

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 OF
BRADY AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Brady is the nation's most longstanding nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. In support of that mission, Brady files this brief as *amicus curiae* in support of petitioners.

Brady has a substantial interest in ensuring that the Constitution and laws are interpreted to allow solutions that would keep individuals, families, and communities safe. Brady has filed *amicus* briefs in numerous cases involving the constitutionality and interpretation of gun laws, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady brief), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Castleman*, 572 U.S. 157 (2014), *Abramski v. United States*, 573 U.S. 169 (2014), *Henderson v. United States*, 135 S. Ct. 1780 (2015), and *Voisine v. United States*, 136 S. Ct. 2272 (2016).

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represent that the parties have consented to the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

This case presents the question whether the family of the victim of an allegedly unjustified and unprovoked federal law enforcement shooting can seek damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when no other avenue of relief is available except an action under *Bivens*. Civil tort liability under *Bivens* is an important, practical, and effective deterrent to prevent similar shootings in the future. The Court should reverse the decision below and uphold the important deterrence role that *Bivens* has played for decades.

Brady fully recognizes the extraordinary service that countless law enforcement officers provide for all Americans, at great personal risk and sacrifice. Police officers are on the front lines of this Nation's gun epidemic and are often themselves the victims of gun violence. But, as with any profession, it is no surprise that there are a few bad apples in law enforcement: agents who use lethal force without adequate provocation or justification. Cases like this one are therefore crucial opportunities to deter such rogue behavior. In particular, the *Bivens* remedy at issue here plays a critical role in deterring bad actors from dishonoring the untold thousands of heroic law enforcement officers and depriving members of the public of core constitutional rights.

Indeed, the *Bivens* remedy is particularly important in the context of the U.S. Customs and Border Protection ("CBP"), which has the largest collection of armed law enforcement agents in the country. Although the vast majority of CBP agents discharge their duties with honor under dangerous conditions, there have been a significant number of allegations

of excessive force against CBP agents in recent years, including hundreds of shootings, border patrol militarization. The specific facts here – an officer responding with lethal force to rock throwing along the U.S.-Mexico border – have arisen with troubling frequency.

All too often, and particularly with the CBP, the *Bivens* remedy is the only effective civil or criminal penalty available to deter misconduct and compensate victims, even in circumstances where the victim is deprived of the fundamental right to live. That is true in this case: in the absence of the *Bivens* remedy, the family of 15-year-old Sergio Hernández will lack any legal recourse. Time and again, this Court has upheld *Bivens*' important role in holding individual officials accountable for abuses of power and deterring similar misconduct from happening again in the future.

This brief will demonstrate (1) that gun violence is an epidemic in this country; (2) that the CBP raises unique concerns regarding unjustified police gun violence; and (3) that the *Bivens* remedy is an appropriate deterrent to unjustified CBP gun violence, which deprives individuals of the constitutional right to live. Accordingly, the Court should reverse the judgment below.

ARGUMENT

I. Gun Violence Is an Epidemic That Harms Everyone, Including Law Enforcement

Every year in the United States, 113,000 people are shot; 36,000 of those people will die. See Brady Fact Sheet, <https://tinyurl.com/y5en3zdd>. That is 310 people shot – 100 fatally – every single day.

Law enforcement is not exempt from the gun violence epidemic. All too often, police lose their lives to guns while protecting their communities. Consider, for example, Officer Bradley Fox. In 2012, Officer Fox was killed in the line of duty by a gun obtained by straw purchase. See Suzette Parmley, *Remembering Plymouth Officer Bradley Fox*, Phila. Inquirer (Sept. 15, 2012), <https://tinyurl.com/yy3j4rt6>. The circumstances of Officer Fox's death are not uncommon. After all, guns are “the cause of death in more than 90 percent of all fatal assaults on police.” Franklin E. Zimring, *When Police Kill* 57 (2017).

Even outside of the line of duty, some police officers become victims of the same gun violence they dedicate their lives to preventing. Officer Thomas Wortham IV, a Chicago police officer and Iraq War veteran, was shot and killed, while he was off duty, with a gun that had been trafficked from Mississippi. See Serena Maria Daniels et al., *Off-duty Chicago police officer killed in robbery attempt*, Chi. Trib. (May 20, 2010), <https://tinyurl.com/yxf42jpo>.

Given the constant threats officers face and the important role law enforcement plays in reducing gun violence, Brady partners with police departments throughout the country and also represents individual police officers who have been harmed by gun violence.

While most police officers are heroic, law enforcement is like every other profession in that it has people who make grievous errors or, very infrequently, are bad apples. Between 2015 and 2018, law enforcement officers shot and killed almost 1,000 people annually, according to a comprehensive investigation led by the *Washington Post*. See John Sullivan et al., *Police Shot, Killed Nearly 1,000 in 2018*, Investigative Reporting Workshop (Feb. 12, 2019), <https://tinyurl.com/y465p9pf>. Of course, “the proliferation of concealable firearms in the civilian population is a major source of the singularly high rate of killings by the police in the United States.” Zimring, *When Police Kill* at 57. But out of fear or, in rare cases, malice, police sometimes shoot unarmed civilians. The nonprofit organization Mapping Police Violence, for example, found that, out of 6,175 fatal police shootings between 2013 and 2018, the victim was unarmed in 680 of them (roughly 11%). See <https://mappingpoliceviolence.org/>.²

II. The Customs and Border Patrol Under-scores the Risk of Gun Violence and the Need for Deterrence and Accountability

This case involves a CBP agent who allegedly “shot and killed an unarmed fifteen-year-old boy standing a few feet away.” Pet. App. 42. The facts here, and the CBP’s unique circumstances, highlight the special risks of gun violence and the need to deter misconduct and compensate victims.

² To cite one example, a former police officer in Georgia, Zechariah Presley, is set to stand trial this fall for shooting a fleeing and unarmed suspect from behind. See Assoc. Press, *Judge sets fall trial for Georgia officer in fatal shooting*, FoxNews (Apr. 11, 2019), <https://tinyurl.com/y4zbz6ox>.

1. The CBP – which was created in 2003, in the aftermath of the 9/11 terrorist attack – has “the largest number of armed, sworn law enforcement officers in the United States.” Homeland Sec. Advisory Council, *Final Report of the CBP Integrity Advisory Panel 1* (Mar. 15, 2016) (“*Advisory Council Report*”), <https://tinyurl.com/yy26enya>. Among its 59,178 employees are 23,079 CBP officers and 19,437 Border Patrol agents. See CBP, *Snapshot: A Summary of CBP Facts and Figures* (May 2019), <https://tinyurl.com/y2xh3m3z>.

In recent years, the CBP has taken an increasingly militarized approach to patrolling the Southwestern border. CBP agents wield M4 rifles and military tactical equipment. See Alex Horton, *Border Protection is preparing for the caravan – with weapons and gear designed for combat*, Wash. Post (Nov. 6, 2018), <https://tinyurl.com/yyyslrfs>. For example, Congress allocated \$90 billion over 10 years beginning in 2001 in part to equip CBP agents with “military hardware like drones, assault rifles and Black Hawk helicopters,” Mark Binelli, *10 Shots Across the Border*, N.Y. Times Magazine (Mar. 3, 2016), <https://tinyurl.com/y4wncajl>, and it “has become entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by,” Todd Miller, *War on the Border*, N.Y. Times (Aug. 17, 2013), <https://tinyurl.com/y4qcp6uz>. Not surprisingly, researchers have found that the use of military weaponry by civilian police breeds violence and leads to more police shooting deaths.³

³ See Casey Delehanty et al., *Militarization and police violence: The case of the 1033 program*, Research & Politics (April-June 2017) (finding relationship between the use of military equipment by civilian law enforcement agencies and an increase in

2. In the midst of often-dangerous circumstances, the vast majority of CBP officers perform their duties with honor. But a few do not. “[D]ata from the Office of Personnel Management reveal that Border Patrol agents are more likely to be terminated for discipline or performance reasons than officers in other large federal law enforcement agencies.” Alex Nowrasteh, *Border Patrol Termination Rates: Discipline and Performance Problems Signal Need for Reform*, Cato Inst., Policy Analysis No. 825, at 1 (Nov. 2, 2017), <https://tinyurl.com/yyej5fbo>. In fact, “Border Patrol agents were 54 percent more likely than guards at the Bureau of Prisons to be terminated for disciplinary infractions or poor performance, 6 times as likely as Federal Bureau of Investigation agents, 7.1 times as likely as Drug Enforcement Administration agents, and 12.9 times as likely as Secret Service agents.” *Id.*

The *Advisory Council Report* concluded that the CBP force’s sheer size and the “difficult environment” in which its agents operate create “a very real potential for the use of excessive and unnecessary force,” particularly in light of the agency’s struggle to adequately train agents. *Advisory Council Report* at 1.⁴ Recent studies confirm this observation.

“police violence” and “officer-involved shootings”), <https://tinyurl.com/yxbul66f>; Ryan Welch & Jack Mewhirter, *Does military equipment lead police officers to be more violent? We did the research.*, Wash. Post (June 30, 2017) (“Militarization makes every problem – even a car of teenagers driving away from a party – look like a nail that should be hit with an AR-15 hammer.”), <https://tinyurl.com/y7bdjw2>.

⁴ See Bob Ortega, *Report finds training of border agents is lacking*, Ariz. Republic (Sept. 18, 2013), <https://tinyurl.com/y5e33a4z>.

One report found that, from 2007 to 2012, there were more than 1,700 allegations of excessive force against CBP officers, including more than 100 shooting incidents. See Garrett M. Graff, *The Border Patrol Hits a Breaking Point*, Politico Magazine (July 15, 2019), <https://tinyurl.com/y4awuqjw>. The Border Patrol itself has reported the use of deadly force on 208 separate occasions. See CBP, *CBP Use of Force Statistics Fiscal Year 2018* (last modified Mar. 5, 2019), <https://tinyurl.com/y2cf6a75>. An ACLU study for the years 2010 to 2016 identified 37 gunshot fatalities in encounters with the CBP, including six where the victim was on Mexican soil when the incident occurred. See ACLU, *Deaths and Injuries in CBP encounters since January 2010* (as of May 19, 2016), <https://tinyurl.com/y5wrwmob>.⁵

In a troubling number of those deaths, CBP officers used lethal force in response to someone throwing rocks at or in the vicinity of the officer – as Officer Mesa allegedly did in this case. See Pet. App. 3 (“The FBI reported that Agent Mesa was engaged in his law enforcement duties when a group of young men began throwing rocks at him from the Mexican side of the border. From United States soil, the agent fired several shots toward the assailants. Hernandez was fatally wounded.”). Until 2014, CBP leaders had no policy prohibiting agents from using lethal force in response to rock throwing. See Brian Bennett & Joseph Tanfani, *A family outing, then a deadly Border Patrol shooting*, L.A. Times (Oct. 18, 2014) (until 2014, CBP leaders “rejected recommendations to change policies to instruct agents to retreat if

⁵ One Border Patrol agent has been charged with murdering four women around Laredo, Texas, with his CBP-issued handgun. See Graff, *The Border Patrol Hits a Breaking Point*.

possible when people throw rocks, rather than use deadly force”), <http://tinyurl.com/BennettTanfani>. The *Los Angeles Times* reported that, between 2006 and 2014, 10 out of 30 people killed by CBP agents were alleged to have thrown rocks, with eight of the victims on the Mexico side of the border. *Id.*⁶ The agency had “created a culture that says, ‘If you throw a rock at me, you’re going to get shot.’” Garrett M. Graff, *The Green Monster: How the Border Patrol became America’s most out-of-control law enforcement agency*, Politico Magazine (Nov./Dec. 2014) (quoting a senior Department of Homeland Security official), <http://tinyurl.com/GraffGreen>.

The CBP commissioned a two-year study by the Police Executive Research Forum (“PERF”), a non-profit, independent organization, which found that CBP agents sometimes used lethal force against rock throwers “when moving out of range was a reasonable option” and, in other cases, when they were safe inside their vehicles. PERF, *U.S. Customs and Border Protection, Use of Force Review: Cases and Polices* at 6, 9 (Feb. 2013) (“*PERF Report*”), <http://tinyurl.com/PERFCBPreport>. To their credit, in recent years, agency leaders have sought to discourage lethal responses to rock throwing, but CBP agents may be receiving mixed messages regarding the use of lethal force as an appropriate response to rock throwing. See Bob Ortega, *Trump said military should shoot rock-throwing migrants. Officials disagree.*, CNN.com (Nov. 2, 2018) (“When they throw rocks like they did at the Mexico military police, consider it a rifle.”), <https://tinyurl.com/y5peybkd>.

⁶ See also Southern Border Communities Coalition, *Deaths by Border Patrol Since 2010* (updated July 8, 2019) (9 deaths out of 42 fatal shootings were reportedly instigated by rock throwing), <https://tinyurl.com/yxpgf3xu>.

III. Civil Lawsuits Like Those Under *Bivens* Are an Important and Needed Deterrent To Hold Accountable Officers Who Deprive Victims of the Right To Live

1. Gun violence deprives its victims of the most basic and fundamental right: the right to live. “The right to life – or to live – is protected by the Constitution and is the bedrock principle on which our government and civil society are founded.” Jonathan Lowy & Kelly Sampson, *The Right Not To Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 Geo. J.L. & Pub. Pol’y 187, 190 (2016) (footnote omitted). The right to live is embodied in the Nation’s founding documents and the Constitution, including the Declaration of Independence and the Due Process Clause’s protection of “life, liberty, or property.” *Id.* at 196-98 (quoting and discussing John Locke, the Declaration of Independence, and the Fifth and Fourteenth Amendments). Courts of appeals have long recognized that a person who encounters police has “a constitutional right not to be shot on sight if he did not put anyone else in imminent danger or attempt to resist arrest for a serious crime.” *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015); *see also Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991) (“Yates ‘had a right not to be shot unless he was perceived to pose a threat to the pursuing officers or to others.’”) (citation and alteration omitted).

2. Violations of constitutional rights, including the right to live, call for remedies that can deter and hold accountable wrongdoers. The dignity and honor of the vast majority of law enforcement who respect those constitutional rights also demands deterrence and accountability for the few rogue actors who

might otherwise act without regard to the rights of others. The *PERF Report* concluded that “[t]oo many” of the cases of CBP officer shootings over the years “do not appear to meet the test of objective reasonableness with regard to the use of deadly force.” *PERF Report* at 6-7. Yet CBP officers rarely face administrative penalties or criminal charges in connection with fatal shootings.

In this case, the U.S. Department of Justice (“DOJ”) declined to prosecute Agent Mesa. *See* Pet. App. 18 (noting that “numerous federal agencies investigated Agent Mesa’s conduct and decided not to bring charges”). As Judge Prado noted in his dissenting opinion below, this “inaction does not appear to be unusual,” citing a report that DOJ has not identified any case where it recommended civil or criminal charges for a CBP agent who killed someone in the line of duty in the previous six years. *See id.* at 31 n.3 (Prado, J., dissenting); *accord* Bennett & Tanfani, *supra* (“[n]o one in the Border Patrol has been formally disciplined or fired for any of the deaths or other shooting incidents” between 2006 and 2014).⁷ In a similar vein, the *Advisory Council Report*

⁷ The Ninth Circuit’s *Swartz* case – which the opinion below cited as evidence that “[t]he threat of criminal prosecution for abusive conduct is not hollow,” Pet. App. 18-19 – underscores the rarity of criminal accountability for CBP officers who shoot and kill even unarmed suspects. The complaint in that case alleged that, “[w]ithout warning or provocation,” Officer Swartz shot a 16-year-old boy who was “peacefully walking down” the street just across the border in Mexico – firing between 14 and 30 bullets that struck the teenager 10 times (with most of the bullets striking him from behind). *Rodriguez v. Swartz*, 899 F.3d 719, 727 (9th Cir. 2018), *cert. petition pending*, No. 18-309 (U.S. Sept. 7, 2018). The United States indicted Officer Swartz, but the jury acquitted him of murder and hung on the manslaughter charge, resulting in no conviction on any count. *Id.* at 741.

concluded that “CBP has not been noted for its transparency when it comes to use of force incidents” and the internal “disciplinary process takes far too long to be an effective deterrent.” *Advisory Council Report* at 1. CBP is also known to stonewall outside scrutiny, including through protracted litigation to prevent public disclosure of information about officer shootings. See Kathryn Hampton, *Zero Protection: How U.S. Border Enforcement Harms Migrant Safety and Health*, Physicians for Human Rights (Jan. 10, 2019), <https://tinyurl.com/y2jfqpoa>.⁸

This Court, in contrast, has repeatedly noted that a lawsuit brought under *Bivens* deters constitutional violations. In *Carlson v. Green*, 446 U.S. 14 (1980), this Court concluded that a lawsuit under *Bivens* was an appropriate remedy when federal officers violated the Eighth Amendment by providing constitutionally deficient medical care. The Court observed that *Bivens*, “in addition to compensating victims, serves a deterrent purpose.” *Id.* at 20-21. Since *Carlson*, the Court has repeatedly affirmed that “[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.” *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)

⁸ More generally, outside of the CBP context, criminal indictments and convictions are rare in police shootings. According to data from the Police Integrity Research Group, only 98 nonfederal law enforcement officers nationwide have been criminally charged in connection with fatal, on-duty shootings in the last 15 years – and, among those, only 35 were convicted. See Janell Ross, *Police officers convicted for fatal shootings are the exception, not the rule*, ABCNews.com (Mar. 14, 2019), <https://tinyurl.com/y4cwu7fl>. Police officers who face criminal trials are convicted half as frequently as non-police defendants. See German Lopez, *Cops are almost never prosecuted and convicted for use of force*, Vox (Nov. 14, 2018), <https://tinyurl.com/y296ysya>.

(Rehnquist, C.J.); *see also* *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (Thomas, J.) (“It must be remembered that the purpose of *Bivens* is to deter *the officer*.”); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (Kennedy, J.) (noting that “individual instances of discrimination or law enforcement overreach” are by their nature “difficult to address except by way of damages actions after the fact” through the *Bivens* remedy); *id.* at 1863 (“There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution.”).

Similarly, this Court has taken as a given that civil liability “is an effective deterrent [for constitutional violations],” *Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (Scalia, J.), in the related context of 42 U.S.C. § 1983 cases. As Justice O’Connor has explained: “The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.” *Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *see also* *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (a purpose of § 1983 is “not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well”).

The deterrent effect of *Bivens* is one of its defining characteristics and a key reason why this Court has applied it. In this context, it is the only effective remedy when a Border Patrol agent violates a child’s right to live.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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