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 AMICUS CURIAE PROFESSOR GREGORY C. SISK IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Professor Gregory C. Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). His interest in this matter is that of a legal scholar studying the jurisprudence of federal sovereign immunity and statutory waivers.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and his counsel made a monetary contribution to this brief's preparation or submission. The parties have consented in writing to the filing of this brief.

For more than a quarter of a century, Professor Sisk's scholarly work has focused on civil litigation with the federal government. He has published both a treatise and the only law school casebook on the subject. *Litigation With The Federal Government* (West Academic Hornbook Series, 2016); *Litigation With The Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & 2017 Supp.). The treatise and the casebook each include a chapter devoted primarily to the Federal Tort Claims Act and a chapter on claims against federal officers including discussion of the Westfall Act and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Professor Sisk also has written several law review articles on federal sovereign immunity and the construction of statutory waivers of federal sovereign immunity.

Professor Sisk's scholarly publications on federal government litigation are cited regularly by the federal courts, including this Court. *See, e.g.*, *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, 314 (2011); *Parrott* v. *Sulkin*, 851 F.3d 1242, 1251 (Fed. Cir. 2017); *Barnes* v. *United States*, 776 F.3d 1134, 1144 (10th Cir. 2015); *Collins* v. *United States*, 564 F.3d 833, 836 (7th Cir. 2009); *Suburban Mortg. Assocs.* v. *HUD*, 480 F.3d 1116, 1123 n.12 (Fed. Cir. 2007); *Role Models Am., Inc.* v. *Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004).

In addition to Professor Sisk's teaching and scholarly work, he continues to practice law, primarily on a pro bono basis. As a former appellate attorney with the Civil Division of the U.S. Department of Justice and now as a private attorney, Professor Sisk has litigated cases on behalf of both the government and private parties under statutory waivers of federal sovereign immunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates the core reasoning behind this Court's decision in *Bivens* v. *Six Unknown Named Agents*: Constitutional rights are only real if there is some remedy when they are breached.

Here, a rogue federal law enforcement officer shot an unarmed teenager in the face, killing him. The teenager's parents, petitioners, filed suit. But because of the particular geographic location of the shooting, along the U.S.-Mexico border, the grave constitutional wrong they suffered—an arbitrary killing by an agent of the state—has no legal remedy at all. The Federal Tort Claims Act does not provide the Hernández family with a right of action due to an exception that applies where any of the harms giving rise to the claim occured in a "foreign country" (even though in this case the rogue officer was standing in the United States when he fired multiple lethal shots at a teen in the border zone). Meanwhile, the Westfall Act bars any state law claims stemming from the officer's conduct. In these circumstances—where there is literally no legal remedy for the wrongful taking of human life by a government agent—a *Bivens* claim should lie.

The traditional considerations for whether the Court should imply the existence of a cause of action under *Bivens* counsel strongly in favor of doing so in this case. The lack of any other legal remedy here—a matter of "central importance" to the *Bivens* analysis, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017)—weighs strongly in petitioners' favor. And there are no "special factors" that weigh against making a *Bivens* remedy available to the Hernández family. Rather, this is in form an excessive-force case that does not implicate national security concerns, high-level executive policy-

making, or international diplomacy. Indeed, the most unique thing about this case, as a legal matter, is the way in which the physical location of the killing at issue creates a legal doughnut hole that leaves petitioners without a remedy for a horrific and otherwise plainly compensable wrong.

Moreover, the basic reasoning of *Bivens* is at stake in this case. The ability to obtain a remedy for the invasion of important constitutional rights and freedoms is the "'very essence of civil liberty.'" 403 U.S. 388, 397 (1971) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). Here, what is at stake is nothing less than the fundamental rule that agents of the state may not arbitrarily take human life. Freedom from such arbitrary killing is what distinguishes a constitutional republic from abject tyranny. The need for a remedy here could not be more imperative. The Court should reverse.

ARGUMENT

I. PETITIONERS HAVE NO OTHER LEGAL REMEDY

A. The Availability Of Alternative Remedies Is A Central Question In The *Bivens* Analysis

The availability of alternative remedies is of "central importance" to the question of whether a *Bivens* claim will lie. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, this Court held that courts may sometimes recognize the implicit existence of a cause of action for damages against a federal agent for the violation of a plaintiff's constitutional rights, explaining that "'where federally protected rights have been invaded,'" courts can "'adjust their remedies so as to grant the necessary relief.'" 403 U.S. 388, 392, 395-

397 (1971); *see also id.* at 395 ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

The Court has since emphasized the special need for such judicially implied remedies where there are no similarly effective legal remedies available to an injured plaintiff. Thus, in *Davis* v. *Passman* and *Carlson* v. *Green*, the Court reasoned that a lack of alternative remedies for the violation of Fifth and Eighth Amendment rights in certain contexts required the creation of judicially implied causes of action, lest those rights become "merely precatory" for want of any "effective means" to enforce them. *Davis*, 442 U.S. 228, 242, 245 (1979) ("For Davis, as for Bivens, 'it is damages or nothing.'" (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring))); *see also Carlson*, 446 U.S. 14, 17 (1980).

And even where the Court has ultimately declined to imply a cause of action under *Bivens*, it has done so in no small part *because* other adequate remedies were available. In *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), for example, the Court considered whether to authorize a *Bivens* action against federal land management officials. *Id.* at 543. The Court found that the plaintiff had alternative administrative and judicial remedies available to him. *See id.* at 551-553. It then proceeded to consider the quality of those remedies versus a new *Bivens* claim. *Id.* at 554-555. The Court adopted a similar approach in *Minneci* v. *Pollard*, 565 U.S. 118, 125 (2012). There, the Court declined to extend *Bivens* as against federal prison employees because state tort law served as an adequate remedy. *Id.* at 131. The Court's analysis again focused on the existence and adequacy of alternative remedies. Since state tort law was "capable of protecting the constitutional interests at stake," the Court did not need to imply a *Bivens* action to sepa-

rately protect the right. *Id.* at 125. But this context, the Court clarified, differed from those in which plaintiffs "'lack[] *any alternative remedy*' at all." *Id.* at 127 (quoting *Correctional Servs. Corp.* v. *Malesk*o, 534 U.S. 61, 70 (2001)). And again, in *Ziglar* v. *Abbasi*, the Court reaffirmed that the existence of alternative remedies is of "central importance" to the *Bivens* analysis. *See* 137 S. Ct. at 1862; *accord id.* at 1874 (Breyer, J., dissenting) (lack of alternatives was one of the "basic legal considerations" on which *Bivens*, *Carlson*, and *Davis* rested). If existing remedies are unavailable or insufficient, the Court acknowledged in *Abbasi*, allowing a plaintiff to seek damages under *Bivens* may be "necessary to redress past harm and deter future violations." *Id.* at 1858.

In all, since *Bivens* was decided, there have been nine cases involving civilian (*i.e.*, non-military) plaintiffs. In the two cases where there was no alternative remedy at all, the Court implied a remedy to safeguard constitutional rights. By contrast, this Court has declined to extend *Bivens* to new types of claims in seven such cases, all of which involved situations where at least some alternative remedies were available.[2] The

[2] *See Abbasi*, 137 S. Ct. at 1862-1863 (suit for injunctive relief challenging "large-scale policy decisions concerning … conditions of confinement," as well as possible habeas petition, were available to plaintiff); *Minneci*, 565 U.S. at 120, 125 (state tort law provided an alternative, existing process capable of protecting the constitutional interests at stake); *Wilkie*, 551 U.S. at 553 (plaintiff had "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints"); *Malesko*, 534 U.S. at 73-74 (federal prisoners in private facilities could pursue remedies in tort, seek injunctive relief in in federal court, and file internal administrative grievances); *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994) (suit against individual officer available, though subject to qualified immunity defense); *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988) (deter-

question of alternative remedies is consistently front and center.

The Fifth Circuit's legal analysis ignored all that and gave the issue of available alternative remedies virtually no weight. Specifically, the court stated that "the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension." Pet. App. 18.

That approach cannot be reconciled with this Court's cases, on multiple levels. For one, the absence of a remedy in fact may, as in cases like *Davis*, be a powerful, standalone reason to imply a cause of action. *E.g.*, *Malesko*, 534 U.S. at 70 (noting *Bivens* has been extended "to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct"). For another, the presence of alternative remedies is far from dispositive, and means only that further consideration of the adequacy of those remedies, as well as any

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mining that Congress "provide[d] meaningful safeguards or remedies" for persons who may have been denied social security disability benefits in violation of due process); *Bush* v. *Lucas*, 462 U.S. 367, 386 (1983) (administrative process created by Congress "provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies").

Two other *Bivens* decisions arose in the military context, which the Court explained was a unique special factor that counseled against allowing claims under *Bivens* despite the lack of available remedies. *See United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987) ("[N]o *Bivens* remedy is available for injuries that arise out of … [military] service" in light of "the unique disciplinary structure of the Military Establishment and Congress' activity in the field" (quotation marks and citations omitted)); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (similar).

additional special factors, is required. *E.g.*, *Wilkie*, 551 U.S. at 554 (availability of alternative remedies "gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it").[3] Contrary to the Fifth Circuit's approach, this Court's cases from *Bivens* through to the present day give the presence or absence of alternative remedies great weight in the analysis of whether a *Bivens* claim will lie.

B. There Are No Alternative Remedies Here

In this case, the centrally important question of whether alternative remedies exist has a clear, definitive answer: They do not. There is no claim under federal law in light of the Federal Tort Claims Act's "foreign country exception" as this Court has interpreted it. And state law claims are meanwhile barred by op-

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[3] The Fifth Circuit downplayed the absence of alternative remedies in yet another way: by considering the deterrence value of "remedies" that are *unavailable* to the plaintiffs in this case. *See* Pet. App. 18-19. The court of appeals reasoned that, although federal authorities chose not to prosecute Agent Mesa, criminal prosecution *could* be pursued in other cross-border shooting cases. *Id.* at 19. Likewise, the court reasoned that although a state-law tort claim could not be brought in this case, one *could* be brought against an officer who acted *outside* the scope of his employment. *Id.* But this court has not suggested that potential future deterrence from remedies that are *unavailable to the plaintiff in the case* can stand in for actually available remedies in the *Bivens* analysis. Rather, in *Malesko* and *Minneci*, this Court considered the deterrence value of remedies that were available to the plaintiffs in order to assess whether those alternatives adequately protected the plaintiff's interests. *See Minneci*, 565 U.S. at 120 (considering deterrence value of state tort law); *Malesko*, 534 U.S. at 74 (considering deterrence value of injunctive relief available to plaintiff).

eration of the Westfall Act. Even for the gravest violations of fundamental constitutional rights, then, there can be no remedy in this context except under *Bivens*.

1. FTCA remedies are unavailable here.

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680, constitutes a "'sweeping'" waiver of the federal government's sovereign immunity. *E.g.*, *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 492 (2006). The FTCA was designed "to render the Government liable in tort as a private individual would be under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962); *see also* 28 U.S.C. § 2674.

However, the federal government explicitly retained its immunity from suit for certain types of tort claims and for certain activities, by including express statutory exceptions in the FTCA. 28 U.S.C. § 2680; *see also*, *e.g.*, *Richards*, 369 U.S. at 6. In a manner akin to an affirmative defense, such exceptions foreclose a tort remedy against the United States even when the individual tortfeasor was acting within the scope of federal employment and the pleadings otherwise state a cognizable tort claim under state law. *See* Sisk, *Litigation With The Federal Government* § 3.6(a), at 150-153 (West Academic Hornbook Series, 2016) ("Sisk, *Litigation*"). One of those exceptions—the "foreign country" exception—unambiguously applies here.

The foreign country exception excludes "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The most obvious function of the foreign country exception is to "insulate the United States from liability based on foreign law when the tort[] occur[s] outside the borders of the United States." Sisk, *Litigation* § 3.6(e), at 174. However, § 2680(k) is not limited to on-

ly those circumstances in which foreign law would apply.[4] Rather, under this Court's decision in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 700-712 (2004), the foreign country exception exempts from the FTCA's sovereign immunity waiver all claims based on injuries that were suffered abroad, *regardless of where the tortious activity took place*. Under that principle, FTCA relief is unavailable to the Hernández family here.

In *Sosa*, the Court held that the foreign country exception to the FTCA applied because the alleged tortious conduct at issue—the plaintiff's kidnaping in Mexico by U.S. agents—was "most naturally understood as the kernel of a 'claim arising in a foreign country.'" *Sosa*, 542 U.S. at 701.[5] *Sosa* rejected the so-called "headquarters doctrine," under which the availability of the

[4] The fact that Congress saw fit to exclude claims arising in foreign countries from the ambit of the FTCA does not weigh against allowing such claims to be asserted under *Bivens*. Such reasoning would be impossible to square with this Court's decision in *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016), where this Court held that that a *Bivens* claim could proceed even where substantively similar FTCA claims had already been dismissed pursuant to a § 2680 exception. As the Court made clear in its unanimous opinion, the FTCA's "judgment bar" provision expressly "does not apply" where a case has been dismissed pursuant to any of the § 2680 exceptions. *Id.* at 1848.

[5] *Sosa* involved a DEA mission to kidnap, capture, and render to the United States for trial a Mexican national who had been indicted for the torture and murder of a DEA agent. 542 U.S. at 697-698. After he was acquitted and returned to Mexico, the suspect brought an FTCA claim for false arrest. *Id.* at 698-699. Importantly, once the suspect was in the United States, his detention was no longer tortious, *see Alvarez-Machain* v. *United States*, 331 F.3d 604, 636-637 (9th Cir. 2003) (en banc), *rev'd by Sosa*, 542 U.S. 692, since at that point he was lawfully under arrest for the alleged murder of the DEA agent. The claim was thus based entirely on his kidnapping and detention in Mexico. *Sosa*, 542 U.S. at 700-701.

foreign country exception hinges on where the tortious *act* occurred, as opposed to the location of the injury. *See, e.g.*, *Sami* v. *United States*, 617 F.2d 755, 762 (D.C. Cir. 1979) (finding FTCA liability "for acts or omissions occurring [in the United States] which have their operative effect in another country"), *abrogated by Sosa*, 542 U.S. at 710 n.8.

Under *Sosa*'s locus of the injury test, the foreign country exception precludes an FTCA claim here.[6] Because petitioners' son was shot in Mexico, it does not matter that Agent Mesa was standing in the United States when he pulled the trigger. The foreign country exception still applies, barring any claim under FTCA. That was the holding of the District Court here in its dismissal of FTCA claims brought by the petitioners. Pet. App. 185. It was also the holding in another, virtually identical cross-border shooting case. *See Ortega-Chavez* v. *United States*, 2012 WL 5988844, at *2 (S.D. Cal. Nov. 29, 2012) (dismissing shooting victim's FTCA claim and holding that despite the tortious activity occurring in the United States, "domestic proximate causation does not eliminate application of the foreign country exception"). Other courts applying *Sosa* have reached the same result.[7]

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[6] Justice Ginsburg, joined by Justice Breyer, would have held the foreign country exception applicable under a narrower "last significant act or omission" test. *Sosa*, 542 U.S. at 759-760 (Ginsburg, J., concurring in part and concurring in the judgment). That test might still foreclose FTCA liability in this case, as the completion of the tort occurred when the bullet struck the decedent on the Mexican side of the border.

[7] *E.g.*, *Agredano* v. *U.S. Customs Serv.*, 223 F. App'x 558, 558-559 (9th Cir. 2007) (foreign country exception applied in case arising from arrest and imprisonment that took place in Mexico); *Thompson* v. *Peace Corps*, 159 F. Supp. 3d 56, 60-62 (D.D.C. 2016)

Accordingly, under *Sosa*, the FTCA does not provide a remedy for the Hernández family, and more generally, it provides no remedy for a category of serious harms like those asserted in this case, including the most severe harm imaginable: loss of human life.[8]

(foreign country exception barred claims brought by former Peace Corps volunteer alleging injuries suffered abroad but caused by anti-malarial drugs given to him by the Peace Corps); *Padilla* v. *United States*, 2007 WL 2409792, at *7-8 (W.D. Tex. Aug. 20, 2007) (applying *Sosa* rule to case where individual was killed in Mexico, even though he was abducted from his home in the United States); *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 23 (D.D.C. 2006) (action alleging torture and murder by CIA agents was barred by foreign country exception), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008).

[8] While it does not apply in this case, another FTCA exception would bar many claims like those asserted here, even where the locus of the alleged injury is the United States. The FTCA excludes "[a]ny claim arising out of assault [or] battery." 28 U.S.C. § 2680(h). This "assault and battery exception" also covers numerous intentional torts. *Id.* The exception would not apply here because it is subject to the so-called "[law enforcement] proviso," which waives sovereign immunity for an assault or battery based on "acts or omissions of … law enforcement officers of the United States Government." *See generally* Sisk, *Litigation* § 3.6(d)(4), at 171; 28 U.S.C. § 2680(h); Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. St. Thomas L.J. 375 (2011). Because Border Patrol agents are law enforcement officers, the law enforcement proviso would likely have allowed for an FTCA claim against the government here if the shooting had occurred completely on American soil. *See Millbrook* v. *United States*, 569 U.S. 50, 56-57 (2013).

However, claims "arising out of" assaults by non-law enforcement federal employees—who make up the lion's share of both the federal civil service and the armed services—are generally not actionable under the FTCA, even where they involve unjustified violence, serious physical harm, or death. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 Iowa L. Rev. 731, 748-749 (2019) ("While those subject to arrest by federal law enforcement officers or incarcerated under the control of fed-

2. State tort remedies are also unavailable here by operation of the Westfall Act.

Nor are there any remedies against Agent Mesa under state tort law, because of another federal statute, the Westfall Act, which makes the FTCA the exclusive remedy when a personal injury claim arises from the tortious act of a federal employee acting within the scope of their employment. 28 U.S.C. § 2679(b)(1). Under the Westfall Act, if a federal employee is sued under state law for actions that fall within the scope of their employment, the Attorney General is required to substitute the United States as the sole defendant in the case, whereupon the suit is restyled as an FTCA action and removed to federal court, while the individual employee is granted immunity for the act in question. *See id.* § 2679(c)-(d); *see also, e.g.*, *Osborn* v. *Haley*, 549 U.S. 225, 229-230 (2007).

Because the application of the Westfall Act hinges on whether the individual defendant was acting within the scope of their employment, the Westfall Act essentially turns state law against itself. As Professor Sisk has observed:

> If the federal employee is found to have acted within the scope of employment, he or she individually will be immune from liability. … Thus, rather than expanding tort liability and enhancing the opportunity for plaintiffs to sue a financially-responsible defendant—which was generally the intent behind state court deci-

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eral correctional officers may seek relief if sexually abused, innocent persons molested by military recruiters, ordinary postal employees, federal daycare workers, or even Transportation Safety Administration airport screeners still find the courthouse doors closed against them.")

> sions broadening the reach of *respondeat superior* in recent decades—application of liberal state scope-of-employment rules sometimes may operate to narrow tort liability in the federal employee/Federal Government context.

Sisk, *Litigation* § 5.6(c)(4), at 373.

The substitution of the United States for an individual employee defendant pursuant to the Westfall Act is "unrecallable." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 422 (1995). Claims against a defendant like Agent Mesa thus may be precluded under the Westfall Act even where the United States is separately immune from FTCA liability under the foreign country exception. *Id.* at 420 (noting that, in situations like this one, "the plaintiff may be left without a tort action against any party"). In such cases, the twin operation of the Westfall Act's preclusion of state law claims and the FTCA's waiver exceptions means that *Bivens* may be the only mechanism for providing a remedy for the violation of constitutional rights.

And critically, *Bivens* claims are expressly exempted from the Westfall Act's exclusive remedy provision. *See* 28 U.S.C. § 2679(b)(2)(A); *see also Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010) (noting ("[t]he Westfall Act's explicit exception for *Bivens* claims"). Indeed, this Court addressed the Westfall Act's stark consequences as they relate to the availability of a *Bivens* claim in *Minneci*. There, the Court explained that "the potential existence of an adequate 'alternative, existing process' differs dramatically" in cases where the Westfall Act applies. 565 U.S. at 126. The Court held that no *Bivens* claim was available against a private employee of a federal prison who *could* be reached by state tort law. *Id.* But the Court expressly

contrasted that situation with one where (as here) the defendant was a federal employee whose conduct would be covered by the Westfall Act. *Id.* (contrasting private employee scenario with *Carlson*, 446 U.S. at 16-18, where prisoner *Bivens* claim was available as against federal government employee).

Here, Texas permits tort claims in its state courts for death or personal injury in cases where the wrongful act occurs in a foreign country. Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a). However, the government has long since made its unrecallable certification that, under Texas law, Agent Mesa was acting within the scope of his employment.[9] The Hernández family is ac-

[9] Particularly under more liberal *respondeat superior* regimes, plaintiffs have little chance of resisting a scope of employment certification by the Attorney General. Here, for example, under Texas law, *respondeat superior* applies where the employee is authorized to use force in the performance of his or her duties "so that the act of using force may be in furtherance of the employer's business." *Texas & Pac. Ry. Co.* v. *Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952); *see also Buck* v. *Blum*, 130 S.W.3d 285, 289 (Tex. App. 2004) (*respondeat superior* applies if assault is "so connected with and immediately arising out of authorized employment tasks as to merge the task and the assaultive conduct into one indivisible tort ...."). Under that standard, the Attorney General's determination that Mesa's actions fell within the scope of his employment under Texas law would have been extremely difficult to contest. It is therefore unsurprising that petitioners "could have sought (but did not seek) federal-court review of the Attorney General's scope-of-employment certification under the Westfall Act." Pet. App. 94 (Haynes, J., concurring).

And while *respondeat superior* standards for intentional torts vary widely by state, Texas's approach is actually narrower than most—*i.e.*, under the law of most states, contesting the application of the Westfall Act would have been *even more difficult*. For example, California provides that an employee's willful, malicious, or even criminal acts may fall within the scope of employment, even if unauthorized, if they foreseeably arose from the conduct of the

cordingly caught in the lacuna created by the combined effect of the Westfall Act and the FTCA's exceptions, with no remedy at all in the absence of a *Bivens* claim.

II. "SPECIAL FACTORS" DO NOT COUNSEL AGAINST THE EXTENSION OF *BIVENS* TO CASES LIKE THIS

There are two overarching considerations that inform the *Bivens* analysis. When considering whether to extend *Bivens* to a new context, courts first consider the centrally important question whether there are adequate alternative remedies; here, as just explained, there are none, which strongly suggests that a *Bivens* claim should lie. *See supra* Part I; *see also*, *e.g.*, *Abbasi*, 137 S. Ct. at 1858 (courts consider whether the existence of an adequate alternative remedy offers "'a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" (quoting *Wilkie*, 551 U.S. at 550)). Next, courts consider whether any "special factors counsel[] hesitation" before implying the existence of a new cause of action for redress of constitutional injuries. *Id.*

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employer. *E.g.*, *Xue Lu* v. *Powell*, 621 F.3d 944, 948 (9th Cir. 2010).

The broader evolution of the law in this area, toward increasingly liberal *respondeat superior* rules, thus yields paradoxical results. "[O]ver time, state law rules have tended to broaden the scope of employment concept so as to expand employer accountability to others for the misdeeds of employees." Sisk, *Litigation*, § 5.6(c)(4), at 373. But "[i]ronically—or some might say, perversely—application of these state law expectations to the peculiar Westfall Act context may have precisely the opposite effect." *Id.* Absent an available *Bivens* claim, a considerable number of tort victims in states with broad approaches to *respondeat superior* may find themselves with no remedy at all.

Here, special factors offer no reason to hesitate. Rather, implying a cause of action for damages that would allow the Hernández family to obtain a remedy for the killing of their teenage son is consistent with the approach laid out by this Court in *Abbasi*. This is, in form, a run-of-the-mine excessive force case that does not implicate the national security apparatus, international diplomacy, high national politics, or any other matter that might constitute a "special factor."

A. Extending *Bivens* Here Is Consistent With This Court's Approach In *Abbasi*

The special factors analysis is premised on "separation-of-powers principles." *Abbasi*, 137 S. Ct. at 1857. The central inquiry is "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1858. This analysis does not mechanistically turn on simple "categories of cases," and, accordingly, some tangential relation to issues like national security or foreign affairs does not end the inquiry. *See id.* at 1862 ("[N]ational-security concerns must not become a talisman used to ward off inconvenient claims."). Rather, it turns on a "systemwide" assessment of the "burdens" imposed by judicial intervention in recognizing a new cause of action. *Id.* at 1858.

In *Abbasi*, this Court pointed to four considerations at play in the special factors analysis: (1) the presence or absence of a "high-level executive policy" being challenged in the action; (2) whether or not the action is "confined to the conduct of a particular Executive Officer in a discrete instance," (3) whether the action requires "inquiry into sensitive issues of national security," and (4) the "burden and demand of litigation" im-

posed by the action. *Id.* at 1860-1861. Each of these gets at the same deeper question: Whether recognizing a *Bivens* action would unduly intrude upon the Executive Branch's proper exercise of its constitutional authority.

In *Abbasi*, this inquiry counseled against recognizing a new freestanding damages claim. As the Court recognized, plaintiffs in that case "challenged … major elements of the Government's whole response to the September 11 attacks." 137 S. Ct. at 1861. Judicial intervention would have involved the potential imposition of liability on high-ranking Executive Branch policymakers far removed from the detention facilities that housed the plaintiffs. *See id.* at 1853. It would have required judges to probe the sensitive national security justifications underlying the detention policy at issue. *See id.* at 1861. And, relatedly, it would have "require[d] inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged," all of which "would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch." *Id.* at 1860-1861.

This case is very different. Here, none of the considerations at play in *Abbasi* apply.

First, there is no high-level executive policy at stake in this case that might be disrupted by making damages available. Rather, the Hernández family challenges only "standard 'law enforcement operations'" that are more amenable to a *Bivens* remedy. 137 S. Ct. at 1861. Indeed, Congress has expressly recognized the appropriateness of damages actions in just this type of scenario. In 1976, Congress amended the FTCA by adding the "law enforcement proviso," which waived

sovereign immunity for claims arising out of intentional torts committed by federal law enforcement officers. 28 U.S.C. § 2680(h); *see also supra* n.8 (discussing the proviso). "Congress intended this provision to broadly 'apply to any case in which a Federal law enforcement agent committed [a] tort while acting within the scope of his employment." Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 Iowa L. Rev. 731, 747 (2019) (quoting S. Rep. No. 93-588, at 2791 (1973)). Congress sought to open the federal government to "liability for a range of intentional wrongdoing by federal agents." *Id.* Congress has already blessed the type of claim at stake here.

Second, and completely unlike in *Abbasi*, petitioners challenge "the conduct of a particular Executive Officer in a discrete instance." *Abbasi*, 137 S. Ct. at 1860. This is not a challenge to the decision of some high policymaker, with a complex chain of causation between the official policy and its application in plaintiffs' case. Indeed, there is no separation at all between the actor sued and the single, straightforward tortious act at issue.

Third, extending *Bivens* here requires no inquiry into sensitive national security concerns or other matters where the Executive has taken discretionary action. Again, this case simply is not a policy challenge at all. Rather, this is a use-of-force incident involving a single officer's decision to fire lethal shots at a teenager in a culvert. The Solicitor General's argument at the certiorari stage that national security deference should extend to "individual agents" who are involved in "securing the border" (because "'border-control policies are of crucial importance to … national security'"), U.S. Amicus Br. 16-17, would turn "border security" into the

same type of categorical "talisman" that the Court flatly rejected in *Abbasi*. 137 S. Ct. at 1862.

Fourth, this case does not risk imposing burdensome discovery that "could inhibit the free flow of advice, including analysis, reports, and expression of opinion within an agency." *Abbasi*, 137 S. Ct. at 1861 (quoting *Federal Open Market Comm.* v. *Merrill*, 443 U.S. 340, 360 (1979)). In *Abbasi*, the Court worried that extending *Bivens* would invite intrusive discovery into "the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged." *Id.* at 1860. But here, again, there are no sensitive policies at issue and no deliberations to be probed. Discovery in this case concerns only the circumstances under which a particular officer shot a teenager to death along the U.S.-Mexico border.

This case turns on settled domestic-law principles governing the use of deadly force by a line-level federal law enforcement officer against an unarmed civilian. No alternative remedies exist. It is a textbook example of where *Bivens* should apply—and completely different from *Abbasi* in every way that matters.

B. The Fifth Circuit's Special Factors Analysis Was Flawed

The Fifth Circuit's contrary special factors analysis missed the mark on nearly every one of these points. None of the special factors the court identified stand up to scrutiny.

First, the court concluded that extending *Bivens* would "threaten[] the political branches' supervision of national security." Pet. App. 13. But the court in the same breath admitted that this case involves "activities analogous to domestic law enforcement." *Id.* The mere

fact that Officer Mesa's shots crossed the border does not automatically turn this case into one involving sensitive national security issues. To hold otherwise would (again) be to apply the same categorical, "talismanic" approach that the Court rejected in *Abbasi*.[10]

Second, the Fifth Circuit cited the risk of "interference with foreign affairs and diplomacy." Pet. App. 15. But this misunderstands the role of foreign affairs concerns in separation-of-powers analysis. The Executive Branch is owed foreign affairs deference when "decisions in these matters may implicate 'relations with foreign powers,' or involve '…changing political and economic circumstances.'" *E.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2418 (2018) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976)). It makes good sense to defer to the Executive Branch where judicial involvement might interfere with ongoing diplomatic negotiations or upset a foreign power. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 431-432 (1964). But there are no such activities that an individual wrongful death action might disrupt. And if it were relevant one way or the other, the Government of Mexico has, in fact, made clear its position that the Hernández family should have a remedy in this case.

Third, the Fifth Circuit, citing *Abbasi*, concluded that "Congress's failure to provide a damages remedy

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[10] *Vanderklok* v. *United States*, 868 F.3d 189 (3d Cir. 2017) (cited in Pet. App. 14) is inapposite. That case held that a challenge to the official response to an alleged bomb threat in an airport implicated Executive Branch policies concerning airport safety, *id.* at 206. Suing over the shooting an unarmed minor who is not even attempting to cross the border sweeps in no such policy concerns. And imposing liability for such a killing would not inhibit CBP's performance of its legitimate border patrol duties.

in these circumstances is an additional factor counseling hesitation." Pet. App. 16. To start, the court's statement simply ignores the explicit carveout in the Westfall Act for *Bivens* claims. Nor can the Fifth Circuit support its argument by citing *Abbasi*. There, the Court inferred an intentional omission of a remedy by Congress with respect to challenges to "high-level policies [that] will attract [Congress's] attention." *Abbasi*, 137 S. Ct. at 1862. Congress's "frequent and intense" attention to such high-profile issues, the Court reasoned, makes it "difficult to believe that congressional inaction was inadvertent." *Id.* (internal quotation omitted). But Congress's attention to the rules surrounding tort claims against the government has been comparatively sporadic.[11]

And the Fifth Circuit's reasoning—that where Congress has not provided a remedy, the court should not do so either—also contravenes the basic rationale for *Bivens* claims in the first place. *Bivens* claims are necessary precisely *because* there is no statutory alternative, to "provide a cause of action for a plaintiff who lack[s] any alternative remedy." *Malesko*, 534 U.S. at 70. By contrast, the provision of an alternative remedial scheme counsels *against* the extension of *Bivens*. *See Bush* v. *Lucas*, 462 U.S. 367, 386 (1983); *see also Abbasi*, 137 S. Ct. at 1858 (same). In the absence of clear evidence of intentional omission, as in *Abbasi*, implying a *Bivens* remedy does not disrespect Congress.

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[11] Congress has enacted legislation regarding exclusion of remedies for foreign injuries only a handful of times in the 120-year period since the 1871 Civil Rights Act, most notably the Federal Tort Claims Act passed in 1946 and the Torture Victim Prevention Act passed in 1991.

That is especially true given that Congress expressly acknowledged *Bivens* claims in the Westfall Act.

Fourth, the Fifth Circuit reasoned that "the extraterritorial aspect of this case … aggravates the separation-of-powers issues" and counsels against extension. Pet. App. 19. But this case involves the application of U.S. law to a U.S. law enforcement officer acting within U.S. territory. This Court's concerns about the extraterritorial application of U.S. law involve situations where "the sovereign will of the United States" is applied to "conduct occurring within the territorial jurisdiction of another sovereign." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 121 (2013). Officer Mesa was standing in the U.S. when he fired shots across the border. If anything, he is properly beyond the authority of *Mexican* law, which would apply extraterritorially.[12]

The special factors analysis, when properly applied, supports the extension of *Bivens* in these circumstances. Other than the fact that the bullets here traveled across the Nation's southern border, this is in *every* respect a mine-run excessive-force type case, which does not implicate national security, foreign affairs, or any considered national policy. Extending *Bivens* to the circumstances here would be proper.

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[12] Nor is there any possibility of "'international friction'" here. Pet. App. 22 (quoting *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2106 (2016) (plurality op.). The Government of Mexico has merely submitted an amicus brief arguing that the Hernández family should have a remedy.

III. THE LOGIC OF *BIVENS* APPLIES WITH THE UTMOST FORCE HERE

The fundamental logic of *Bivens* is that constitutional rights may lose their force if the law provides no remedy when federal agents violate them. That, the *Bivens* Court explained, is the "'very essence of civil liberty'": There must be an adequate remedy for such constitutional injuries. 403 U.S. at 397 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

This reasoning is well pedigreed: The Court in *Bivens* traced it back to *Marbury*, where Chief Justice Marshall explained that "the United States government has been emphatically termed a government of laws, and not of men" but "will [not] deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) at 163.

Here the right at stake could not be more precious. It is fundamental that, in a free society, no one may be arbitrarily deprived of their very life by government agents. Thus, in *Tennessee* v. *Garner*, 471 U.S. 1 (1971)—a case that bears striking similarities to the one at hand, and in which a police officer shot an unarmed 15-year-old fleeing the scene of a crime—the Court recognized that "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Id.* at 9 (explaining that "the suspect's fundamental interest in his own life need not be elaborated upon"). The Court accordingly held in clear terms that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at 11. And the Court has recognized the special nature of the right to one's very life in numerous other cases as well. *See, e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976) (Stewart, Powell, and Stevens, JJ.) (noting, in the Eighth Amendment context, that "death as a

punishment is unique in its severity and irrevocability"); *see also, e.g.*, *Washington* v. *Glucksberg*, 521 U.S. 702, 729 (1997) (examining ban on assisted suicide and noting "the gravity with which we view the decision to take one's own life or the life of another"); *cf. Gonzalez* v. *Carhart*, 550 U.S. 124, 157 (2007) (upholding Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, and noting Congress' legitimate interest in "expressing respect for the dignity of human life").

The iron-clad prohibition against arbitrary killing by agents of the state is what separates a democratic republic from pure tyranny. It is the most basic requirement of a "government of laws, and not of men." *Marbury*, 5. U.S. (1 Cranch) at 163. The Court should not render that fundamental right "merely precatory" for want of a mechanism to enforce it. *Davis*, 442 U.S. at 242. The Hernández family's teenage son was shot to death by a federal agent. Their need for a right of action here could not be more urgent, more just, or more consistent with the basic logic of *Bivens*.

CONCLUSION

The court of appeals should be reversed.

Respectfully submitted.

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