately acquitted of murder. Brief for United States as Amicus Curiae regarding Certiorari at 9.

Permitting the mere possibility of criminal charges to dictate whether a *Bivens* remedy is available would effectively accord the executive branch exclusive control over redress for and deterrence of unconstitutional actions—including fatal shootings—by its own officers. As illustrated here, there certainly is no guarantee that any particular case will result in an indictment, much less a conviction. Not surprisingly, therefore, this Court has never denied the availability of a *Bivens* remedy based on the mere possibility that the government could in theory bring charges and the even more remote possibility that it might secure a conviction.

Indeed, if the possibility of prosecution were enough to foreclose a *Bivens* claim, there would be no *Bivens* remedy for *any* civil rights violations that could be subject to prosecution. That rule would swallow *Bivens*, as criminal prosecution is theoretically available for *any* willful violation of constitutional rights. *See* 18 U.S.C. § 242.

Bivens itself involved conduct that could have been subject to criminal prosecution. *Rodriguez*, 899 F.3d at 742. The Second Circuit's decision in *Bivens*—ultimately reversed by this Court—specifically noted the existence of three federal crimes that could apply to the agents' conduct there

and cited that as a factor in its decision declining to permit a civil remedy. *See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 724-25 (2d Cir. 1969) ("Congress has made it a federal crime to execute a search warrant with unnecessary severity or to exceed willfully one's authority in executing it, 18 U.S.C. § 2234; to procure the issuance of a search warrant maliciously and without probable cause, 18 U.S.C. § 2235; and, in certain circumstances, to search an occupied private building without a warrant, 18 U.S.C. § 2236.").[4] Nevertheless, the Court held that a civil remedy for Fourth Amendment violations was available. Thus, the potential for criminal prosecution cannot warrant denying a *Bivens* remedy.

* * *

The allegations here—like those in *Rodriguez*—are extraordinary: "What is pleaded is simple and straightforward murder." *Rodriguez*, 899 F.3d at 727. To ensure that a remedy exists in such cases, and to check the unjustified use of lethal force by law enforcement officers, a *Bivens* remedy is not just appropriate, but a "necessity." *Abbasi*, 137 S. Ct. at 1856.

[4] The criminal nature of the alleged conduct was also noted in the petitioner's brief in *Bivens*. Brief for Petitioner at 16, *Bivens*, 403 U.S. 388 (explaining that the alleged search and seizure was "punishable by criminal penalties under 18 U.S.C. § 2236").

CONCLUSION

For the reasons above, amici respectfully request that the Court reverse the judgment of the court of appeals.

Respectfully Submitted,

Mitra Ebadolahi
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138

Andre I. Segura
Edgar Saldivar
ACLU FOUNDATION OF TEXAS
5225 Katy Freeway, Suite 350
Houston, TX 77007

Marty Lieberman
Molly Brizgys
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, AZ 85014

Leon Howard
Maria Martínez Sanchez
ACLU OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103

Cody Wofsy
Counsel of Record
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770
cwofsy@aclu.org

Lee Gelernt
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Dated: August 9, 2019